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THE
FEDERAL REPORTER.

VOLUME 146.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 146.

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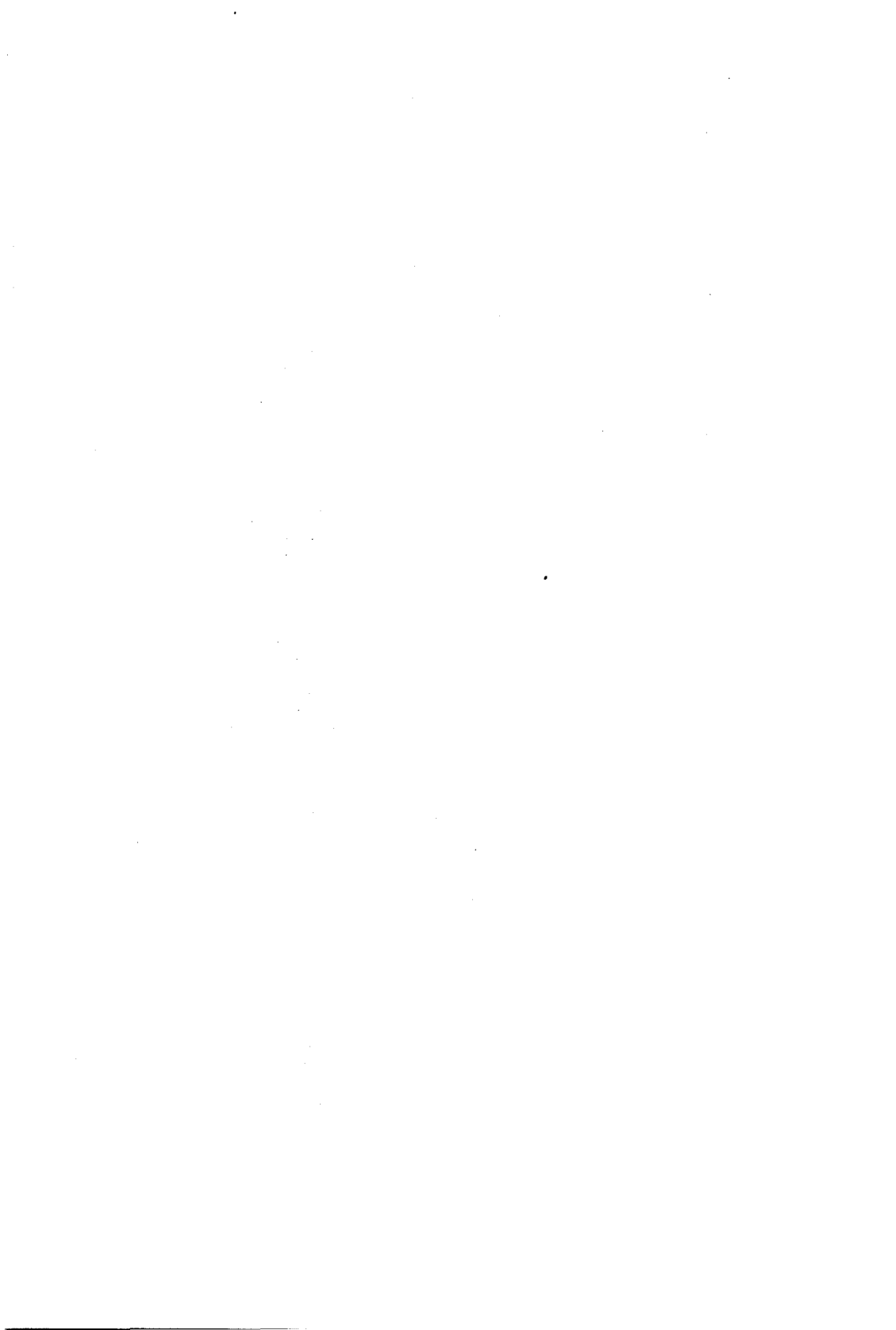
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CASES
ARGUED AND DETERMINED
IN THE
UNITED STATES CIRCUIT COURTS OF APPEALS AND THE
CIRCUIT AND DISTRICT COURTS.

LOVE v. SCATCHERD.

(Circuit Court of Appeals, Sixth Circuit. May 1, 1906.)

No. 1,476.

1. TRIAL—DIRECTION OF VERDICT—REQUEST BY BOTH PARTIES—OPERATION.

Where each party requested the court to instruct the jury to return a verdict in his favor, it was tantamount to an affirmance by both that there was no substantial conflict in the evidence, and that the facts raised only a question of law.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 400.]

2. EVIDENCE—OPINION.

In an action for broker's commissions, a question asked defendant as a witness as to whether he understood that plaintiff came to defendant's residence representing the purchaser, and not as defendant's agent, was inadmissible as calling for defendant's opinion.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2149-2185.]

3. BROKERS—CONTRACT—OPTIONS—CONSTRUCTION.

Plaintiff procured a contract authorizing him to sell defendant's timber land on a 5 per cent. commission; and, having found a purchaser, presented to defendant for his signature an option giving the grantee the right to purchase within 60 days. Defendant, before signing the option, but without any conversation with plaintiff, changed the same so as to read that the price was "net cash" to him. *Held*, that such alteration meant that the price was net cash to defendant as between himself and the purchaser and had no reference to defendant's contract with plaintiff for commissions.

4. SAME.

Defendant wrote plaintiff authorizing him to sell defendant's timber land in Arkansas agreeing that if plaintiff put defendant in communication with a reliable purchaser defendant would protect plaintiff on a commission of 5 per cent. Plaintiff immediately corresponded with a purchaser, who, at plaintiff's direction, wired defendant for a price; and this being agreed on, the purchaser wrote plaintiff a letter concerning the property inclosing a skeleton option which he desired defendant to execute. Plaintiff then went to defendant's place of business, showed him the purchaser's letter with the option, and defendant after some delay signed the option after inserting that the price should be net cash to him, but without any statement that it was to be free of commis-

sions. *Held*, that defendant was not justified in believing that plaintiff was acting for the purchaser, and that it was therefore error for the court to direct a verdict for defendant in plaintiff's action for commissions.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Action in assumpsit to recover the sum of \$12,000, claimed to be due the plaintiff, A. M. Love, for his services in bringing about a sale of a tract of land belonging to the defendant, Scatterd. The pleas were non assumpsit and nil debit. At the conclusion of all the evidence the court was requested by the defendant to instruct the jury to find against the plaintiff. The plaintiff thereupon requested the court to instruct a verdict for the plaintiff. There were no other requests and no exception to rulings upon evidence. The court instructed a verdict for the defendant and this is assigned as error.

The defendant below, who resided at Buffalo, N. Y., owned a body of land situated in Arkansas containing about 22,000 acres. The plaintiff below lived at Jonesboro, Ark., and in vicinity of Scatterd's land. The contract, if any there was, by which plaintiff was to be compensated for bringing about a sale of Scatterd's land, is to be deduced from certain correspondence between the parties. Such of it as is found in the transcript here follows: Prior to July 29, 1903, the plaintiff had written to the defendant, and on the 29th of July the defendant wrote to the plaintiff as follows:

"Buffalo, N. Y., July 29, 1903.

"Mr. A. M. Love, Jonesboro, Ark.—Dear Sir: We are in receipt of yours of the 20th and contents noted. We are not prepared at this time to make terms with you as we have concluded to take our property out of the market for the present. If you will write us again about the middle of next month, we will have come to a decision in the matter and will be pleased to entertain your proposition.

"Yours truly,

Scatterd & Son."

The letter to which the above is a reply is not in evidence.

"Jonesboro, Ark., August 15, 1903.

"Gentlemen: Referring to yours of July 29th, in which you said you would at this time be in position to quote prices and terms on 22,000 acres of forest land you have near here, I will say that I have a man that wants to buy if price and terms are right. Mention me price you want for the tract and pay me 5 per cent. commission, also please mention your net price and protect me in the price from 50 cents to \$1.50 for the trouble and expense of selling. The man that wants to buy was on the land 10 days ago, and will be back in 10 days. I will want you to allow sufficient time for parties to investigate and estimate timber, which is a big job.

"A. M. Love."

In reply to this letter Scatterd & Son, on the 18th of August, 1903, wrote to the plaintiff as follows:

"A. M. Love, Jonesboro, Ark.—Dear Sir: We are thinking of taking our property out of the market, but if you have anybody who is reliable and with whom you can put us in communication regarding this property, we would protect you on a commission of 5 per cent. We would want to have an opportunity to look up the party as to his responsibility before making prices, and if this were satisfactory, before doing so, we would arrange all matters in detail with you. In any event, we would agree to protect you in case you furnish us names, etc.

"Yours truly,

Scatterd & Son."

On August 29th the plaintiff wrote to the defendant as follows:

"Jonesboro, Ark., August 29, 1903.

"Scatterd & Son, Buffalo, N. Y.—Gentlemen: I have some parties to look over your land next week from St. Louis, and they will want to know the

first thing what the price is going to be. Please tell me something in the neighborhood of what to say. It puts me in an awkward shape not to be able to make them some kind of price.

"Yours truly,

A. M. Love."

This letter the defendant testified that he did not remember to have received. The only reason he gives is that he gets so many letters he can not remember them all.

On September 10, 1903, plaintiff wrote to one E. L. Westbrook the following letter:

"Jonesboro, Ark., September 10, 1903.

"Mr. E. L. Westbrook, City—Dear Sir: I am trying to sell for Scatcherd & Son of Buffalo, N. Y., their land at Mosher, Ark. There is about 22,500 acres of land located near the Frisco R. R., with about seven miles of standard guage railroad on it; good band saw, mill building, etc. The land is good for farming when the timber is taken off. I would like to sell you this land, as I think you can make some money out of it. You are also interested in some railroad propositions, as I understand. Why not take this up and you would have seven miles built, which would be a starter. I enclose you plat of the land and estimate of the different kinds of timber. Please let me know at an early date what you think of it.

"Yours truly,

A. M. Love."

This letter was accompanied by a plat of the land, and an estimate of the timber and improvements.

On September 15th Westbrook wrote to the plaintiff as follows:

"Mr. A. M. Love, City—Dear Sir: I have been thinking of your suggestion to me about the purchase of the property of Scatcherd & Son, at Mosher, in Poinsett county, this state, and I am very favorably inclined to take hold of it. I represent some people who have money enough to carry out anything they become interested in, and if I took hold of the proposition it would be on a cash basis, and I believe I am now ready to make a cash offer of \$9 per acre for this property, provided, of course, the timber is there that is thought to be there. When you are in again, please call up my office and we will place in writing what we agree on. I expect to be here all this week, but in the event I am out when you call, leave a note for me, making an engagement for any day most convenient for you.

"Very truly yours,

E. L. Westbrook."

To which the plaintiff replied on the 18th of September as follows:

"Jonesboro, Ark., September 18, 1903.

"Mr. E. L. Westbrook, City—Dear Sir: I have just received yours of the 15th and called at your office but found you were not in. I am out of town a good deal, as you know, and I will ask you to take the matter up with Scatcherd & Son, of Buffalo, direct, and they will give you all the information you want about the property, also prices, terms, etc. Please let me know how you are getting along with it.

"Yours truly,

A. M. Love."

On September 26th Westbrook telegraphed to the defendant as follows:

"Jonesboro, Ark., Sept. 26, 1903.

"John N. Scatcherd & Son, Buffalo, N. Y.—Will you accept \$9 per acre cash for Poinsett county land?

"Edward L. Westbrook."

To which the defendant replied by telegram:

"Will accept \$10 net cash if closed immediately."

On September 28th Westbrook telegraphed to the defendant as follows:

"Name day next week; can see you about land matter."

To which the defendant replied:

"Meet October six; will you be here? Others wire will be here beginning of next week."

On October 2d Westbrook telegraphed to the defendant as follows:

"Jonesboro, Ark., Oct. 2.

"Scatcherd & Son, Buffalo, N. Y.—Will you send abstract to Citizens' Bank immediately for examination?

"Edward L. Westbrook."

To which the defendant replied October 3d as follows:

"Require abstract here; parties coming next week. Will you be here Tuesday?"

Tuesday following October 3d was October 6th.

"Buffalo, N. Y., Oct. 5, 1903.

"Mr. A. M. Love, Jonesboro, Ark.—Dear Sir: Contents of your letter of October 2d noted. If Luehrman Hardwood Lumber Co. desire to purchase our property we should be pleased to hear from them, but we have not ourselves offered this property to anybody. If they apply for prices, etc., we will be pleased to give the information to them.

"Yours truly,

Scatcherd & Son."

The letter referred to of October 2d, is not in the transcript.

On October 7th Westbrook wrote to the plaintiff as follows:

"Mr. A. M. Love, Thayer, Mo.—Dear Sir: I have been so engaged with the affairs of the company that I have not had the opportunity to write you, and I have thought I would see and talk with you with reference to your request that I take up with Scatcherd & Son the purchase of the Mosher property in Poinsett county, direct, because of your probable absence from home. I wired Mr. Scatcherd to know if they would accept \$9 per acre for the property and they wired in answer to my telegram that they would take \$10 per acre cash. I immediately sought to make a date to meet these gentlemen in Buffalo and they wired me to meet them in Buffalo the following Tuesday and stated they expected other parties the first of the week to close the deal. Of course I did not care to make a wild goose chase of my trip and get there perhaps to find the property sold, so I decided to remain at home. I do not know if they have sold the property to the parties they expected, but I have concluded that I will take the property if they care to sell it for a cash consideration of \$10 per acre, the actual acreage to be ascertained from the United States government surveys on file in the office of the clerk and recorder of Poinsett county, at Harrisburg, provided the title is good and the property is as represented. As I understand, the sale of the property at \$10 an acre includes the land minus the cottonwood, the mill, buildings and land at Mosher, the railroad, locomotive and cars, saw mill, etc. This is a pretty good sized deal, and I would want to make a careful examination of the property as a whole. This is a bona fide matter with me, and I am ready to take it up on receipt of the proper assurances that I will be protected. Some people look at this property longingly, but the price is really pretty large and there are but few of us that can go into such a deal of the magnitude of this. I have therefore concluded to take the property, provided you can get the owners to execute the within contract, and if you care to take it up further with them, I will be very glad to have you do so. If the property is as represented and satisfactory and the title is good, I will take it and pay cash for it. You, of course, know me, but you might refer your people to the banks here or any one they may think of, R. G. Minnick, the former owner of the property included, if they would know further of me and my ability to take care of my contracts. If anything is done at all it will have to be done soon, as the fall rains will soon be here. I wish, however, that this property were out of the levee district, as the last legislature raised the levee taxes from four to six cents per acre. Please advise as soon as you can what you expect.

"Very truly,

Edward L. Westbrook."

With this letter he inclosed the skeleton of a contract which he desired to make with the defendant.

To which the plaintiff replied on October 8th as follows:

"Thayer, Mo., October 8, 1903.

"Edward L. Westbrook—Dear Sir: I am in receipt of yours of 7th relative to your communication with Scatcherd & Son with regard to the purchase of their Mosher property, and will say I will take this matter up with Mr. Scatcherd next week in person, and see if I can procure the option you want. Will say that 60 days is quite a while. Could you not get along with shorter time? This property does not need a close examination, as you will realize when you come to examine, to see \$10 per acre in it. Will let you know as soon as I see them what you may expect.

"Yours truly,

A. M. Love."

Plaintiff, Love, thereupon wired Scatcherd that he would be in Buffalo within a day or two. He accordingly went and saw Mr. Scatcherd in his office. He carried Westbrook's letters of October 7th, set out above, and a copy of the proposed option contract accompanying the letter. Love testified that he gave this letter and option to Scatcherd, and told him he had come on to arrange for the option desired by Westbrook, as he thought he would take the land. Scatcherd, he says, read the letter, and took the option and interlined "net" before cash and then had the agreement rewritten. He further testified that Scatcherd said he was negotiating with another party and asked him to wait over until he could see what should come of that. This Love did. On the second or third day after arrival, Scatcherd agreed to give an option to Westbrook for thirty days, saying 60 days, the time asked for by Westbrook, was too long. That he then asked if he, Love, should take the matter up with Westbrook, as Westbrook was the man he was dealing with. That Scatcherd said: "You take it up with him by wire." Thereupon Love wired as follows:

"Buffalo, N. Y., Oct. 10.

"E. L. Westbrook, Jonesboro, Arkansas: Will only give 30 days' option. What will you pay for same. Wire me today, Hotel Brozelle, sure.

"A. M. Love."

Westbrook replied as follows:

"One hundred dollars for 60 days' option. Feel sure will take land, can do no better.

"E. L. Westbrook."

The option was given and before it expired Westbrook took the land and paid cash, \$226,183 for same to Scatcherd direct.

Under date of November 5, Scatcherd wrote Westbrook as follows:

"Yours of the 28th received. Note that you say the option which was dated the 19th was so delayed in transit that 10 days of your time are gone by. There must be some error in this, because we received your signed receipt dated October 22d for the delivery of the option, which went by registered letter. This would show that it was only three days in transit. October 22d was the day that your receipt card was mailed. Note that you have men at work estimating the property. We received a telegram from Mr. Love in which he says the option was delayed, and asking us to send on the abstract of title to the bank. Is this your desire? In matters of this kind we would like it if you would communicate with us direct.

"Yours truly,

John N. Scatcherd."

On December 14, 1903, Love wrote Scatcherd as follows:

"Jonesboro, Ark., Dec. 14, 1903.

"Scatcherd & Son, Buffalo, N. Y.—Gentlemen: As the deal between you and Mr. Westbrook on your Poinsett county land is now closed at \$10 per acre, the amount of acres being as you and I figured, 22,619, please send me your check for 5 per cent. of the amount as per your agreement by letter August 18th to me. This was a good, big deal and you have done well, which I am glad to know, as it always encourages men of money to

invest in our country, and there are other investments here just as good. Wishing you success, Merry Christmas, a Happy New Year.

"Yours very truly,

A. M. Love."

To this Scatcherd replied, under date of Dec. 19th:

"Buffalo, N. Y., Dec. 19, 1903.

"Mr. A. M. Love, Jonesboro, Ark.—Dear Sir: Yours of the 14th received. Thank you for your good wishes at this time and I beg leave to state that I do not see wherein I owe you 5 per cent. in my trade with Mr. Westbrook. I wrote you in August that if you gave me the names of satisfactory parties and I traded with them I would protect you. You did not give you (me) the name of Mr. Westbrook, he applying himself and I replying direct to him. I did not even know that you knew him, and you came here not at my solicitation but representing Mr. Westbrook, as I understood it, to obtain for him the written option which I gave. I therefore can not see that I am under any obligation to pay you 5 per cent.

"Wishing you the compliments of the season, I remain,

"Yours truly,

John N. Scatcherd."

Scatcherd testified that the first knowledge he had of Westbrook was Westbrook's wire of September 26th, heretofore set out, and that he did not know that Love had had anything to do with his offer. Scatcherd says that when Love handed him Westbrook's proposed option he said to Love, "this price is net cash to me" and interlined "net" before "cash." That he, Love, made no reply when he said this.

He was asked by his counsel:

"Q. Did you understand that he was coming there (meaning Buffalo) representing Westbrook?"

"A. That was my understanding of it."

Plaintiff then objected, saying:

"We object to his understanding. Ask him what transpired between the parties and we will have no objection."

The court then said:

"He stated awhile ago what occurred."

Scatcherd did not deny the statement of Love that he gave Scatcherd, Westbrook's letter of October 7th, heretofore set out, or that he read it.

Cooper & Fitzhugh, for plaintiff in error.

W. A. Percy, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Each party requested the court to instruct the jury to return a verdict in his favor. Nor were there any requests for an alternative charge as in *Minahan v. Grand Trunk Western Ry. Co.*, 138 Fed. 37, a recent case decided by this court.

This was tantamount to an affirmance by each party that there was no substantial conflict in the evidence and the facts raised only a question of law. *Beutell v. Magone*, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; *Phenix Ins. Co. v. Kerr*, 129 Fed. 723, 64 C. C. A. 251, 66 L. R. A. 569; *Minahan v. Grand Trunk Western Ry. Co.*, supra.

The only questions for our consideration are, first, whether there was any substantial evidence upon which a verdict for the defendant might have been rested; and second, whether, upon the settled facts of the case, the court erred in directing a verdict against the plaintiff. Upon a careful consideration of all of the facts in the case we reach

the conclusion that there was no substantial conflict in respect of the facts of the case. The claim of the plaintiff that he was entitled to recover a commission for the sale of the defendant's land depended at last upon the proper interpretation of Love's letter of August 15, 1903, and Scatcherd's reply thereto of August 18th, both of which have been set out in the statement of the case.

That Westbrook was a purchaser procured by the direct solicitation of Love is beyond dispute; that Love induced him to correspond direct with Scatcherd, is not denied and that finally Love went to Buffalo and there brought the minds of buyer and seller together upon an optional sale and purchase is plain.

Counsel for defendant in error frankly admit that the defense to Love's action is accurately stated by Scatcherd in his letter of December 19, 1903, to Love. That letter was in these words:

"Buffalo, N. Y., Dec. 19, 1903:

"Mr. A. M. Love, Jonesboro, Ark.—Dear Sir: Yours of the 14th received. Thank you for your good wishes at this time and I beg leave to state that I do not see wherein I owe you 5 per cent. in my trade with Mr. Westbrook. I wrote you in August that if you gave me the names of satisfactory parties and I traded with them I would protect you. You did not give you (me) the name of Mr. Westbrook, he applying himself and I replying direct to him. I did not even know that you knew him, and you came here not at my solicitation, but representing Mr. Westbrook, as I understood it, to obtain for him the written option which I gave. I therefore can not see that I am under any obligation to pay you 5 per cent. Wishing you the compliments of the season, I remain,

"Yours truly,

John N. Scatcherd."

The plain meaning of the Scatcherd letter of August 18th was that if Love should put him "in communication," with a purchaser and a sale should result that he should have a commission of 5 per cent. At Love's solicitation Westbrook opened a correspondence with Scatcherd and a sale was the direct result. That Scatcherd was not at the beginning aware of the fact that Love had induced Westbrook to negotiate is not of the essence. Before the sale was concluded he became aware of Love's connection with the matter through Westbrook's letter and option handed to him by Love in which Love's instrumentality was plainly stated.

In the light of this letter Scatcherd is charged with notice of the fact that Westbrook was the name of a person furnished by Love. The most that can be made out of Scatcherd's statement that his "understanding" was that Love represented Westbrook is that Scatcherd put a wrong interpretation upon the contract. His "understanding" was not competent and from the ruling of Judge McCall we must understand that it was so regarded and ruled when objected to. Nothing which occurred at Buffalo estops Love from claiming his commissions, even if a waiver or estoppel is competent under a plea of non assumpsit. The uncommunicated understandings of Scatcherd furnish no rule by which the rights of Love are to be controlled. If Scatcherd understood by inserting "net cash" in the option he gave Westbrook, that he was to pay no commission to Love, he should have said so. On its face it meant that his price of \$10 per acre meant

"net cash" as between buyer and seller. Love was not the buyer. He did not represent the buyer. He was endeavoring to procure an option which should bring about a sale, but the option was to be given to the buyer by the seller. Ten dollars "net cash" meant that the buyer should pay that net price to the seller. But what about the agent and his commissions? Net cash did not necessarily imply either that Love should have no commissions or that the buyer should pay them. The understanding of Scatterd may have been one thing and that of Love, another. Neither asked an explanation. Each stood upon his own view of the contract. If Scatterd in fact believed that Love represented the buyer he would not owe commissions to him and could not have had the matter of commissions in mind, for he did not suppose he would owe any. If upon the other hand he knew or should have known that Westbrook was a customer put in communication with him by Love, he knew he was under contract "to protect him" on a commission of 5 per cent., as stated in his letter of August 18th.

It was upon this contract that Love stood. If Scatterd expected to escape commissions to Love by interlining "net cash" in his option to the latter, he should have been explicit in so stating. If Scatterd had been giving a minimum "net cash" price to Love to govern him as an agent in making any future sale, Love might well have understood that the price must net him the sum named free of commissions. Love might have then protected himself by loading his commissions upon the net cash price. But Scatterd had by wire fixed \$10 net cash per acre when communicating direct with Westbrook, and before he says he knew that Love had put Westbrook in communication.

We think the court erred in instructing a verdict for the defendant. Remand, and direct a new trial.

CASTLE CREEK WATER CO. v. CITY OF ASPEN.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1906.)

No 2,379.

1. SPECIFIC PERFORMANCE—SALE OF WATERWORKS AT VALUE TO BE APPRAISED.

There was a contract between a water company and a city for the construction of waterworks and their operation for 20 years, wherein the company agreed to give the city the option to purchase the works at the end of the term at a price based on their productive worth, to be determined by four appraisers chosen by the parties and a fifth to be chosen by the four, on condition that the city gave notice of its intention to buy a year before the expiration of the term. The city gave the notice, but subsequently refused to appoint appraisers and to complete the purchase. *Held*, these facts disclosed an equity in the complainant, which entitled it to a specific performance of the contract, and this remedy was more complete and efficient than any it had at law.

2. SAME—SALE AT VALUE TO BE APPRAISED—RULES—ENFORCED IF STIPULATION FOR APPRAISERS SUBSIDIARY AND PARTIES NOT IN STATU QUO; OTHERWISE NOT.

Where, in a contract of sale of real estate at a price to be fixed by appraisers to be chosen by the parties, the stipulation for the appraisers

is not a condition nor the essence of the agreement, but is subsidiary or auxiliary to its main purpose and scope, and the parties cannot be left or placed in statu quo by a refusal to enforce performance, a court of equity may determine the price itself, or by its master or by appraisers of its own selection, and may enforce specific performance of the agreement of sale. But where the stipulation for the appraisers is a condition or the essence of the contract, and a refusal to enforce it will leave the parties in their original situations when the contract was made, a court of equity will not enforce specific performance of it.

3. VENDOR AND PURCHASER—OPTION TO PURCHASE CONTINUING OFFER—ACCEPTANCE EXHAUSTS OPTION AND COMPLETES CONTRACT.

An option to purchase is a continuing offer by the vendor to sell. Its acceptance by the vendee completes the contract, exhausts the option, and estops the vendee from subsequently repudiating it, or choosing the other alternative.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 23.]

4. EQUITY—ADEQUATE REMEDY AT LAW.

The adequate remedy at law which will prevent relief in equity must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 151-163.]

5. SAME—ACCOUNTING.

Where the remedy at law and the remedy in equity involve an accounting and the consideration of many items, the remedy in equity is more complete and efficient and better adapted to attain the ends of justice than the remedy at law.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 152.]

6. SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF WATERWORKS—BREACH—REMEDY AT LAW.

Where a city has refused to perform its contract to purchase the waterworks of a company at a price based on their productive worth, to be determined by appraisers, the water company has no remedy at law as complete and efficient as the specific performance of the contract in equity.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Specific Performance, §§ 5-8.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of Colorado.

C. S. Thomas (Wm. H. Bryant and Wm. P. Malburn, on the brief), for appellant.

C. W. Waterman (Joel F. Vaile, James H. Pershing, and Harold W. Clark, on the brief), for appellee.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. The town of Aspen made a contract with Cowenhoven & Brown wherein it granted to them the use of its streets for the purpose of laying water mains and pipes, and agreed to pay them hydrant rentals for 20 years, and they covenanted to erect and maintain waterworks, and to supply the town and its inhabitants with water during that time. One of the terms of this agreement was that the town should have the right to purchase the waterworks at the expiration of the 20 years on condition that it should give notice of

its intention to buy one year in advance of the date of the purchase, and that in that event, if the parties should fail to agree upon the price, the same should be determined by five appraisers, four to be chosen by the parties and the fifth by the four, and that this price should be based upon the productive worth, and not on the cost of the works. The assigns of Cowenhoven & Brown constructed waterworks at an expense of \$150,000, and supplied water to the town and its inhabitants. The complainant, the Castle Creek Water Company, succeeded to the rights of Cowenhoven & Brown, and the town of Aspen became the defendant, the city of Aspen. One year before the expiration of the term of the contract, the city gave notice to the complainant that it would "purchase said waterworks and appurtenances at the time and in accordance with the provisions of said proposition and ordinances." The parties failed to agree upon the price of the works, and the city refused to appoint appraisers, and notified the complainant that it would not be bound by the contract. Thereupon the water company exhibited its bill, in which it set forth the facts that have been recited, and prayed for a specific performance of the agreement of purchase. The court below sustained a general demurrer and dismissed the bill, and the complainant appealed.

The main purpose and scope of the contract of 1885, which is the subject of this controversy, was to procure waterworks for the city of Aspen and for its inhabitants. This was the great desideratum which induced the town to enter into the agreement. The chief object of the water company was to secure adequate compensation for the construction of the works and the supply of the water by means of the hydrant rentals and the payments for water by private consumers during the term of the agreement. The stipulation regarding the sale of the works was an incidental part of the main agreement, and that agreement did not constitute a contract of sale of the waterworks. Nevertheless, the agreement of the company that the city should have the option to purchase them at an appraised value was an inseparable part of this original contract. It was a continuing and irrevocable offer of the water company to sell. The notice given by the city that it would purchase upon the terms specified in this offer was an exercise of its option, and an irrevocable acceptance of the water company's offer. The city had but one option. When it had exercised it, its power to choose was exhausted. An election once made estops the elector. He may not revoke his choice and select another alternative. Bishop on Contracts, § 784; Childs v. Stoddard, 130 Mass. 110; Brown v. Insurance Co., 1 El. & El. 853. The irrevocable offer and the irrevocable acceptance attested the meeting of the minds of the parties, and constituted a contract of sale of the waterworks. Cherryvale Water Co. v. City of Cherryvale, 65 Kan. 219, 69 Pac. 176; Rockport Water Co. v. Inhabitants of Rockport, 161 Mass. 279, 37 N. E. 168; Braintree Water Supply Co. v. Braintree, 146 Mass. 482, 487, 16 N. E. 420; Chadsey v. Condley, 62 Kan. 853, 855, 62 Pac. 663; 21 Am. & Eng. Enc. of Law (2d Ed.) 929.

But counsel for the city contend that a court of equity may not enforce the specific performance of this contract, because it provides that

the price based upon the productive worth shall be appraised by four experts to be chosen by the parties and another to be selected by the four. They invoke the rules that a court of equity will not specifically enforce an agreement to arbitrate a disputed claim (*Oregon & W. Mtg. Sav. Bank v. American Mtg. Co.* [C. C.] 35 Fed. 22; *Tobey v. County of Bristol*, Fed. Cas. No. 14,065), or a contract of sale wherein the price is not fixed, but is to be determined by appraisers (*Milnes v. Gery*, 14 Ves., Jr., 400; *King v. Howard*, 27 Mo. 21; *Van Doren v. Robinson*, 16 N. J. Eq. 256); and they insist that these rules apply to cases of the nature of that in hand, where the agreement of sale at a valuers' price is a part of a lease or of a broader contract (*Agar v. Mackalew*, 2 Sim. & S. 418, 432; *Greason v. Keteltas*, 17 N. Y. 491; *City of St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69, 94; *Montgomery Gaslight Co. v. City of Montgomery*, 87 Ala. 245, 6 South. 113, 4 L. R. A. 616).

The general rule that contracts for the sale and conveyance of real estate may be specifically enforced by a court of equity has become firmly established, upon the ground that actions at law for the breaches of these contracts do not place the parties in the same situation in which they were before the agreements were made, and for that reason do not afford adequate relief. Contracts to arbitrate disputed claims escape this rule, because the failure to enforce them leaves the parties in their original situations, with their original claims and rights of actions. Separate agreements of sale of real estate, in which the prices have not been agreed upon or in which they are to be fixed by valuers to be chosen by the parties, do not fall within the rule for the same reason, so long as they have not been executed in whole or in any substantial part. In contracts of this class the price is an essential condition, which determines the nature and the value of the contract, and until it is fixed the parties may be left in statu quo by the mere refusal to enforce the agreement. They fall so near the line, however, that a court of equity will readily enforce an agreement of sale for a fair price, or for the reasonable value of the property, on the ground that that is certain which can be made certain, and that the court may itself ascertain the fair price or the reasonable value. *Milnes v. Gery*, 14 Ves., Jr., 400, 404. Thus far the two rules that equity will specifically enforce a contract for the sale of real estate and that it will not enforce an agreement to arbitrate claims or to appraise property run *pari passu*.

There is, however, a class of cases to which both rules appear to apply, but in which the application of one necessarily excludes the use of the other. They are cases in which a contract of sale of real estate springs from a broader agreement, which has been partly performed, so that the parties may not be placed in their original situations by a mere refusal to enforce the agreement of sale, and the stipulation for the appraisal of the value or the determination of the price is a subsidiary or auxiliary part of the same contract. In cases of this nature it is clearly inequitable to permit a party to an agreement to deprive a complainant of its benefit by his own wrong by means of his unjustifiable refusal to appoint the appraisers which he has solemnly agreed

to select, and in that way to avoid the discharge of his obligation. Large amounts of money are often invested in reliance upon such an agreement, and the defaulting party frequently receives the substantial benefits of the contract before he avails himself of this device to repudiate it. He then refuses to name appraisers, and argues that his contract is that the price of the property shall be determined by persons whom the parties shall select, and that a court of equity may not lawfully fix the price or select the parties to determine it because such a course of action would substitute the master or the court for the parties' appraisers, and would thus make a new agreement for them, which no court may lawfully do. The answer to this contention, however, is that it is not the court but the defaulter himself who by his own refusal to perform his contract deprives himself of the benefit of the appraisers to be chosen by the parties; that it does not lie in his mouth to say that the court may not select the valuers as long as he wrongfully refuses to do so, and that he is estopped from taking advantage of his own wrong to prevent the complainant from successfully invoking the aid of a court of equity to compel him to perform his agreement. The authorities upon this subject are not entirely in accord, but the more cogent reasons and the weight of authority sustain these salutary rules: Where in a contract of sale of real estate at a price to be fixed by appraisers chosen by the parties, the stipulation for the valuers is not a condition nor the essence of the agreement, but is subsidiary or auxiliary to its main purpose and scope, and the parties may not be left or placed in statu quo by a refusal to enforce the contract, a court of equity may determine the price itself, by its master or by appraisers of its own selection, and may enforce specific performance of the agreement of sale. But where the stipulation for the appraisers is a condition or the essence of the contract of sale, and a refusal to enforce it will leave the parties in their original situations when the agreement was made, a court of equity will not specifically enforce it. *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 51 Fed. 309, 330, 2 C. C. A. 174, 244; *Tscheider v. Biddle*, 4 Dill. 58, 62, Fed. Cas. No. 14,210; *Cherryvale Water Co. v. City of Cherryvale*, 65 Kan. 219, 69 Pac. 176, 180; *Town of Bristol v. Bristol & Warren Waterworks*, 19 R. I. 413, 34 Atl. 359, 361, 32 L. R. A. 740; *Fry on Specific Performance*, §§ 247, 342, 348; *Waterman on Specific Performance*, §§ 44, 47; *Pomeroy on Contracts*, §§ 150, 151; *Coles v. Peck*, 96 Ind. 333, 339, 49 Am. Rep. 161; *Herman v. Babcock*, 103 Ind. 461, 3 N. E. 142; *Biddle v. Ramsey*, 52 Mo. 153, 159; *Black v. Rogers*, 75 Mo. 441, 449; *Braintree Water Supply Co. v. Braintree*, 146 Mass. 482, 487, 16 N. E. 420; *Parson v. Ambos (Ga.)* 48 S. E. 696; *Hall v. Warren*, 9 Ves. 605; *Gourlay v. Duke of Somerset*, 19 Ves. 429; *Richardson v. Smith*, L. R. 5 Ch. 648; *Dinham v. Bradford*, L. R. 5 Ch. 519.

The case under consideration falls far within the first rule. The main purpose and scope of this contract was the construction of the waterworks and the supply of water to the city and its inhabitants. The stipulation for a determination of the price by appraisers in case of a sale was neither a condition nor the essence of the agreement nor of the contract of sale. It was an incident of each, a stipulation not

of substance but of mode. Moreover, the contract prescribes the standard by which the price shall be measured. It provides that it shall be based upon the productive worth of the waterworks, and not upon their cost. The stipulation for appraisers, therefore, is but a designation of the method of the selection of those who shall take the necessary accounting, and apply this measure for the determination of the price. The ascertainment of this standard of measurement is necessarily conditioned by an accounting of the income and expenses of the waterworks during a reasonable length of time anterior to the date of sale, and a calculation from this accounting and from the net income it will disclose of the productive worth of the property. The consideration and settlement of issues dependent upon the taking of accounts composed of many items is one of the great heads of equity jurisprudence, and the appointment of an accountant, the examination and confirmation of his report, are the ordinary functions of the chancellor. The stipulation for the choice of appraisers is therefore merely incidental to the contract of sale, and it provides for an act which may be well and wisely performed by a court of equity. Again, the water company or some of its predecessors in interest invested thousands of dollars in these works and in their operation, while the city held them bound by their agreement to continually offer to sell them to the city for their productive worth. The city may not rescind the original agreement of 1885 because it has received the substantial benefits of the contract, and the parties cannot be restored to their original situations.

In October, 1904, the city exercised its option, and accepted the continuing offer of the company to sell. By the terms of the contract of 1885 the city had agreed to notify the water company whether or not it would accept this offer as early as October 31, 1904. The acceptance of the city bound the water company to sell its property to the city at the price fixed in the contract, and it was not until September, 1905, that the city declined to perform, and repudiated its contract of purchase. If the city was not to buy the property, the water company had the privilege and the right by the express terms of the contract to secure another franchise, or an extension of the franchise which it held, if it could do so, and if it could not, to sell to another who might be able to accomplish this result; and it had the right to know that it could exercise this privilege, and that it could embrace every opportunity that offered during the 12 months which followed October 31, 1904. These were valuable rights and opportunities. The acceptance of the offer by the city deprived the water company of all of them for more than 10 of the short 12 months during which the city had covenanted with the water company that it should be free to exercise and enjoy them if the city itself did not purchase, and it is now too late to restore them. The lost opportunities of those 10 months can never be returned to the water company, and to permit the city to deprive the water company of its right under the contract to protect its property or to sell it to another by holding it to its agreement to sell it to the city until it was too late for the company to exercise that right, and until its property was at the mercy of the city, and then to permit the

city to repudiate its contract, would be both unjust and inequitable. The contract of sale of 1904 may not be lawfully rescinded now, because it is impossible to place the parties in the same situations in which they stood when the city accepted the offer.

The conclusion is that the stipulation that the price of the waterworks, based upon their productive worth, shall be determined by appraisers chosen by the parties presents no valid objections to the enforcement of the specific performance of this contract by a court of equity, because this stipulation is not a condition nor the essence of the agreement, but a subsidiary and incidental part of it, because the contract has been partly performed, the city has received substantial benefits from it, and the parties cannot be placed in statu quo, and because a failure to enforce it might, and probably would, result in a gross injustice by permitting the city to take advantage of its own wrong—of its refusal to select appraisers, as it agreed.

The repeated remark of counsel for the city that the basis of the price—the productive worth of the waterworks—is not their reasonable or their fair value, that it is susceptible of misrepresentation by false accounts and fraudulent practices, and that for this reason an enforcement of the contract would be unjust, has not escaped attention. But the parties to this contract were of the opinion that the productive worth of the property indicated its fair value and a fair price for it, for they agreed that this should be its price. This conclusion commends itself to our judgment, and we concur in it. No more equitable or rational basis for the appraisal of the value of the property has occurred to us. The apprehension of falsity in the account is without basis to support it. There is no allegation or indication that the complainant has not kept just and true accounts, nor that it will fail to faithfully disclose the income and the expenses of the property. The presumption is that its accounts are correct and true, and that it will faithfully discharge its duty. When the contrary appears, ample time will remain to consider its effect. No injustice can therefore result from an enforcement of the sale at the price stipulated in the agreement.

Finally, counsel object to the maintenance of this suit upon the ground that the complainant has an adequate remedy at law. But the adequate remedy at law which will deprive a court of equity of jurisdiction must be as certain, complete, prompt, and efficient to attain the ends of justice as the remedy in equity. *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 215, 7 L. Ed. 655; *Williams v. Neely*, 134 Fed. 1, 67 C. C. A. 171, 180, 69 L. R. A. 232. An action at law for damages for the refusal of the city to appoint appraisers, or an action at law for the price of the works, necessarily involves an accounting of the income and expenses of the property—an accounting which a court of equity with its deliberate methods, its power to select men of training and experience in work of this nature, its authority to consider and to modify their reports after exceptions and hearings, is alone competent to fairly take and justly determine. No remedy at law which necessitates the submission of such questions to a jury is either adequate or as efficient to attain the ends of justice as this remedy in equi-

ty. *Gunn v. Brinkley Car Works, etc., Co.*, 66 Fed. 382, 384, 13 C. C. A. 529, 531; *Fechteler v. Palm Bros. & Co.*, 133 Fed. 462, 465, 66 C. C. A. 336; *Hayden v. Thompson*, 71 Fed. 60, 63, 17 C. C. A. 592, 595. The water company cannot deliver the waterworks to the city, and bring an action at law for their price because the municipality refuses to accept them. The company cannot tender the works and then abandon them and bring its action at law, because these works supply the city and its citizens with water, and the public interest, the danger of fire, the domestic necessities of the people of the city forbid the cessation of their operation. *Barton v. Barbour*, 104 U. S. 126, 134, 26 L. Ed. 672; *Joy v. St. Louis*, 138 U. S. 1, 47, 11 Sup. Ct. 243, 34 L. Ed. 843. A court of equity alone possesses powers sufficiently elastic and comprehensive to continue the operation of the works, if the interest of the public demands it, to fairly take the accounting which conditions their productive worth, and to render a decree that the property be conveyed, and that the price be paid at such time and on such terms as will best conserve and enforce the rights of all the parties in interest. It alone has plenary power to enforce this contract, and the water company has no remedy at law as complete and efficient as the remedy in equity. It has no remedy at law that will secure it adequate relief. The demurrer should be overruled, the defendant should be permitted to answer, and, unless a defense not yet suggested is presented, the court below should appoint a master to ascertain, under its direction and subject to its approval, the productive worth of the works, and should enforce the performance of the contract of sale. The decree below is accordingly reversed, and the case is remanded to the court below for further proceedings not inconsistent with the views expressed in this opinion.

UNITED STATES v. HYAMS.

(Circuit Court of Appeals, First Circuit. May 24, 1906.)

No. 636.

1. UNITED STATES—CLAIMS—TUCKER ACT—FINDINGS AND DECISION.

Tucker Act (Act Cong. March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 755]), relating to the prosecution of claims against the United States, provides (section 7) that it shall be the duty of the court to cause a written opinion to be filed in the case, setting forth the specific findings by the court of the facts therein and the conclusions of the court on all questions of law involved in the case, and to render judgment thereon. *Held*, that where the trial judge, in a suit to recover a tobacco tax rebate, filed two papers, one entitled a decree for the petitioner, and the other the opinion of the court, which the statute makes in effect a part of the record, the two setting out sufficient findings of fact to sustain the court's conclusions, such papers were sufficiently formal to constitute a compliance with the section.

2. SAME—FINDINGS—REFUSAL.

It was sufficient in this case for the court to refuse the government's requests for findings and rulings in gross.

3. SAME.

The United States objected that the claim was invalid because not reverified after an error in computation, discovered by a deputy collector, had been corrected as required by the regulations, such objection involved in this case a finding of fact, and therefore not reviewable.

4. COURTS—JURISDICTION—CLAIMS AGAINST UNITED STATES.

Tucker Act (Act Cong. March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, pp. 752, 753]) § 1, declares that the court of claims shall have jurisdiction over all claims against the United States founded on the Constitution of the United States or any law of Congress except for pensions, *Held*, that the circuit court had jurisdiction of a claim, involving the requisite amount, for a tobacco tax rebate granted by Act Cong. April 12, 1902, c. 500, § 4, 32 Stat. 97 [U. S. Comp. St. Supp. 1905, p. 445], though it involved no contractual liability.

5. INTERNAL REVENUE—TOBACCO REBATE—RECOVERY—CONDITION PRECEDENT—STATUTES—CONSTRUCTION.

Act Cong. April 12, 1902, c. 500, § 4, 32 Stat. 97 [U. S. Comp. St. Supp. 1905, p. 445], provides that on all original and unbroken factory packages of smoking and manufactured tobacco and snuff held by manufacturers or dealers on July 1, 1902, on which a higher tax has been paid than that provided by the preceding section of the act, there shall be allowed a drawback or rebate equal to the full amount of the difference between the tax paid and the tax imposed by the act, etc. The section also requires that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, adopt such rules and regulations as may be necessary to carry the act into effect. *Held*, that a provision in such rules and regulations which made it an absolute prerequisite to the recovery of the rebate that the proofs offered the executive officers should be satisfactory to them, is invalid as applied to this case.

In Error to the Circuit Court of the United States for the District of Massachusetts.

For opinion below, see 139 Fed. 997.

William H. Garland, Asst. U. S. Atty. (Asa P. French, U. S. Atty., on the brief).

Wilfred Bolster (Charles W. Bartlett, on the brief), for defendant in error.

Before COLT, PUTNAM, and LOWELL, Circuit Judges.

PUTNAM, Circuit Judge. This case arose under the fourth section of the act of April 12, 1902, c. 500, 32 Stat. 97 [U. S. Comp. St. Supp. 1905, p. 445], as follows:

"Sec. 4. That on all original and unbroken factory packages of smoking and manufactured tobacco and snuff held by manufacturers or dealers on July first, nineteen hundred and two, upon which there has been paid a higher tax than that provided for in the preceding section of this act, there shall be allowed a drawback or rebate equal to the full amount of the difference between such higher tax and the tax imposed by this act, after making the proper allowance for discounts and rebates heretofore authorized, but the same shall not apply in any case where the claim has not been presented within sixty days after July first, nineteen hundred and two; and no claim shall be allowed or drawback paid for a less amount than ten dollars. It shall be the duty of the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to adopt such rules and regulations and to prescribe and furnish such blanks and forms as may be necessary to carry this section into effect."

In accordance with the closing sentence of the section quoted, the Commissioner of Internal Revenue, with the approval of the Secretary

of the Treasury, adopted certain rules and regulations pertaining thereto, one of which required that the proof entitling a petitioner to a drawback or rebate should be satisfactory to the Commissioner, and the other that the claim, after it was signed and sworn to, should be forwarded to the Collector, or Division Deputy Collector, of Internal Revenue for the proper district. Under the interpretation which we place on the statute, though the provision that the proof should be satisfactory to the Commissioner in order to entitle the petitioner to recover may be valid for regulating the personal conduct of his own office, it is invalid for the purposes now claimed by the United States. Of course, under the statute, the claim must be presented to the Commissioner, and the petition alleges that the same was done. The record shows that the claim was filed with the Collector of Internal Revenue for the District of Massachusetts, which undoubtedly, under the regulation which we have cited, can be and must be accepted as in legal effect a presentation of it to the Commissioner.

The proceeding in the Circuit Court was in accordance with what is known as the Tucker act, approved on March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]. The learned judge of that court filed two papers, one entitled a decree for the petitioner, and the other entitled the opinion of the court, each on the same day. The seventh section of the Tucker act reads as follows:

"Sec. 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon." 24 Stat. 506 [U. S. Comp. St. 1901, p. 755].

The United States apparently claim that certain formalities are required with reference to the specific findings of fact and the conclusions on questions of law called for by the statute; but such a position is not in harmony with the spirit of the law, and in *United States v. Swift* (C. C. A.) 139 Fed. 225, 226, we held in effect that it is sufficient if the record presents understandingly the questions of law involved. In that case the record consisted largely of an agreed statement of facts, with an opinion of the learned judge of the Circuit Court elaborating and adding thereto. It was in no respect any more formal than the present record. Having in view the explanation we have made in reference to the manner of presenting the claim to the Commissioner, what was filed by the learned judge of the Circuit Court entitled a decree for the petitioner sets out sufficient findings of fact to sustain his conclusions. It appears that, at the hearing in the Circuit Court, the United States presented certain requests for findings and rulings, meaning, of course, by this findings of fact and rulings of law. As to all those the learned judge observed in his opinion, which under the Tucker act may be a part of the record, that it was sufficient to say that the requests should be regarded as refused. This, of course, covered the requests for findings of fact, and was a holding in lump that the proofs sustained none of the propositions of the United States in reference thereto. This was as effectual as though the learned judge had taken each request for a

finding of fact, and denied the same seriatim. The result meets all the requirements of *United States v. Swift*, and the record clearly and fully presents all the questions of law which could arise. Nothing more can be required.

The requests of the United States for findings of fact were filed, but they were not brought up; neither has any formal suggestion of diminution of the record been made. Neither, however, is of any consequence in view of the consideration that the proofs taken in the Circuit Court are not before us. We could not, therefore, revise the findings of fact against the United States made by the Circuit Court, even if the law, on any state of the record, would permit us so to do. Consequently, the omission from the record which we have named is wholly unimportant, and the entire case is before us, so far as, under the statutes and rules of law, one of this character can ever be presented on appeal.

Only a few propositions arise. One is disposed of by the observation that it relates entirely to a question of fact. The United States maintain that after the original claim had been signed and sworn to by the claimant, it was delivered to a deputy collector, who called attention to an error in certain columns of figures which were thereupon changed without the claim being again signed and sworn to, and that this was in violation of the regulations. This, however, involves so much a matter of finding of fact that it cannot be revised by us. The United States also claim that it does not clearly appear here that the amount was sufficient under the second section of the Tucker act, that is to say, in excess of \$1,000, to give the Circuit Court jurisdiction under that act as distinguished from the District Court; but the findings of the Circuit Court necessarily dispose of this proposition. The United States also claim that there is no contractual obligation here on their part, and, therefore, that there exists no jurisdiction to maintain this suit. Reliance is placed on the expression found in *Schillinger v. United States*, 155 U. S. 163, 167, 15 Sup. Ct. 85, 39 L. Ed. 108, which case was brought under the Tucker act, where it was said that "some element of contractual liability must lie at the foundation of any action." Like observations may be found in *Harley v. United States*, 198 U. S. 229, 234, 25 Sup. Ct. 634, 49 L. Ed. 1029, and in some other opinions; but the clear language and settled construction of the first section of the Tucker act are so positive that all such expressions must be held to be limited by the subject matter of the various cases in which they are used. In none of them was the demand based on any statute. On the other hand, in *Dooley v. United States*, 182 U. S. 222, 224, 21 Sup. Ct. 762, 45 L. Ed. 1074, the precise language of the first section so far as it relates to this topic is given; and the opinion of the court analyzes it, and expressly reiterates as one ground of jurisdiction claims founded on laws of Congress. *Campbell v. United States*, 107 U. S. 407, 2 Sup. Ct. 759, 27 L. Ed. 592, which we will hereafter refer to again, would be sufficient to make it clear that the Supreme Court has not in any way derogated from that portion of

the statute which gives jurisdiction over claims of the character now before us.

The real issue in the case is whether the ruling of the Commissioner of Internal Revenue denying the claim of the petitioner is conclusive on us. Of course, this is a mere question of the construction of the statute of 1902. It is true that the construction of such statutes has not always been uniform. *American School of Magnetic Healing v. McAnnulty*, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90, and *Bates & Guild Company v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894, contain sufficient general discussions of the varying phases under different statutes. The United States rely especially on *United States v. Kaufman*, 96 U. S. 567, 24 L. Ed. 792, and *Stotesbury v. United States*, 146 U. S. 196, 13 Sup. Ct. 1, 36 L. Ed. 940; but there was enough in the phraseology of the statutes there involved to show that a condition precedent to recovery by the claimants in each case was a favorable judgment of some executive officer named. On the other hand, under the present statute, a right to the rebate is given at the outset, and the only power expressly vested in any executive officer is to establish rules and regulations as to the method of presenting a claim. The legal right is first given unqualifiedly, so that, in this particular, the case, both as to the right and the jurisdiction of the courts to establish the right, is apparently settled in favor of the claimant, alike on principle and by *Campbell v. United States*, 107 U. S. 407, 410, 412, 413, 2 Sup. Ct. 759, 27 L. Ed. 592, already referred to. That was a case of a drawback under a customs act, where the statute was framed in almost exactly the same form as that before us, the right being given in its body, followed by a provision for regulations to be prescribed by the Secretary of the Treasury. There the jurisdiction of the court of claims under the Tucker act was maintained, and it was also held that the petitioner was entitled to recover notwithstanding the denial of his demand by the executive officers. Therefore, we hold that the regulation which we have cited, established under the act now before us, by virtue of which proofs are to be satisfactory to the Commissioner of Internal Revenue, is invalid so far as this case is concerned, and that the conclusion of the Circuit Court is correct.

The decree of the Circuit Court is affirmed.

NOTE BY THE COURT. *United States v. Cornell Steamboat Company*, 202 U. S. 184, 192, 26 Sup. Ct. 648, 50 L. Ed. 987, although decided May 14th. did not come to hand until after *United States v. Hyams* was announced. In *United States v. Cornell Steamboat Company*, the language of the statute was clearly premissive. *United States v. Cornell Steamboat Company* is also interesting with reference to the position taken in *United States v. Hyams* as to jurisdiction under the Tucker act.

HEROLD v. SHANLEY.

(Circuit Court of Appeals, Third Circuit. May 2, 1906.)

No. 11.

1. INTERNAL REVENUE—LEGACY TAX—CONTINGENT LEGACY.

Testator bequeathed \$190,000 to his executor in trust to pay the income for the support and education of testator's grandson until he should arrive at the age of 21 years, when the sum was to be paid to such grandson, etc. *Held*, that such legacy was not vested prior to the grandson's arrival at age, and hence the only portion thereof which in the meantime was taxable under War Revenue Act, June 13, 1898, c. 448, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, 31 Stat. 948 [U. S. Comp. St. 1901, pp. 2307, 2308], and Act June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 449], was the amount he would probably receive before reaching majority.

2. SAME.

Testator left his residuary estate in trust until the death or remarriage of his widow, when it was to be divided equally between his three sons, and in the meantime the income was to be divided equally each year between the widow and sons, share and share alike. *Held*, that the reversionary interest of the sons pending the widow's life unmarried was not absolutely vested in possession or enjoyment prior to July 1, 1902, the widow being then living and unmarried, and was not therefore subject to taxation under War Revenue Act, June 13, 1898, c. 448, 30 Stat. 464, as amended by Act March 2, 1901, c. 806, 31 Stat. 948 [U. S. Comp. St. 1901, pp. 2307, 2308], and Act June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 449].

3. SAME—COMPUTATION OF TAX.

Where a collector of internal revenue, in determining the amount of a tax on certain legacies, adopted a method that operated to reduce the principal of the estate, and thus diminish the income of the widow, which was not taxable, such method was erroneous.

4. SAME—MORTALITY TABLES.

Where the division of the residue of testator's estate was postponed until the death or remarriage of testator's widow, the use of mortality tables to ascertain the value of the interest of the remaindermen for the purpose of assessing an internal revenue legacy tax was improper.

5. SAME—TAXES ILLEGALLY EXACTED—INTEREST.

Where an internal revenue tax on certain legacies was illegally exacted, interest was properly allowed on the principal of the tax in a suit to recover the same.

In Error to the Circuit Court of the United States for the District of New Jersey.

For opinion below, see 141 Fed. 423.

John B. Vreeland, for plaintiff in error.

Thomas J. Lintott and Frederick J. Johnson, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. Bernard M. Shanley died on March 19, 1900, leaving a will, which was duly probated in the following month. In 1901 and 1902 the defendant in error, who was the executor of the will, was obliged to pay to the plaintiff in error, who was the collector of internal revenue for the Fifth district of New

Jersey, more than \$100,000, being the tax that was levied by the collector, under the war revenue act of 1898 and its supplements, upon certain interests passing by the will to the three sons and to a grandson of the testator. The needful preliminary steps having been taken by the executor, the present suit was brought to compel the government to refund so much of the tax as had been improperly levied; the result of the action being that the Circuit Court, before whom the case was tried without a jury, entered judgment in favor of the executor for \$93,533.74, with interest amounting to \$15,052.41, aggregating \$108,586.15. The correctness of this judgment is the point now in issue, and it is to be determined by construing the fifth and seventh paragraphs of the will in the light of the judicial decisions that are pertinent to the inquiry. These paragraphs are as follows:

"Fifthly: I give and bequeath the sum of one hundred thousand dollars to my executor hereinafter named, in trust nevertheless, to invest the same in safe securities and to expend the income thereof for the support, maintenance and education of my grandson, Joseph Sandford Shanley, until he shall arrive at the age of twenty-one years, when the said sum of one hundred thousand dollars shall be his and shall be paid to him accordingly. If my grandson shall not have arrived at the age of twenty-one when the distribution of my estate is to be effected as hereinafter provided; that is, upon the death or remarriage of my wife; then I direct that my executor shall hold in trust the further sum of one hundred and fifty thousand dollars and pay the income thereof for the support, maintenance, and education of my said grandson, until he shall arrive at that age, and, upon his reaching that age and the time of distribution of my estate having arrived as aforesaid, the said sum of one hundred and fifty thousand dollars shall be his and be paid to him. If my said grandson should die before attaining the age of twenty-one years, the said bequests for his benefit of one hundred thousand dollars and one hundred and fifty thousand dollars shall lapse, revert to, and become part of my general estate. If he arrives at that age he shall have the first mentioned sum immediately thereupon, and the other sum, one hundred and fifty thousand dollars, when the final distribution of my estate is made as herein provided."

"Seventhly: I direct that the net income of all the residue and remainder of my estate, after the payment of all necessary and proper expenses and charges on account of the same, be annually divided, on the twenty-fifth day of January of each year, between my wife, and my three sons, share and share alike—each receiving one-fourth thereof—until the death or remarriage of my said wife, upon the happening of either of which events all her right, title and interest in my estate shall cease. And thereupon, I direct that all the rest, residue and remainder of my estate, real and personal, subject to the provisions above written for the benefit of my grandson, shall be distributed and divided among my said three sons, share and share alike."

Under these provisions of the will and the fourth paragraph, which it is not necessary to consider, the Circuit Court allowed certain claims of the collector which are not now before us, as no writ of error has been taken by the executor to such allowance. The widow is still living and unmarried, and the grandson is also living, a lad of about 12 years of age. The questions presently to be decided, with the positions thereon of the defendant in error, are clearly and accurately stated in the brief of his counsel as follows:

"(1) Are the legacies to Joseph Sandford Shanley, bequeathed by the fifth section of the will, taxable under the act of Congress approved June 13, 1898, c. 448, 30 Stat. 464, the amendments to that act passed in 1901, Act March 2, 1901, c. 806, 31 Stat. 948 [U. S. Comp. St. 1901, pp. 2307, 2308],

and the act of Congress of June 27, 1902, c. 1160, 32 Stat. 406 [U. S. Comp. St. Supp. 1905, p. 449]?

"The defendant in error contends on this question: First, that these are technically contingent legacies, and as such are not taxable under the act of June 27, 1902, because they are not absolutely vested in possession or enjoyment; and, secondly, that, even if they are technically vested legacies, they are not taxable, under the act of Congress of June 13, 1898, and its amendments, until they are vested in possession or enjoyment.

"(2) Are the legacies given to the three sons of the testator by the seventh section of the will taxable under the acts of Congress above referred to?

"The defendant in error contends as to this question: (1) That the tax imposed in respect to the above legacies is illegal because it taxes the interest of the widow of the testator bequeathed to her by the said seventh section; (2) because the said legacies are not vested in possession or enjoyment, and are therefore not taxable under the said acts; and (3) because they cannot be valued for taxation before the remarriage of the widow.

"(3) If the defendant in error is entitled to judgment, is he entitled to interest on the amount recovered?

"The defendant in error contends as to this question that he is entitled to interest on the amount recovered from the date of the payment of the taxes in question, on the ground that they were illegally exacted from him, and were paid under protest."

The first question is settled, we think, in favor of the defendant in error by the decisions of the Court of Errors and Appeals of New Jersey. In *Gifford v. Thorn*, 9 N. J. Eq. 702, it was decided by that court that a legacy to a person "when he arrives at the age of 21 years" is a contingent legacy. In the language of Chief Justice Green, who wrote the opinion of the court:

"It has been repeatedly held, and seems at this date to be the settled law, that where the bequest made to a legatee is in these words, or words of a similar meaning, without being controlled by the context of the will, they imply a condition precedent, to wit, that the legatee shall live to that age; and consequently the legatee does not take a vested interest in the legacy until twenty-one. I give and bequeath to A. B. 'at the age of twenty-one,' or 'if he arrives at twenty-one,' or 'provided he lives to be twenty-one,' or 'when he arrives at the age of twenty-one,' or 'in case of his arriving at twenty-one,' have all been held to be contingent legacies."

See, also, *Neilson v. Bishop*, 45 N. J. Eq. 473, 17 Atl. 962, and *Howell's Executors v. Green's Administrator*, 31 N. J. Law, 570. And this court has recently decided in *Philadelphia Trust, etc., Co. v. McCoach*, 129 Fed. 906, 64 C. C. A. 338 that a legacy to a daughter, which she was not to take unless she survived her mother, was contingent and not vested; to which may be added the authorities referred to in *Heberton v. McClain* (C. C.) 135 Fed. 226.

The second question does not need elaborate discussion, in view of the recent decision of the Supreme Court in *Vanderbilt v. Eidman*, 196 U. S. 480, 25 Sup. Ct. 331, 49 L. Ed. 563. The clause of Cornelius Vanderbilt's will that was there under examination gave the residue of his estate to his executors to be held in trust for the support, maintenance, and education of his son Alfred, to accumulate the surplus income, and pay the accumulations to his son when he should arrive at the age of 21 years, and thereafter to pay him the net income of the estate until he should arrive at the age of 30 years, when he was to be put in full possession of one-half the estate. The net income from the remainder was to be paid to him thereafter until he

should arrive at the age of 35, when he was to receive the rest of the estate. Remainders over were limited in case he should die before reaching the age of 30 or 35, but these were not regarded as material to the construction of the clause. Upon the language thus summarized, the Court of Appeals for the Second Circuit certified several questions to the Supreme Court, of which the third question was as follows:

"(3) Did sections 29 and 30 of said act of June 13, 1898 (chapter 448, 30 Stat. 464, 465 [U. S. Comp. St. 1901, pp. 2307, 2308]), authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests shall become absolutely vested in possession or enjoyment?"

This question was answered by the Supreme Court in the negative, and the very full consideration given to the subject will satisfy any reader of Mr. Justice White's opinion that the paragraphs of Bernard M. Shanley's will now under review must receive the same construction as was given to the will of Cornelius Vanderbilt.

Referring to sections 29 and 30 of the act of 1898, the court observes that section 29 imposes duties upon two classes of property—first, upon legacies or distributive shares passing by death and arising from personal property; and, second, upon any personal property or interest therein that may be transferred by deed, grant, bargain, sale, or gift, to take effect in possession or enjoyment after the death of the grantor. But, as the statute expressly makes the second class taxable only when it comes into the actual possession and enjoyment of the grantee, any fair construction must apply the same limitation to the first class, unless it should appear that the statute has subjected the first class to a different rule. No such rule was found, however, by the court after a detailed consideration of the act, and the conclusion was reached, fortified by the decisions of several state courts upon similar statutes, that it would be "doing violence to the statute to construe it as taxing such an interest before the period when possession of enjoyment had attached."

It was further pointed out that the construction primarily put upon the act of 1898 by the Treasury Department was in harmony with this construction, and that the construction complained of by Cornelius Vanderbilt's executor was only adopted because the Treasury supposed it to be required by the amending act of 1901. Turning, therefore, to that act, the Supreme Court proceeded to consider this question:

"Did the amendatory act of 1901 enlarge the act of 1898 so as to cause that act to embrace subjects of taxation which were not included prior to the amendment?"

Without referring in detail to the discussion of this question, it is enough to say that, after a careful consideration of the act of 1901, not only by itself, but also in connection with the subsequent acts of April 12, 1902, and June 27, 1902, the court concluded that the

amendments of 1901 did not introduce any new subject of taxation, but merely fixed a uniform period within which the obligation should arise of paying the tax that was levied under the act of 1898, namely, a tax upon a beneficial interest that had already vested in possession and enjoyment; and that when it is necessary to decide what taxes are referred to in the acts of April 12, 1902, and June 27, 1902, the distinction must be borne in mind between an interest which had, and an interest which had not, become vested in possession and enjoyment at the dates mentioned in these two acts. No interest is taxed until it vests in possession and enjoyment.

In view of the opinion of the Supreme Court thus imperfectly summarized, it would be superfluous to discuss further the will of Bernard Shanley. As we think, the case before us cannot be distinguished from *Vanderbilt v. Eidman*, and therefore, upon the authority of that decision, it must be held that the interests of Bernard Shanley's sons under the seventh section of his will were not taxable. It may be added, however, that the method of calculation adopted by the collector was also objectionable because it reduced the principal of the estate, and thus diminished the income of the widow, in effect taxing her without any authority for such taxation, and that the value of the residuary estate bequeathed to the sons was estimated by the use of mortuary tables, for which use we fail to find any authority in the statute. Still further, if the use of mortuary tables were permissible in a proper case, they should not have been used here, for one of the contingencies contemplated by the will was the remarriage of the widow, and, while the probability of death may perhaps be approximately estimated from the recorded experience of insurance companies, there are as yet no statistics available from which the probability of remarriage may even be conjectured. *Dunbar v. Dunbar*, 190 U. S. 345, 23 Sup. Ct. 757, 47 L. Ed. 1084.

That interest was properly allowed upon the principal of the tax, since payment had been illegally exacted from the defendant in error, we have no doubt. *Erschine v. Van Arsdale*, 15 Wall. 75, 21 L. Ed. 63; *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, 28 L. Ed. 109.

The judgment of the Circuit Court is accordingly affirmed.

BALTIMORE & O. R. CO. v. BROWN.

(Circuit Court of Appeals, Third Circuit. May 28, 1906.)

No. 26.

1. MASTER AND SERVANT—FELLOW SERVANTS—FOREMEN AND WORKMEN.

A mere foreman or gang boss is a fellow servant of those working with or under him and for his defaults by which a fellow servant is injured the master is not responsible, unless the duty as to which the default is made is an absolute duty of the master the performance of which has been delegated to such foreman.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 433, 449.

Who are fellow servants, see notes to *Northern Pac. R. Co. v. Smith*, 8 C. C. A. 668; *Flippin v. Kimball*, 31 C. C. A. 286.]

2. SAME—INJURY OF SERVANT—NEGLIGENCE OF FELLOW SERVANT.

Defendant railroad company owned barges on which cars were transported into a dock to be loaded from a pier alongside. There were two parallel tracks on the barge and between them a platform at about the height of the car doors used in loading the cars. There was a space a foot wide between the platform and the cars and iron plates were provided to be placed across such space from the car doors to the platform. Plaintiff was a workman employed by defendant with others in loading cars on such a barge under direction of a foreman. Having occasion to move one of the cars the foreman directed that the plate be not replaced and plaintiff while assisting to roll a cask from such car to the platform in obedience to an order of the foreman, without knowledge or notice that the plate was not in place stepped backward into the opening and fell and was injured. *Held*, that defendant having provided proper appliances to make the work safe was not under the personal duty to see that such appliances were replaced after being temporarily removed by the workmen and that plaintiff's injury was due to the negligence of the foreman who was his fellow servant for which defendant was not liable but which was one of the assumed risks of the employment.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 142 Fed. 911.

Wm. B. Linn, for plaintiff in error.

Thomas Raeburn White, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

GRAY, Circuit Judge. An action in trespass was brought in the court below by the defendant in error, hereinafter called the plaintiff, against the plaintiff in error, hereinafter called the defendant, to recover damages for personal injuries sustained by plaintiff while employed by defendant. The plaintiff had a verdict, upon which judgment was entered in his favor in the court below, and the writ of error sued out by defendant brings the case into this court. The evidence set forth in the record shows that the defendant had twelve freight stations in Philadelphia, all under the supervision of a general freight agent, who was represented at each station by an assistant freight agent. One of these freight stations was a certain pier No. 12 in the Delaware river, to which freight cars of the defendant company were brought upon barges, which were moved in a dock alongside the pier, to be unloaded and loaded. One of these barges was so moved at the time of the accident complained of, and hogsheads of tobacco were being loaded from the pier into the cars on the barge. To accommodate the cars, there were two separate tracks, one on each side of the barge and parallel thereto. Between the tracks a platform ran lengthwise of the barge, six or eight feet wide, and at an elevation a little lower, or nearly even with the floors of the cars on each side. Between the cars and the edge of this elevated platform, there was an open space about 12 inches wide. For the purpose of facilitating the loading and unloading of heavy articles from or onto the platform, iron plates of sufficient length and width were provided by the defendant company to bridge the space between the door and the side of the car and the platform. At the time of the

accident, large casks or hogsheads of tobacco were being rolled from the pier on a gang plank into one of the cars on the track next to the pier, across the same and out of the door on the opposite side of the car onto the platform, to be loaded into a car on the other track. This was being done by four or five men employed by defendant, one of whom (Mulch) acted as gang boss or foreman, and directed the work. One of the hogsheads had been thus rolled from the pier through the car nearest thereto, onto and across the platform, to the car to be loaded, one of the iron plates provided for that purpose being used to bridge the open space between the car door and the platform. In the movement of this hogshead, the gang boss assisted, standing with another man in front of the hogshead to steady it, as it was rolled across the floor of the car and out the opposite door onto the platform. It then appearing that the doors of the car through which the hogsheads were to be rolled, were not conveniently situated with reference either to the pier or to the car to be loaded on the other side of the platform, the cars next the pier were pushed ahead some feet, and the iron plates from the doors to the platform were necessarily displaced. Mulch then summoned the plaintiff, who had been working at some other place, to take his (Mulch's) place in loading these hogsheads into the cars on the barge. It seems that it was more convenient to so load them when the tide was high, and as it was then falling, Mulch told one of the men engaged in the work, to never mind replacing the iron plates from the door of the car to the platform, as he "wanted to rush the hogsheads in." By his direction, the plaintiff assisted in moving the next hogshead from the pier, and when it was being rolled across the first car, by like direction, he took the place Mulch had before occupied, in front of the hogshead, between two other men, walking backward toward the door next the platform, and stepped out, expecting, as he said, the plate to be in its usual position at the door. Owing to its absence, he stepped into the hole or space between the car and the platform, and fell, the hogshead rolling out over him, whereby he suffered the injuries complained of. Neither the general freight agent, nor the assistant freight agent in charge of this particular station were present, or had in any way interfered with the placing of the plates at the doors of the cars.

The plaintiff's contention as to the liability of the defendant, is based upon the following averments in the declaration:

"The defendant, its superintendent, or vice principal, with full knowledge of the danger and without informing the plaintiff of it, specifically ordered the plaintiff in front of the cask and that he should steady it as it was being rolled into the car. In pursuance of the company's orders, the plaintiff, believing he was in perfect safety, in order to steady the cask, was forced to step backward, and in doing so fell into a hole on the barge, unknown to him at the time, but known to the defendant and vice principal, whose duty it was to have the hole covered or to inform the plaintiff of the danger."

It is in evidence, and not disputed, that the person responsible for not replacing the plates after the movement of the cars, was Mulch, the gang boss or foreman who had that authority and control that is necessarily reposed in one of several men engaged in such work

as was here being performed. He was in no sense such a vice principal or representative of the defendant, as to take him out of the class of fellow servants of the plaintiff, or to impose liability upon the defendant, even if the situation had been such as to attach liability to the interference of a vice principal. If plaintiff has a right to recover at all, it must be upon the ground that the injuries of which he complains resulted from the neglect of the duty of the master to exercise reasonable care in providing a safe place in which and safe tools and appliances with which his servant is to work, and also due care in the selection of those with whom he is to work. This duty is an absolute duty, sometimes called a personal duty of the master, and cannot be delegated by him so as to avoid liability for its nonperformance. The one who may be charged for the time being with the performance of this duty, performs it for and in place of the master, and no matter what his grade of service may be, whether highest or lowest, his default is the default of the master.

In cases like the present, it is essential, then, to inquire whether the negligence averred pertains to such an absolute or personal duty of the master. There is no suggestion that there had been any lack of care in the selection and employment of Mulch and the other fellow servants of plaintiff. The physical situation disclosed by the testimony was not more than ordinarily dangerous. The elevated platform that ran between the tracks on the barge for the convenient loading and unloading of cars across the same, was faultless in structure, so far as the testimony shows, and at no more than the proper distance (12 inches) from these tracks. It can hardly be said that, even without plates or gang boards at all, it would have been an unsafe place in which to work, so far as the ingress and egress to and from the car by the workmen was concerned, the open space between the platform and the car being obvious to any one with the ordinary faculties of perception. These plates were presumably furnished to facilitate the movement of large and heavy articles, like these hogsheads, from the car to the platform, as also for the convenience and safety of those engaged in performing such work. At all events, the plates were provided by the defendant, and their regular use for the purposes mentioned established. So far as such provision was a duty, it was undeniably performed, and we cannot say that that duty extended so far as to require of the defendant that it should be responsible for the placement of the plates, whenever the movement of such articles as these hogsheads might require it. They were not permanent appliances affixed either to the car or the platform. They were necessarily movable and casual appliances, and required to be placed and adjusted for use as occasion demanded. They were necessarily displaced each time the cars were moved, to be replaced by those engaged in or in charge of the work when again required. Proper appliances, such as these plates, having been provided by the master, his personal duty, if any, was performed. The placing, replacing, and adjustment necessary for their use, belonged to those who were working for the time being, and could not, from the nature of things, be supervised and controlled in each particular instance by

the defendant. Mulch, with the other workmen of the gang, including the plaintiff, were fellow workmen employed by the same master, working together under a common control, and to the same end; that is, in this instance, the removal of these hogsheads from the pier to the car into which they were to be loaded. It is well settled in reason and by authority, that a mere foreman or gang boss is a fellow servant of those working with or under him, and for his defaults, by which a fellow servant is injured, the master is not responsible, unless the duty as to which default is made is an absolute duty of the master, the performance of which has been delegated to such servant. But when that is not the case, the negligence of such a person is one of the ordinary risks of the employment undertaken by every one who enters the service of another. The master's negligence, on the contrary, is never one of the risks so undertaken. From what has been said, it must be apparent, that Mulch's admitted negligence, in directing that the plate be not replaced after the moving of the car, and in failing to inform plaintiff of the fact that it had not been replaced, was the negligence of a fellow servant, and not the negligence of the defendant.

This case, upon its undisputed facts, is so far within the line laid down in a series of decisions subsequent to the *Ross Case*, 112 U. S. 377, 5 Sup. Ct. 184, 28 L. Ed. 787, that it is hardly necessary to do more than refer to them. These decisions have illuminated the whole subject of master and servant in the respect we are now considering it, and have settled the principles upon which the liability of the master, where the allegation is that he has failed in the performance of any phase of the absolute duties above referred to, can be predicated. It is the character of the duty, rather than the grade of the servant or employé whose negligence of it causes the injury, that must determine the liability of the master. Did the negligence in question pertain to an absolute or personal duty imposed by law upon the master? If it did, no delegation of that duty to another, in any grade of his service, can relieve the master's liability for nonperformance of that duty. There is sometimes difficulty in ascertaining whether the negligence does or not pertain to such absolute duty of the master. We think, however, there is no such difficulty in this case. The undisputed evidence shows no want of ordinary care in the selection and employment of Mulch, or in making the barge platform and pier reasonably safe places on which to work, and the provision of the plates to bridge the space between the platform and the cars, satisfy any reasonable demands upon the defendant for safe appliances in connection with the work to be done. Under these circumstances, as we have said, the negligence of the foreman (Mulch) in not replacing the plate after the car was moved, was the negligence of a fellow servant, the risk of which was of course assumed by the plaintiff, when he entered into the employment of the defendant. Where tools or appliances that are to be used only as occasion requires, are furnished by the master, their negligent use by one servant resulting in injury to another servant, cannot be imputed to the master.

In the case of *Alaska Mining Co. v. Whelan*, 168 U. S. 86, 18

Sup. Ct. 40, 42 L. Ed. 390, the plaintiff and another workman were directed by one Finley, who was their foreman or boss in the work in which they were engaged, to work on a pile of broken rock in a certain mining chute of defendant. It was Finley's duty to direct when the rock from any particular chute was to be drawn, and it was his custom to go into the pit and notify the men when he was going to draw the chute. Without such a notice to plaintiff, or his co-worker, Finley ordered the chute to be drawn and plaintiff went through with the mass of rock and was injured. The plaintiff had judgment in the circuit court, on the ground that it was the master's duty to provide a reasonably safe place for its employes to work in, to keep the chutes, through which the rock was to be drawn, in good condition, and to notify the workmen engaged in breaking rock when the chute would be drawn, and that the delegation of this latter duty to the night boss did not relieve the master from liability. This judgment was affirmed in the Court of Appeals for the Ninth Circuit. In reversing this judgment, the Supreme Court of the United States (168 U. S. 89, 18 Sup. Ct. 41, 42 L. Ed. 390) uses the following language, which is closely applicable to the present case:

"Finley was not a vice principal or representative of the corporation. He was not the general manager of its business, or the superintendent of any department of that business. But he was merely the foreman or boss of the particular gang of men to which the plaintiff belonged. Whether he had or had not authority to engage and discharge the men under him, is immaterial. Even if he had such authority, he was none the less a fellow servant with them, employed in the same department of business and under a common head. There was no evidence that he was an unsuitable person for his place, or that the machinery was imperfect or defective for its purpose. The negligence, if any, was his own negligence in using the machinery or in giving orders to the men."

The latest case in the Supreme Court is that of the Northern Pacific Railway Co. v. Dixon, 194 U. S. 346, 24 Sup. Ct. 686, 48 L. Ed. 1006. In this case, the negligence of a local telegraph operator and station agent, in observing and reporting by telegraph to the train dispatcher the movement of trains past his station, which caused the death of a fireman of the company, without any fault or negligence of the train dispatcher, was held not to be the negligence of a vice principal for which the railway company is liable, but the negligence of a fellow servant of the fireman, the risk of which he assumes. Mr. Justice Brewer, in delivering the opinion of the Supreme Court, quotes from *Whittaker v. Bent*, 167 Mass. 588, 46 N. E. 121, the following felicitous statement by Mr. Justice Holmes:

"The absolute obligation of an employer, to see that due care is used to provide safe appliances for his workmen, is not extended to all the passing risks which arise from short-lived causes." *B. & O. R. R. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772; *Central Railroad Co. v. Keegan*, 160 U. S. 259, 16 Sup. Ct. 269, 40 L. Ed. 418; *Railroad Co. v. Conroy*, 175 U. S. 323, 20 Sup. Ct. 85, 44 L. Ed. 181; *Northern Pacific R. R. Co. v. Hamby*, 154 U. S. 349, 14 Sup. Ct. 983, 38 L. Ed. 1009; *Northern Pacific R. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994.

The counsel for appellee apparently rely upon the opinion of this court, in the case of *Penna. R. R. Co. v. La Rue*, 81 Fed. 148, 27

C. C. A. 363. We do not think, however, that the ratio decidendi of that case conflicts with that of our opinion in the present case. The injuries inflicted upon a locomotive fireman in that case, were due to the shifting of large pieces from the top of a car loaded with lumber. The car was a gondola car and the lumber was held in place by wooden standards along the sides. A gondola car, when used as a lumber car, must be equipped as such, and the standards necessary for this equipment must be sufficient for their purpose, that is, long enough and strong enough to hold the lumber piled upon the car in place. These standards are part of the permanent equipment of a car so used, and it was undoubtedly the duty of the defendant company, as being a master's duty, to see that the car in this respect was fit for the purposes for which it was used, by a proper equipment of standards. Some of these standards were of hemlock, instead of oak, as they ought to have been, and gave way to the pressure of the lumber, allowing some of the sticks to protrude, which occasioned the injury to the plaintiff. A defect in the standards or equipment of the car, was a defect in the car itself, as a lumber car, and was due to the negligence of the defendant company, as much as would have been a defect in a box car that allowed any portion of its load to escape, to the injury of one situated as the plaintiff in the case was. Judge Acheson, in delivering the opinion of the court, says:

"In the present case, the negligence which caused the mischief was not the improper or insecure loading of the car, for in this regard there was no fault, nor was this a case of the negligent use by the defendant's employes of safe appliances. The ground of complaint here is, that the defendant failed in the positive duty it owed to the plaintiff to equip the car with reasonably safe appliances for the service in which it was employed. * * * Its whole duty to the plaintiff was not fulfilled, short of the actual proper equipment of the car."

In another place, the learned judge says:

"In the case of a low sided gondola car employed in the transportation of lumber, side standards to keep the load in place * * * are appliances necessary for the proper equipment of the car, and as essential to the safe transportation of the load as is a proper car body."

As we think the learned court below erred in refusing defendant's request for peremptory instructions to the jury, to render a verdict for the defendant, and also in refusing defendant's motion for judgment in its favor, non obstante veredicto, the subject of the first, second and third assignments of error, it will not be necessary to consider those assignments which concern alleged errors in the charge of the court.

For the reasons stated, the judgment below is reversed, with direction to enter a judgment in favor of the defendant.

SOUTHERN RY. CO. v. HUBBARD BROS. CO.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1906.)

No. 1,497.

CARRIERS—ACTION FOR LOSS OF GOODS—EVIDENCE OF DELIVERY TO CARRIER.

Defendant railroad company made a contract with a cotton compress company located on a belt line at Birmingham, Ala., reciting that defendant would receive uncompressed cotton for shipment, but for convenience desired a portion of the same compressed, and providing that the compress company would receive and receipt for such cotton from defendant or shippers, compress the same, and load it in cars of defendant, as directed, for which it was to receive payment as therein fixed. It also agreed to be responsible to defendant for any loss or damage to such cotton while in its possession. A through shipment of cotton was made from a point in Mississippi to plaintiff at New York by way of Birmingham, and thence over defendant's road. The initial carrier delivered the cotton to the belt line road, which delivered it to the compress company. The first carrier then paid to defendant its share of the freight, and delivered to it the compress company's receipts. The cotton was not delivered by the compress company to defendant, and was never received by plaintiff, which brought an action against defendant for its value. Aside from such contract, there was evidence of a custom of the initial carrier to make deliveries of cotton to defendant at Birmingham in the manner pursued in this instance. *Held*, that such evidence warranted the submission to the jury of the question whether the delivery of the cotton to the compress company constituted a delivery to defendant, either because of an agency to receive it, created by the contract, or by the custom which the evidence tended to prove.

In Error to the Circuit Court of the United States for the Western District of Tennessee.

Caruthers Ewing, for plaintiff in error.

Henry Craft, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The plaintiffs, who are citizens of the state of New York, and whose place of business is the city of New York, brought this action against the Kansas City, Memphis & Birmingham Railroad Company, the St. Louis & San Francisco Railroad Company, and the Southern Railway Company, to recover damages for the loss of 100 bales of cotton delivered by Smith & Coughlan to the first-named company at Nettleton, Miss., to be carried by that company and connecting carriers to New York, and there delivered to the plaintiffs. The Kansas City, Memphis & Birmingham Railroad connected directly at Birmingham, Ala., with the Southern Railway. It also connected at Birmingham with the Belt Railroad, operated by the St. Louis & San Francisco Railroad Company, over which cotton intended to be compressed before further transportation was carried to the works of the compress company, where, after being compressed, it was delivered to the next carrier. The 100 bales of cotton referred to were received for shipment at Nettleton, March 6, 1903, and a bill of lading issued showing the consignment of the cotton to the plaintiffs. A draft on the plaintiffs for \$4,000 was attached thereto, upon payment of which sum and the indorsement

of the bill of lading the cotton was deliverable to them. The bill of lading was in the usual form, making each successive carrier responsible for his own fault only, and these words were noted in the routing specifications therein, "Railroad Compress, Birmingham, Ala." The plaintiffs paid the draft for \$4,000. The bill of lading duly indorsed was turned over, and the cotton became deliverable to them. When the cotton arrived in Birmingham, it was transferred to the Belt Railroad and from the latter it was delivered to the compress company, three car loads on the 18th of March, 1903, and the remaining two car loads on the 19th of the same month. This is the last trace of the cotton. The compress company never delivered it to the Southern Railway Company, but the latter company was notified on March 27, 1903, by the agent of the Kansas City, Memphis & Birmingham Company of the delivery of the cotton to the compress company, and the receipt of the latter for the cotton bearing date March 26th, was handed to the Southern Railway Company at the same time, as was also the unearned freight money, which had been paid in advance. There was also evidence from which the jury might have found that the Southern Railway Company had received earlier notice from the Kansas City, Memphis & Birmingham Railroad Company that the cotton in question had been delivered to the Belt Line Company, for account of the Southern Railway Company for compression, and forwarding by the latter to New York. But, however that may be, the Southern Railway Company made no complaint that the notification of March 27th was not seasonable.

On proof of these and some other facts to be noticed later on, the plaintiffs gave up the pursuit of the other railroad companies, and confined its suit to the Southern Railway Company, as to which the controversy turned ultimately upon the question whether the compress company was the agent of the Southern Railway Company for the purpose of receiving the cotton. To establish this the plaintiffs relied upon two lines of proof—First, a contract between the railway company and the compress company; and, second, evidence of the previous method of doing business by the Kansas City, Memphis & Birmingham Railroad Company and the Southern Railway Company in transferring freight of this kind at Birmingham by the former to the latter for further transportation. As we think the contractual relations between the railway company and the compress company are of prime importance in determining the liability of the former for the loss in question, it is expedient to set it forth (except some formal parts) as follows:

"Whereas, the compress company is now engaged in operating a cotton compress at Birmingham, in the state of Alabama; and, whereas, during the cotton season of 1902-1903 the railway company will accept uncompressed cotton for through transportation, but, for convenience in forwarding the same, desires that a portion thereof shall be compressed at said compress of the compress company; now, therefore, this agreement witnesseth: That the compress company, for and in consideration of the premises and the sums of money herein agreed to be paid by the railroad company, hereby covenants and agrees:

"(1) That, as and when requested by the railway company so to do, it will promptly receive and receipt for, unload from cars or wagons, shelter

when practicable, compress and load on cars in the order of its receipt, or as may be otherwise instructed by the railway company, all cotton of such dimensions as to make it practicable to compress it to a density, as herein below specified, intended for shipment over the line of the railway company and its connections, and tendered to the compress company for that purpose by the railway company or by shippers, and for such cotton as is so tendered by shippers it will issue to shippers tendering same one single certificate only, covering each lot of cotton designated by one mark. Where the cotton which the compress company is requested by the railway company to receive and handle as above stated is tendered to the compress company of dimensions such as to make it impracticable to compress such cotton to a density as great as $22\frac{1}{2}$ pounds to the cubic foot, the compress company shall immediately notify the agent of the railway company of the tender of such cotton for such instructions as to disposition as the railway company may desire to give.

"(2) That it will well and sufficiently compress all cotton to it as hereinbefore provided, and will place upon each bale of cotton so compressed at least eight bands, so that the density of each bale of cotton so compressed shall not be less than $22\frac{1}{2}$ pounds per cubic foot at the ports, as measured from end to end and over the bands; provided, that if cotton is delivered to the compress by the railway with less than six bands, the bands necessary to make the number of bands equal six shall be put on the bale at the expense of the railway.

"(3) That before loading any cotton compressed by it under the terms of this agreement, it will carefully and properly reband each bale so handled by it.

"(4) That it will load not less than 50 bales of compressed cotton in any standard car of 34 feet in length, excepting remnants, and when loading is completed will cause doors of cars to be closed, sealed, and stripped in proper manner (doors closing tight into the side of a car properly fastened and sealed need no strips), and thereafter will promptly furnish unto the railway company an accurate statement of all cotton loaded in each and every car.

"(5) That it will indemnify and save harmless the railway company against any and all claims, demands, suits, judgments, and sums of money accruing to any person against the railway company for loss or damage to cotton so tendered to, compressed by, or loaded by, the compress company, howsoever such loss or damage may result, except by fire, if the same accrues between the time of delivery of such cotton unto the compress company by shippers or by the railroad company, or the time when the railway company shall have placed cars of uncompressed cotton in position for unloading at the compress company, with way bills, abstracts, or other memoranda or advice, showing that the cars have been placed in position for such unloading and the time when the same have been loaded or reloaded in cars, and the railway company so notified that the cotton has been so loaded or reloaded, or until the railway company shall have been in default for 48 hours in furnishing cars therefor, as hereinafter provided, such indemnity to be effective at whatsoever time such loss or damage may be discovered; and to that end hereby specifically assumes all responsibility for the proper handling, storing, and protection of such cotton while in its possession, as hereinbefore provided, and agrees that the count made by the railway company or its connections of the number of bales of cotton loaded in any car under the seals of the compress company, at the points where such seals are broken, shall be final and conclusive as between the parties hereto for the purpose of this agreement as to number of bales of cotton loaded in such car, such count to be promptly and carefully made and checked.

"(6) That it will pay unto the railway company, upon weekly or monthly bills to be rendered by the railway, any and all sums disbursed by the railway for premiums of insurance against loss or damage by fire to any cotton covered by outstanding bills of lading of the railway, for the full value thereof, while such cotton may be in possession of or upon the premises of the compress company: Provided, however, that the rate of such premiums shall not exceed at any individual compress the average of premiums for the year, or for

the cotton season, paid by the railway at said compress; and also in like manner, will reimburse the railway for any and all expenses incurred in putting in proper shipping condition cotton received at the port from the compress company, with heads open, bands off, or insufficient density, provided such expenses are incurred and bills rendered to the compress company, or it notified, within 60 days after the cotton has been unloaded at the port, and the payment of such expenses to be made by the compress company within 30 days after the bill of the railway therefor shall have been rendered to the compress company.

"(7) That the compress company shall not undertake, do, or perform, for any person, for less price than herein provided for, services substantially similar to those herein agreed to be performed for the railway company by means of the payment of any rebate, commission or drawback out of the charge of the compress company for compression as provided for herein; but if the compress company should, because of competition of other companies, or for other good reasons, undertake, do, or perform services substantially similar for a less price by other means than by rebate, commissions, or drawback, in that event the railway company shall have the benefit of any rate allowed to such person or persons.

"(8) That it will execute and deliver unto the railway company, simultaneously with the execution of this agreement, a good and sufficient bond in the penal sum of \$10,000, with sureties to be approved by the railway company, conditioned upon its faithful performance of each and every one of its covenants in this agreement contained.

"And the railway company hereby covenants and agrees:

"(1) That it will pay unto the compress company, in weekly settlements, during the life of this agreement, such sums as may be determined by applying such reasonable charge not exceeding seven and one-half cents per 100 pounds, when destined to mill points in South Carolina, North Carolina, and Virginia; and when destined to South Atlantic ports, Gulf ports, Virginia ports, Baltimore, Philadelphia, New York, and Boston, proper and for export, interior eastern points, points in Canada, and points north of the Ohio river, eight and one-half cents per 100 pounds as ordinarily and contemporaneously paid by the railway company at other compresses, for similar services performed under substantially similar circumstances and conditions, to the bill of lading weights of the cotton of the railway company during the preceding calendar month: Provided, however, that when the railway company shall issue its bill of lading for compressed cotton to be delivered to it for shipment at the compress of the compress company, then the compress company shall look to the shipper of such cotton for its charges, and not to the railway company."

"(2) That it will furnish upon the tracks used by the compress company in loading cotton for account of the railway company, as and when required, and within reasonable time after notice of such requirement, such cars as may be necessary for the loading and shipment of such cotton as may be compressed for account of the railway company, and, in the event that the railway company shall fail to furnish such sufficient supply of cars within forty-eight hours after notice in writing of the requirement of the compress company therefor, then the railway company shall and will be responsible for all cotton actually delayed by its said default from and after the expiration of forty-eight hours from the service of such notice, in all respects as if the same had been actually delivered unto the railway company at the expiration of such forty-eight hours, but not otherwise."

The evidence tended to prove that in making delivery by the Kansas City, Memphis & Birmingham Company at Birmingham for further transportation by the Southern Railway, the custom had been sometimes to make direct delivery to the Southern Railway Company, without the intervention of any other parties; this when the cotton was not intended to be compressed at that place, and sometimes to deliver it to the Belt Railroad to be taken to the works of the compress com-

pany, by which it would be delivered to the Southern Railway Company after it had been compressed. This was the course pursued when for any reason the probable expectation would be that the cotton would be compressed, as, for instance, when the ultimate destination would be a distant point. In the latter case it was customary for the Kansas City, Memphis & Birmingham Company to notify the Southern Railway Company of the arrival and delivery of the freight to the compress company, and forward that company's receipt therefor. If, as was the case in this instance, the through freight had been paid in advance, the first-named company would deduct its own proportion, and turn over the balance to the Southern Railway Company. That was what was done here.

The cause was submitted to the jury under instructions from the court, some of which were excepted to. Certain requests for instructions were presented in behalf of the railway company, which were refused, and exceptions were taken to the refusal. A verdict was rendered in favor of the plaintiffs in the sum of \$4,000, and the interest thereon, and judgment was entered accordingly.

The grounds on which a reversal is prayed are:

1. That there was no evidence to sustain the verdict.
2. That the court erred in denying a motion of the plaintiff in error for a peremptory instruction to the jury.

These may be disposed of together. From what has been said of the evidence, we think the court was required to submit to the jury the question of the agency of the compress company in receiving the cotton, if, indeed, the contract between that company and the railway company and the undisputed facts did not, of themselves, establish such agency. If the latter view were to be taken of the case, the court would have been required to have instructed for the plaintiff. We think it is not necessary to decide whether such action would have been proper, for there was other evidence from which the jury might have found that the employment of the compress company was for the purpose of facilitating the transportation by reducing the bulk of the cotton, and was an expedient whereby the railway company would more easily earn the stipulated freight than if it should transport it in its larger bulk. If it was done for the convenience of the railway company, or mainly for its convenience, it surely would not be unreasonable to find that during the time while the compress company had the possession it was holding it as an agent or employé of the railway company.

3. In the course of its instructions the court charged the jury as follows:

"I charge you that it would not be a delivery of this shipment of cotton to the Southern Railway Company if you believe the Kansas City, Memphis & Birmingham Railway Company delivered it to the Birmingham Belt Line R. R., and they in turn delivered to the Railroad Compress, unless you should also find that the compress company was the agent of the Southern Railway Company, and authorized to receive cotton for the Southern Railway Company for shipment over that line; and in that case delivery to the compress company would be a delivery to the Southern Railway Company. If the cotton was lost or stolen while in the compress company's possession, the Southern Railway Company would be liable."

We think there was no error in this. It was sufficiently favorable to the plaintiff in error. It required as a condition to the plaintiff's recovery that the jury should find that the compress company was an agent and authorized to receive cotton for the railway company. It is urged that there was no evidence justifying this charge. But, for reasons already stated we think otherwise.

4. The court also instructed the jury as follows:

"If you believe from the proof that the Kansas City, Memphis & Birmingham Railroad Company and the Southern Railroad Company had an agreement or understanding that when cotton arrives in Birmingham over the road of the former company for the East that it was to be compressed at Birmingham, and that it would be a delivery to the Southern Railway Company when the Kansas City, Memphis & Birmingham Railroad Company delivered it to the Railroad Compress, or if there was no such express understanding, but you believe from the proof that business of this character had been conducted in this manner for such length of time and with such frequency as to amount to a custom, and, in the absence of any express agreement or understanding, both roads had so acted in such transactions as to lead the other to believe that cotton delivered at the Railroad Compress by the K. C., M. & B. R. R. to be compressed and forwarded over the Southern Railway would be considered a delivery and treated by both roads as a delivery to the Southern; and, if you believe the K. C., M. & B. Railroad in this case relied upon this custom so established, and delivered the cotton in question, believing at the time it would be a delivery to the Southern, and the Southern would so accept it, then the Southern Railway could not relieve itself from liability in this case if the cotton was lost or stolen while in the compress by insisting that the cotton was not delivered to it."

It is objected that "there was not a scintilla of evidence to justify this charge." The correctness of the conclusion as matter of law is not challenged, and we think the jury would have been justified in finding that the practice had been substantially that which the court made a condition to a verdict in favor of the plaintiffs. Of course, we are not to be understood that the evidence did prove such a custom. It was for the jury to draw conclusions of fact from the evidence.

5. Requests were presented for instructions in regard to the requisites of constructive delivery of the cotton by means of the transmission of way bills, expense accounts, and shipping instructions. These instructions were refused, and properly so, for they would have only tended to confuse the jury. It was clearly proved and is admitted that the cotton was actually delivered to the compress company on the 18th and 19th of March, 1903.

Another objection is that the court refused an instruction that, if the jury could not find any evidence from which to determine the quality and value of the cotton, they would not be justified in rendering a verdict for it. But the bill of lading stated the quantity, and witnesses testified to the current value, and there was no conflict on either subject. For the court to have given an instruction which would present these subjects to the jury as though they were matters of doubt would be diverting their minds into a region of supposed doubt where none in fact existed.

There is really only one important question in the case, which is

that of the relation of the compress company to the Southern Railway Company, and that has been determined against the latter. Its misfortune is in having put in its place a dishonest agent.

The judgment must be affirmed, with costs.

HALL'S SAFE CO. et al. v. HERRING-HALL-MARVIN SAFE CO.

(Circuit Court of Appeals, Sixth Circuit. June 20, 1906.)

No. 1,494.

1. CORPORATIONS—CONTRACTS—BINDING EFFECT ON STOCKHOLDERS.

A contract made by a private corporation on a sale of its property, business, and good will, that it will not again engage in business in competition with the purchaser, is not binding individually on a stockholder, even though he may have been an officer acting for the corporation in the transaction.

[Ed. Note.—For cases in point, see vol. 12. Cent. Dig. Corporations, §§ 663, 664, 1457.]

2. TRADE-MARKS AND TRADE-NAMES—RIGHT TO USE NAME IN TITLE OF CORPORATION—UNFAIR COMPETITION.

Hall's Safe & Lock Company, a corporation, and its predecessors in business were engaged for many years in the manufacture of safes, which were marked and known generally as "Hall's Safes," and acquired a good reputation. The company sold its property, business, and good will, which were subsequently acquired by complainant, and went out of business. The individual defendants whose name was Hall, and who had throughout their business lives been engaged in the making of safes, subsequently organized a corporation for that purpose under the name of "Hall's Safe Company." *Held*, that the adoption and use of such name was within their rights, provided it was so used as not to mislead the public into the belief that the company's products were those of the Hall's Safe & Lock Company or its successors in business, against which complainant was entitled to an injunction.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

3. SAME—INFRINGEMENT BY CORPORATION—LIABILITY OF STOCKHOLDERS.

Stockholders in a corporation are not individually liable or subject to injunction because of unfair competition practiced alone by the corporation.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Judson Harmon and W. C. Cochran, for appellant.

Lawrence Maxwell, Jr., for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. The parties to this controversy are engaged in the business of manufacturing and selling safes. The complainant is a corporation organized under the laws of New Jersey. The defendant the Hall's Safe Company is an Ohio corporation, and the other defendants are citizens of that state. The bill was filed for the purpose of obtaining an injunction restraining the defendants from carrying on the business of manufacturing or selling fireproof or burglar proof safes or vaults under the name of the "Hall's Safe

Company," or under any other trade-name substantially or essentially the same, and calculated to deceive the public or intending purchasers into the belief that they are dealing with the complainant, or with the establishment founded by Joseph L. Hall and carried on by complainant, when they are dealing with the defendants, and from advertising their products as "Hall's Safes," and from marking them with that name, and for the recovery of profits and damages already lost and suffered by the complainant from acts of the like character, and there was a prayer for general relief.

The facts, about which there is not much controversy, are these: From about the year 1847 to 1867, one Joseph L. Hall had, in successive co-partnerships with other persons, been engaged at Cincinnati, Ohio, in the manufacture and sale of fire and burglar proof safes. In this business he had been the principal and managing member of his firms. In the latter year (1867) he with other persons organized a corporation under the laws of Ohio by the name of "Hall's Safe & Lock Company," for the purpose of carrying on the same business. Its factory and principal office were located at Cincinnati, and its business of selling safes extended throughout the United States and into foreign countries. Its safes were known as "Hall's Safes" and "Hall's Standard Safes," and certain styles of them were marked "Hall's Standard Safes," and the safes had a good reputation. In March, 1889, the said Joseph L. Hall, who was at that time the principal stockholder in the corporation last mentioned, died. He sons, Edward C., William H., and Charles O. Hall, were also stockholders. The first two became, successively, presidents of the corporation. The stock of Joseph L. Hall continued part of his estate, and the business went on as before until May 4, 1892, when the corporation sold to the Herring-Hall-Marvin Company, a New Jersey corporation, all its "real estate and leasehold interests, tools, machinery, fixtures, merchandise, trade-marks and good will," and the Hall's Safe & Lock Company covenanted and agreed that it would close up its affairs and be dissolved and would not in the future engage or continue in said business. This sale and agreement was assented to by the above-named sons of Joseph L. Hall, who are the individuals made defendants in this cause. Edward C. Hall and William H. Hall at or about the date of the transfer became stockholders (as we must suppose), directors, and, respectively, president and treasurer, of the Herring-Hall-Marvin Company, at stated salaries agreed upon at the time of said transfer. But in 1895 these persons were deposed from their offices, and their salaries reduced, and on August 1, 1896, they resigned their offices as directors. Their resignations were accepted, and they withdrew from the company. At the time when these parties became associated with the Herring-Hall-Marvin Company, a written agreement with that company was entered into by each of them, which, after stating the terms of their employment, contained the following stipulation:

"And in consideration as aforesaid, I, the said Edward C. Hall (in the other contract, William H. Hall), do hereby covenant, promise, and agree that I will not, so long as the Herring-Hall-Marvin Company may desire to retain my services as above, engage, either in the state of Ohio, or in the state of

New Jersey, or in any of the states east of the Mississippi river, in the business of manufacturing, selling, buying, or dealing in fire or burglar proof vaults and safes, or in any business or occupation such as the said corporation known as the Hall's Safe & Lock Company has heretofore been engaged in, or such as the Herring-Hall-Marvin Company is authorized or empowered to engage in, or in any other business which will or may compete or interfere in any manner with the business of the said Herring-Hall-Marvin Company."

In September, 1896, Edward C. Hall, William H. Hall, Charles O. Hall, and other persons organized a corporation under the laws of Ohio by the name of the "Hall's Safe Company," the corporate defendant herein, and this company shortly thereafter went into the business of manufacturing and selling safes. A bill in equity was soon after filed in the Circuit Court of the United States against the new company by the Herring-Hall-Marvin Company, complaining that the former was infringing its trade and good will, and praying for an injunction. While that suit was pending the Herring-Hall-Marvin Company became insolvent, and a receiver was appointed. A new corporation was organized in New Jersey, the complainant in this suit, an order of the court for a sale of the assets of the old company was obtained, and the new company became the purchaser in December, 1900, by a deed which purported to convey to the complainant all the real estate, personal property, manufacturing plant, tools, machinery, merchandise, assets, franchises, property, and good will of the Herring-Hall-Marvin Company. The bill in that case was dismissed upon a ground not now material, but without prejudice. Not long after the present bill was filed by the new company.

The gravamen of the complaint is that the defendants invade and injure the good will and reputation of the complainant's business by the adoption of the corporate name of the defendant, the "Hall's Safe Company," and also by inducing the public, through advertisements, circulars, and other representations, to believe that their safes are the product of the complainant's business. The defendants admit the acquisition by complainant of the properties, including the good will, of the Hall's Safe & Lock Company, but claim that the individual defendants were not by the sale of the latter company deprived of the right to organize a new company which shall include their family name, and that the name of "Hall's Safe Company," is one which may lawfully be adopted. The defendants also filed a cross-bill, in which they charge complainant with unfair conduct in seeking to divert the defendant's trade by false representations concerning it. The complaint of the cross-bill was that the defendant therein had some time prior to the commencement of this suit removed its manufacturing plant from Cincinnati to Hamilton, Ohio, and had directed all mail addressed to the Hall's Safe & Lock Company at Cincinnati to be forwarded to it at Hamilton, and that it was holding itself out as the Hall Safe & Lock Company or Hall Safe & Lock Works, and the like, and was representing by its signs, advertisements, publications, and stationery that it was the "Successor of Hall's Safe & Lock Co., or was "operating Hall's Safe & Lock Works," or was making and selling "Hall's Safes," and upon answer and replication evidence was taken upon those matters. The court below dismissed the cross-

bill, and decreed for the complainant upon the original bill, awarding an injunction. Complaint is made of the decree, that it is vague and uncertain in respect to the things which the defendants are restrained from doing; a matter to be recurred to later on.

Counsel for complainant contend that it is entitled to the relief it demands by virtue of the contract between its predecessor and assignor and the Hall Safe & Lock Company by which it, though the assignment, acquired the property and good will of the latter company, and that its rights are not to be measured by the rules and principles which apply in the case of unfair competition in trade; and it is argued that this consideration distinguishes the case from that of *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972, where there was much discussion of the extent of the right of a person to use his own name in the conduct of his business, whether it be his private business, or that of a corporate business in which he is associated with others; and reference is made to the language of the chief justice at page 140, where he says:

"We hold that, in the absence of contract, fraud, or estoppel, any man may use his own name in all legitimate ways, and as the whole or a part of a corporate name."

Upon this contention it becomes important to determine what were and are the relations between the complainant and its predecessor in title and the several defendants. Undoubtedly the Herring-Hall-Marvin Company acquired by its contract of purchase with the Hall Safe & Lock Company all its physical properties and the good will which it had acquired in its business, as well as the right to use such trade-names as had been customarily used to identify its products. It acquired also the right to require that the Hall's Safe & Lock Company should go out of business, or, in substance, that it should not longer engage in business of the kind which it sold to the Herring-Hall-Marvin Company. But it is contended that the contract reaches beyond the corporation, the Hall Safe & Lock Company, and binds the defendants who were stockholders and officers of the corporation, and prevents them and any corporation of which they may become stockholders and managers from doing what the Hall Safe & Lock Company could not do; and the principal reason for this contention is the fact that these individual defendants participated in the sale, and as stockholders received its benefits. We are of opinion that this proposition cannot be sustained. The contract which the Herring-Hall-Marvin Company had was with the corporation only, and not with its stockholders or officers. The officers who conducted the business of the selling company were not parties to the contract. It is a familiar rule that an agent, who, having lawful authority, makes a contract with another for a known principal, does not bind himself, but his principal only (*Story on Agency*, § 261; *Mechem on Agency*, § 555; *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050); and the officers of a private corporation, in respect to their liability on contracts entered into by them in behalf of the corporation, stand upon the same footing as agents of private individuals (21 Am. & Eng.

Ency. of Law [2d Ed.] 879; *Whitney v. Wyman*, supra). If the purchaser desired to make the officers and agents of the selling corporation subject to the stipulations of the company in the contract of sale, it should have required their personal agreement to that effect.

The cases cited by counsel for the complainant to support their contention that the court may look through the form of a corporate organization, and fasten upon the stockholders a liability for the acts of the corporation, do not support such a doctrine as applicable to contract relations. These are *State v. Standard Oil Co.*, 49 Ohio St. 137, 30 N. E. 279, 15 L. R. A. 145, 34 Am. St. Rep. 541, *McKinley v. Wheeler*, 130 U. S. 630, 9 Sup. Ct. 638, 32 L. Ed. 1048, and *Anthony v. American Glucose Co.*, 146 N. Y. 407, 41 N. E. 23. They were all cases where, for special purposes and in special circumstances, the court held that it was competent and proper to regard the rights and duties of stockholders in corporations. None of them impugns the general rule above stated that in matters of contract the officers and agents of a corporation are not bound personally by stipulations made by them in behalf of their principal. This rule is not affected by the circumstance that they are indirectly interested as stockholders in the contracts of their corporation. If it were so, it would break down all distinction between the corporate entity and its component parts. Counsel for the appellee have painted in their brief a recent decision, not yet published, of the Circuit Court of Appeals for the Seventh Circuit, in a case entitled *Hall's Safe & Lock Company and James W. Donnell v. Herring-Hall-Marvin Safe Co.* The suit was brought to restrain the defendant from using in its business the corporate name of the complainant as descriptive of its products. The defendant filed a cross-bill to restrain the complainant in the original bill from using the name of the Hall's Safe & Lock Company in their business of making and selling safes, and from selling such safes as "Hall's Safes." It appears from the opinion that Donnell had organized an Illinois corporation, the codefendant, with the name of the old Hall's Safe & Lock Company, having no member of the name of Hall, and was carrying on the safe business under that style at Chicago. The court holds—what we should suppose quite clear—that this assumption of the name of "Hall's Safe & Lock Company" was a fraudulent device to appropriate the good will of the old company, to which the Herring-Hall-Marvin Safe Company had succeeded. It is also held that the defendant in the cross-bill should be restrained from selling safes which were not of the manufacture of the Herring-Hall-Marvin Company, as "Hall's Safes." It was claimed that the defendant in the cross-bill was selling under that name safes made by the Hall's Safe Company, the defendant here. It was only in this incidental way that the rights of the Halls were considered, and of course they could not be adjudged in that suit.

We do not think there is any substantial difference between the conclusion of that court upon the propriety of the use of the designation "Hall's Safes" and our own. We think it quite likely that court would have accepted the qualification that the use of such a designation in the business of the Halls would not be unlawful provided it

was accompanied by explanatory matter showing that the product was their own, and not that of the old company or its successors in business. It is true that the learned judge who delivered the opinion said *arguendo* that the court might look behind the corporation, and find whether there were equities between the Herring-Hall-Marvin Company and the members of the Hall's Safe & Lock Company which would attach to the Hall's Safe Company, of which they are now members, and, concluding there were such equities, proceeded to deduce the consequences. Without repeating what we have said upon this subject, we are constrained to think that the defendants Hall were not bound individually, in law or in equity, by the contract of their corporation.

The determination of the case must depend upon the application of other principles than such as would obtain if there were contractual relations between the parties in reference to the subject-matter of the suit. When the Herring-Hall-Marvin Company purchased the Hall Safe & Lock Company's plant and business, it acquired the good will of the latter company, and this included the right to use the means of communicating to the public information that it had succeeded to the business and good will of its vendor, and among these rights was that of using the trade-names which had been employed in the business, and by which the products thereof had been identified and known; and although the receiver's conveyance to the complainant did not in terms convey the right to use the old trade-names, yet, as it professed to convey all the assets of the Herring-Hall-Marvin Company, including the good will, we think it should be held that the purchaser acquired the right to designate its products by the same means as its predecessor in title had done. These rights it was entitled to enjoy exclusively. They were its property. Neither these defendants nor any other person could lawfully invade them, and we put the statement in this form to signify that in our opinion the defendants were precluded equally with, and not otherwise than, all other persons; because it seems to us that, if there are no contractual relations between the parties, it is indifferent that the rights of the complainant are derived from the Hall Safe & Lock Company.

It would not be difficult to define in comparatively set terms the limits within which the parties to this controversy should be confined, were it not for the fact that these individual defendants bear the name which has long been associated with the complainant's products. Joseph L. Hall left five sons, of whom the defendants Hall were the eldest, and they were all bred to the father's business, and have followed it from their youth. They undoubtedly have the right to pursue the occupation of manufacturing and selling safes, and they have the right to use their own family name in the business, and adopt all proper means of making it known to the public that the safes they offer are made by them, and they have the right to build up a business with a good will of its own, and if they choose to organize a corporation for that purpose, they have the right to use their family name in its title. But in doing all these things neither these individual parties nor the corporation has the

right to endeavor to lead the public into the belief that the safes they make are the product of the Hall Safe & Lock Company's successors in business. If, notwithstanding the defendants conduct their business within these limits, it should happen that from the similarity of names and the kind of business, intending purchasers might sometimes fall into the mistake that the defendants were the successors of the Hall Safe & Lock Company, and were making the kind and quality of safes that were made by that company, the defendants would not be responsible therefor. If in the choice of a corporate name one should be chosen which would be likely to catch the complainant's business, it would be necessary to accompany its use in the business of the company by explanatory statements, which would prevent any misunderstanding; for such a choice without explanation would be prima facie evidence of unfair dealing. The cases upon this subject have come to be very numerous, and it is unnecessary to canvass them. This has been done so recently in several decisions of the Supreme Court that we shall content ourselves with the statement of the controlling principles which we conceive to be now established, referring for authority to *Howe Scale Co. v. Wyckoff, Seamans, etc.*, 198 U. S. 118, 25 Sup. Ct. 609, 49 L. Ed. 972; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 11 Sup. Ct. 625, 35 L. Ed. 247; *Turton & Sons v. Turton & Sons*, L. R. 42 Ch. Div. 128; *Reddaway v. Benham*, L. R. App. Cas. (1896) 199. The subject was also elaborately discussed and the authorities cited in the opinion of this court in *Royal Baking Powder Co. v. Royal*, 122 Fed. 337, 58 C. C. A. 499, delivered by Judge Lurton.

Recurring to the facts of the present case, the name adopted for the corporation was "Hall's Safe Company," a name so dangerously near to that of the "Hall's Safe & Lock Company" as to make it apparently necessary, to avoid mistake, that explanation should be made that it was not the same company or its successor in business. The testimony shows clearly enough that this had not been done, and although for a short time before the filing of the petition the defendant's practices had been mended in this regard, there was sufficient ground to apprehend the repetition of unauthorized pretensions by defendants to justify the complainant in invoking the power of the court to prevent them. Inasmuch as the individuals who are made defendants are not engaged in a business or proposing to engage in a business of their own prejudicial to the complainant, it would seem that the relief required should be the restraining of the corporation and its officers and agents from committing the unlawful acts complained of. It is not alleged in the bill that these defendants are personally committing, or threatening to commit, any injurious acts. They are apparently made parties because of the fact that they were large stockholders in the Hall's Safe & Lock Company, and had assented to the sale of its properties, and had been instrumental in the organization of the new company. But we do not think the latter fact alone subjected them to any liability, and if,

as we have held, they were not personally bound by the stipulations of the company, we perceive no sufficient ground for awarding an injunction against them. This has often been held in suits brought for the infringement of patents, and the rule seems equally applicable to cases of the character before us. *Western Union Tel. Co. v. Home Tel. Co.* (C. C.) 85 Fed. 649; *Bowers v. Atlantic, G. & P. Co.* (C. C.) 104 Fed. 887; *Loomis-Manning Filter Co. v. Manhattan Filter Co.* (C. C.) 117 Fed. 325; *Greene v. Buckley* (C. C.) 120 Fed. 955.

But we think the facts justified an injunction against the Hall Safe Company, though not in the terms stated in the decree.

With respect to the defendants Hall, we think the decree should be reversed, with directions to dismiss the bill.

With respect to the defendant Hall's Safe Company, the injunction should be modified. In lieu of the injunction ordered by the court below, the following will be substituted: The defendant the Hall's Safe Company, its servants, agents, officers, and employés, are perpetually enjoined from carrying on the safe or vault business in the name of the Hall's Safe Company, or any other name having similarity to the name Hall's Safe & Lock Company, without also giving information to the public that it is not the business formerly carried on by the Hall's Safe & Lock Company, and from marking, advertising, or otherwise designating its safes and vaults as the products of the Hall's Safe & Lock Company or its successors in business, or pretending that it is carrying on the business started by Joseph Hall, and continued by the Hall's Safe & Lock Company, and from interfering in any manner with the exclusive right of the complainant to possess and enjoy the good will acquired by the Hall's Safe & Lock Company, and from using the trade-name of said last-named company without at the same time so qualifying such trade-name as to show that the trade-name used is not the one formerly used to designate the products of the Hall's Safe & Lock Company.

In respect to the matter of the cross-bill, we think there is no substantial ground for complaint. For the reasons stated in the preceding opinion, we are not prepared to say that the complainant in the original bill has exceeded its rights in endeavoring to maintain the benefits of its purchase from the Hall Safe & Lock Company, and we concur with the court below in holding that the cross-bill should be dismissed.

The costs of this appeal will be borne by the appellant Hall's Safe Company and the appellee, to be equally divided.

UNITED STATES v. CURNEN & STINER.

(Circuit Court of Appeals, Second Circuit. March 23, 1906.)

No. 123.

1. CUSTOMS DUTIES—INVALID REAPPRAISEMENT—DUTIABLE VALUE.

The value of certain imported merchandise was advanced by the local appraiser, and the importers brought reappraisement proceedings before a General Appraiser and a Board of General Appraisers, as provided in section 13, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932]. The reappraisements being defective and void, but the appraisement by the local appraiser being valid, *held* that duty should be assessed on the value found by the local appraiser, rather than the invoice value.

2. SAME—APPAISEMENT—PRESUMPTION OF CORRECTNESS.

In the absence of evidence to the contrary, it will be presumed that an appraisement by a local appraiser, under section 13, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], was in conformity with law and was valid.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 195.]

3. SAME—DUTIABLE VALUE—INVALID REAPPRAISEMENT.

Under section 13, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], until there has been a legal reappraisement taking the place of an original and valid appraisement by a local appraiser, such appraisement stands, and is not to be affected and set aside because there was an appeal for reappraisement, but no valid reappraisement was had.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 195.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (136 Fed. 807), reversing the Board of General Appraisers (G. A. 5,720, T. D. 25,423) and the collector of the port of New York, in the matter of an importation of certain toys. No question was raised as to the classification of the importations, but only as to their appraisement.

Henry L. Stimson, U. S. Atty., and Henry A. Wise, Asst. U. S. Atty.

Comstock & Washburn (J. Stuart Tompkins, of counsel), for the importers.

Before LACOMBE and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The Board of General Appraisers found that the importations were dolls, of which there were very many varieties, each variety differing from every other, so that a sample of one was not in any way representative of any other; also that the single General Appraiser who reappraised the dolls, and the Board of three General Appraisers which sat in review of such reappraisement, had before them only one case out of ten of each importation, the same being at least one case from each invoice, which did not represent the numerous varieties of dolls making up the importations. What hap-

pened was this: The local appraiser, in accordance with section 13, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 136 [U. S. Comp. St. 1901, p. 1932], did "report to the collector his decision as to the value of the merchandise appraised." Such report covered all the merchandise. As to some of the merchandise, the importers acquiesced in this decision. As to the balance of the importations, importers gave notice in writing of their dissatisfaction, and the collector directed a reappraisement of such merchandise by one of the General Appraisers. That officer having reported his decision upon reappraisement, the importers gave notice of dissatisfaction with such decision, whereupon the collector did, in accordance with the provisions of said section, "transmit the invoices and all the papers appertaining thereto to the Board of three General Appraisers" for examination and decision. The Board having decided, the collector assessed duty upon the valuations found by it. It appears that such valuation was in no instance greater than that ascertained by the local appraiser. The importers thereupon, under section 14, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1333], filed protest, and sought a review of the collector's decision by the Board of General Appraisers. That Board sustained the collector's action, and appeal was taken to the Circuit Court, which reversed the Board and the collector, and directed that duties should be liquidated on the valuations given in the invoices.

No one disputes the proposition that a decision as to valuation or appraisement of imported merchandise cannot be reviewed under section 14, except for jurisdictional defects. The points raised must be found, not in the briefs, but in the protest, which charges that:

"Neither the General Appraisers nor any of the witnesses in the matter had at or prior to the hearing or decision seen or examined, or sufficiently examined, any of the cases in question, or sufficient or proper samples therefrom, or a legal, proper, and sufficient number of cases for the purpose from the invoices in question, or sufficient and proper samples therefrom. Our offers to produce adequate samples were rejected. There was material informality in the conduct and conclusion of said so-called reappraisements. * * * We claim that duty should be assessed solely on the basis of the invoice valuations, inasmuch as we have not received, but have been deprived of, legal and valid reappraisements, such as we were entitled to under the law."

Strictly construed, this protest is against the action of the Board of three General Appraisers only. It has, however, been treated all along as covering also the reappraisement by a single General Appraiser, and may be accorded an equally liberal construction here.

An interesting and very important question is presented on this appeal, viz., when the Board of three General Appraisers sits, under section 13, in review of the reappraisement by a single General Appraiser, do they sit as a court of review or as appraisers? Counsel for the government contend (and support their contention by a very strong argument) that the change of phraseology in the section is highly important; that the single General Appraiser, when so directed by the collector, makes a reappraisement under like conditions as the local appraiser; but that when, upon the importer's notice of dis-

satisfaction, the Board of three General Appraisers are called in, they are required only to "examine and decide the case thus submitted" by the collector when he "transmits the invoice and all the papers appertaining thereto." That, therefore, they are not left powerless to act if the merchandise imported or samples of such merchandise are not before them. That whichever side seeks a review of the reappraisement should supply them with whatever may be necessary—the importations, samples thereof, samples shown to be fairly representative, or testimony from which the character of the importations can be determined—and, in default of thus supplying them with sufficient proof, cannot be heard to complain that they decided the case on an insufficient record. In other words, that the "Board of three General Appraisers" under section 13 is exactly the same sort of Board, and should act in exactly the same way when reviewing reappraisements, as the "Board of three General Appraisers" under section 14 when reviewing classifications. It is pointed out that the language of the two sections prescribing their duties is identical.

It is not necessary to decide that question in this case, since the result will be the same either way. A decision in accord with the contention of the government would apparently be inconsistent with the opinion of this court in *U. S. v. Loeb*, 107 Fed. 692, 46 C. C. A. 562. That opinion was concurred in by three judges, while in the cause at bar only two are sitting, and the decision upon what is practically a reargument of that case may appropriately be reserved for a full bench, inasmuch as our conclusions on another branch of the case lead to an affirmance of the collector's action.

It is further contended for the government that, even upon their own theory, the importers' testimony is not sufficient to warrant a decision in their favor. Even under the *Loeb Case* it is not necessary for the Board of three General Appraisers to have all the importations before them; samples will equally well answer the purpose. No doubt, samples of the actual goods covered by the invoice are preferable, but it may very well be that samples which can be shown to be accurate representatives of the importations would answer the purpose. Such seems to be the importers' own view of the situation, for their protest asserts that they offered to "produce adequate samples," and the proof indicates that this meant, not invoice samples, but stock samples. The evidence of such offer and rejection, however, is quite unsatisfactory. Apparently no such offer was made to the "Board" nor to all three General Appraisers, but only to one of them. Other alleged defects in proof are pointed out by counsel for the government; but fortunately we need not dispose of the cause on any such technical objections as these. It may be conceded, for the purposes of this appeal, that the reappraisement of the single General Appraiser and the review thereof by the board of three were void for jurisdictional defects. What is the result? The answer will be found in the act itself. Section 13 provides that the appraiser shall revise and correct the reports of the assistant appraisers as he may judge proper, and the appraiser shall report to the collector his decision as to the value of the merchandise appraised. The decision of the appraiser, or of the General Ap-

praiser in cases of reappraisement, shall be final and conclusive as to the dutiable value against all parties interested therein, unless it is overruled by a decision of a majority of the board of three upon examination of the case submitted to them. Section 2906, U. S. Rev. St. [U. S. Comp. St. 1901, p. 1923], provides that the appraised value shall be considered the value upon which duty shall be assessed. The importer is of course entitled to a reappraisement if he gives notice of dissatisfaction; if that is denied him by refusal of the General Appraiser to act at all, or to comply with jurisdictional requirements, the importer may have appropriate remedy to obtain such reappraisement. But until there is such a reappraisement as will take the place of an original valid and proper appraisal, it is difficult to understand upon what theory it can be vacated and set aside; certainly the mere filing of notice of dissatisfaction does not accomplish that result. The interests of the importer are provided for by various provisions as to the manner in which the local appraiser shall discharge his functions. U. S. Rev. St. §§ 2614, 2615, 2901, 2931, 2950 [U. S. Comp. St. 1901, pp. 1804, 1805, 1921, 1931, 1940], Customs Administrative Act July 10, 1890, c. 407, § 10, 19, 26 Stat. 136, 139 [U. S. Comp. St. 1901, pp. 1922, 1924], and for failure to conform to them his appraisal may in a proper case be set aside by the court. *Greely v. Burgess*, 18 How. 413, 15 L. Ed. 455; *Oelbermann v. Merritt*, 123 U. S. 356, 8 Sup. Ct. 151, 31 L. Ed. 164. But there must be some proof made of a failure to conform to the requirements of the statute.

In the case at bar we start with an appraisal by the local appraiser, and the presumption that he, a public officer, performed his statutory duties. There is not a scintilla of evidence to show the contrary. For aught that appears, he may have had before him samples of every variety of dolls covered by the invoices; some taken from the public storecases, and the others furnished by the importers themselves, or by the persons to whom they had sold and delivered the cases not sent to public store. Moreover, the importers do not attack the validity of the appraisal by the local appraiser; no reference to it, directly or indirectly, is found in the protest. Under these circumstances, we must hold that such appraisal is valid, and that the collector was not in error when he based his assessment for duties thereon.

The decision of the Circuit Court is reversed, and the collector's action approved.

NORTH AMERICAN TRANSPORTATION & TRADING CO. v. SAMUELS.

(Circuit Court of Appeals, Ninth Circuit. June 20, 1906.)

No. 1,273.

EVIDENCE—WRITTEN CONTRACT—EXPLANATION BY PAROL.

A written contract provided for the sale of all the seller's merchandise at Nome, Alaska, except liquors, cigars, tobacco, and lumber, but contained no stipulation as to the character and quantity of the merchandise to be delivered, nor as to the sales to be made between the execution of the contract and the date specified for delivery. It had been orally agreed

that the merchandise consisted of a first-class stock, not more than 30 per cent. of which was groceries and provisions, and that the seller should continue to sell only in the ordinary course of business and not at a sacrifice. The seller immediately wired its agent confidentially to dispose of as much of the stock as possible for cost or a little below, and large quantities of the more valuable goods were sold out of the ordinary course of business. *Held*, that parol evidence was admissible to show the particular kind and quality of the goods contracted to be sold, the respective proportions thereof, and the manner in which it was contemplated the seller should make sales from the stock prior to delivery.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 2030–2035.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

This is an action brought by the defendant in error to recover damages from the plaintiff in error for a breach of a contract entered into by the respective parties on April 19, 1904. The complaint alleges:

"III. That on or about February 1, A. D. 1904, the said plaintiff then being at the place of business of the defendant, in the city of Chicago, Illinois, for the purpose of ascertaining from said defendant the freight rates on goods and merchandise which said plaintiff then contemplated purchasing and shipping to Alaska, said defendant then and there represented to the said plaintiff that it, the said defendant, then owned and had a general stock of merchandise, consisting of dry goods, clothing, boots and shoes, hats, caps, gents' furnishing goods, carpets, furniture and house furnishings, hardware, coal, groceries, and provisions, and other miscellaneous merchandise, in its warehouses and stores, in Nome, in the district of Alaska, of the value of more than \$75,000, and that it, the said defendant, would have and own, at the opening of navigation, at Nome, Alaska, in the year 1904, to wit, on or about June 15, A. D. 1904, after selling from the said stock of merchandise in the ordinary and usual course of trade and business, merchandise of the kind hereinbefore enumerated and described of the value of at least \$75,000, and that 40 per cent. or more of the said goods and merchandise of the said defendant, remaining on hand at the opening of navigation as aforesaid, would be and consist of dry goods and other merchandise above mentioned, other than and exclusive of groceries and provisions, and that all of the said goods and merchandise remaining on hand at the opening of navigation, as aforesaid, would be first-class and of merchantable quality, and at said time and place further represented to plaintiff that of the said goods and merchandise which the said defendant would have and own at the opening of navigation, as aforesaid, not more than 30 per cent. thereof, would consist of groceries and provisions, and it, the said defendant, at said time and place, for the purpose of inducing plaintiff to purchase all of the stock of merchandise aforesaid, which it, the said defendant, represented it would have and own at the opening of navigation, as aforesaid, at Nome, Alaska, then and there agreed with plaintiff that it, the said defendant, would sell to plaintiff all of the said goods and merchandise which the said defendant represented it would have at Nome, Alaska, at the opening of navigation as aforesaid, and which it, the said defendant, then and there represented would be merchantable and of first-class quality and of the amount and value of \$75,000, and 40 per cent. or more of which the said defendant agreed should be and consist of dry goods, furnishing goods, and the merchandise above-mentioned, other than and exclusive of groceries and provisions, and that no more than 30 per cent. thereof should be groceries and provisions, at and for a price to be fixed and paid as mentioned in the written contract hereinafter set forth, and it, the said defendant, further agreed, at said time and place, that if the said plaintiff should purchase the said stock of goods and merchandise which it, the said defendant, then and there represented it would have and own in its said warehouses and stores at Nome, Alaska, at the opening of navigation as aforesaid, that it, the said defendant, would, between the date of the said con-

tract of purchase and the opening of navigation, as aforesaid, sell the said goods and merchandise in the ordinary course of trade only, and not sell the same at a sacrifice or less and that, at the opening of navigation in the year 1904, the said defendant would deliver to plaintiff, at Nome, Alaska, the goods, wares, and merchandise of the kind, quality, and quantity and of the value hereinbefore stated; that the said plaintiff, relying solely upon the truth of the said representations of the said defendant, and not having any means of ascertaining the truth thereof, saving and excepting that derived from the said representations of the said defendant, did on or about the 1st day of February, A. D. 1904, agree to buy and purchase of the said defendant the goods and merchandise, with the express understanding and agreement that at least 40 per cent. thereof should consist of dry goods and furnishing goods of merchantable and first-class quality, and that not more than 30 per cent. thereof should consist of groceries and provisions, and with the further express understanding and agreement that the said defendant should not sell the said goods, which it, the said defendant, then represented it owned and had in its warehouses and stores in Nome, Alaska, save and except in the usual and ordinary course of business, and that none of said goods and merchandise should be sold at a sacrifice, or at less than cost, at the price stated and to be fixed and paid as mentioned, and in the manner set forth in the written contract hereinafter set forth; and plaintiff further alleges that he entered into this agreement, for the purchase of the said goods and merchandise, on the said representations of the said defendant that 40 per cent. or more of the said goods, wares, and merchandise should be goods other than groceries and provisions, and that not more than 30 per cent. thereof should consist of groceries and provisions, and not otherwise.

"IV. Said plaintiff further alleges that, relying solely upon the said representations of the said defendant, and with the express understanding and agreement above mentioned he, the said plaintiff, did on the 19th day of April, A. D. 1904, enter into a written contract with the said defendant in words and figures as follows, to wit:

"This agreement, made this 19th day of April, 1904, by and between the North American Transportation & Trading Company, a corporation of the state of Illinois, hereinafter called the seller, and Michael D. Samuels, of Nome, Alaska, hereinafter called the buyer, witnesseth, as follows: (1) The buyer agrees to buy and the seller agrees to sell all the merchandise, except liquors, cigars, tobaccos, and lumber, belonging to the seller in the warehouses and stores at Nome, Alaska, at the opening of navigation in 1904, at and for a price to be fixed as follows: To the "outside" invoiced cost shall be added the freight, both as shown by the seller's books, and from the total shall be deducted 25 per cent. thereof, the remaining 75 per cent. of such outside cost plus freight to be the price. (2) The title of all merchandise so purchased, and of all merchandise, if any, substituted therefor under the conditions of this agreement, shall remain in the seller until the purchase price of all of said merchandise has been fully paid, and said seller shall select a cashier and bookkeeper as its representative to retain possession thereof until said purchase price is fully paid, who shall be paid by said buyer. (3) The sum of one thousand (\$1,000.00) dollars, on account of said purchase price, is paid by the buyer to the seller upon the execution of this instrument, the receipt whereof is hereby acknowledged, and further sum of four thousand (\$4,000.00) dollars on account of said purchase price shall be paid at the time said buyer begins to conduct the store now conducted by the seller at Nome, Alaska. The balance of the purchase price shall be paid at the rate of \$7,500.00 per month, the first of such monthly payments to be made one month from the date when said buyer begins to operate said store. (4) The seller shall be further secured for the unpaid balance of said purchase price by the deposit in the store hereinafter mentioned of merchandise belonging to the buyer, and in case sales of the merchandise hereby sold shall exceed, after deducting expenses of the business, the sum of \$7,500.00 per month, then such excess shall be paid on account of the purchase price, or such excess shall be used in the purchase of merchandise, to be placed in said store as security for the payment of the unpaid part of the purchase price. (5) The buyer assumes and

agrees to pay, from July 1, 1904, to July 1, 1905, the rent of \$275.00 per month of the N. C. Co. store on Front street in Nome, Alaska. (6) All merchandise owned by the seller, now in the warehouses at Nome, Alaska, shall be delivered to the buyer, free of storage charges. (7) The cost of insurance upon the merchandise hereby sold, and upon all replacements thereof, shall be paid by the buyer from the time when he begins to operate said store.

"Duly executed and delivered by the parties hereto, the day and year first above written.

"The North American Transportation and Trading Company,

"By W. H. Isom, Vice-President. [Seal]

"M. D. Samuels. [Seal]"

—duly attested by witnesses. And upon the execution and delivery of said written contract the said plaintiff paid unto the said defendant the sum of \$1,000 as a deposit upon the said agreement of sale, and the said defendant has not returned unto the said plaintiff any part thereof, although it, the said defendant, has violated and failed to perform its said contract and said plaintiff has demanded the return of the same.

"V. And said plaintiff further alleges that in the month of February, A. D. 1904, and immediately after said plaintiff had agreed to purchase the said stock of goods and merchandise, which were to be of the quality, quantity, and proportions as aforesaid, the said defendant, for the purpose of cheating and defrauding said plaintiff and depriving him of the benefits of said contract of purchase, caused its said stock of goods and merchandise which it then owned and had in its warehouses and stores in Nome, Alaska, and which it had agreed to deliver to the said plaintiff at the opening of navigation as aforesaid, to be sold at a great sacrifice, and at a grossly and inadequate price, and in job lots, and not in the ordinary course of business and trade, and it, the said defendant, caused to be sold all of the said dry goods, furnishing goods, and goods other than the said groceries and provisions, with a fraudulent intent and purpose of delivering unto the said plaintiff only the groceries and provisions that should remain on hand in its said warehouses and stores in Nome, Alaska, at the opening of navigation in the year 1904.

"VI. Plaintiff further alleges that he arrived at Nome, Alaska, on or about the 15th day of June, A. D. 1904, and immediately thereafter went to the warehouses and stores of the said defendant in Nome, Alaska, to take possession of the said stock of goods and merchandise, of the quality, quantity, and proportions aforesaid, under and pursuant to the terms of his said agreement with said defendant, and then and there offered and tendered to the said defendant the installment of said purchase price as mentioned in said written contract, and then and there demanded of the said defendant that it, the said defendant, deliver unto the said plaintiff the said goods and merchandise which it, the said defendant, agreed to sell and deliver unto the said plaintiff under the said contract; but plaintiff alleges that the said defendant then failed and refused, and has ever since failed and refused, to deliver unto the said plaintiff the said stock of merchandise which it, the said defendant, agreed to sell and deliver unto the said plaintiff, or any part thereof, save and except a remnant of groceries and provisions of an inferior quality,"

—and prayed for damages, special and general, in the sum of \$59,500.

The answer of the plaintiff in error admitted the written contract, and that defendant in error had paid the sum of \$1,000 thereon, and denied all the other averments of the complaint. It also denied that by reason of any act of the said defendant with respect to said contract, or the subject-matter thereof, plaintiff has been damaged in any sum or amount whatever, and as an affirmative defense, and by way of counterclaim, alleged "that it made and entered into a contract precisely as set forth in paragraph 4 of plaintiff's complaint, and none other, and alleges that at all times heretofore defendant was ready to do and perform each and every condition mentioned in said contract to be by said defendant done and performed, but that said plaintiff thereafter, and ever since the execution of said contract, failed, neglected, and refused to perform the conditions of said contract to be by him done and performed," and set up a counterclaim for damages in the sum of \$5,609.31.

The case was tried before a jury, a verdict was rendered in favor of defendant in error for \$3,600, and a judgment entered for said amount. The bill of exceptions recites that it "contains all the evidence introduced by the plaintiff in said cause in his case in chief." It appears that the defendant offered testimony in support of its case, but none of this testimony is embodied in the bill of exceptions.

In the course of the charge to the jury the court instructed the jury as follows: "The question as to whether or not a written instrument shows on its face that certain matters pertaining to it are left undetermined is a question of law to be determined by the court, and I therefore instruct you that the written contract is in my opinion silent and indefinite upon the questions, first, as to the character and quantity of the merchandise mentioned therein and contracted to be sold and delivered to plaintiff; and, second, upon the question as to the manner of sale of said merchandise by defendant from the time of the execution of the written contract aforesaid to the time of the contemplated delivery of said merchandise to plaintiff. For this reason the plaintiff has been allowed to introduce oral testimony on these matters, and it will therefore be your duty to determine from all the evidence which has been submitted to you what was the contract, if any, which was entered into between the plaintiff and defendant with reference to these matters, which, as I have instructed you, are left undetermined by the written contract introduced in evidence." To which portion of said charge the counsel for the defendant then and there, and before the jury had retired for deliberation, duly excepted, and the exception was by the court allowed.

There are 17 assignments of error to the rulings of the court in admitting testimony during the trial, and giving instructions to the jury. They are all virtually based upon the alleged proposition that the court erred in admitting oral testimony to vary the terms of the written contract.

Dudley Du Bose and J. K. Wood (Campbell, Metson & Campbell and S. D. Woods, of counsel), for plaintiff in error.

James E. Fenton, W. M. Madden, Albert Fink, M. J. Cochran, and T. M. Reed, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The contention of the plaintiff in error is that the defendant in error should have been confined to the "written contract"; that the court erred (1) in permitting oral testimony to vary or add to the terms of the contract; (2) as to the particular kind and quality of the goods, and the respective proportions thereof, as well as of the value thereof; and (3) by admitting oral evidence to add to the contract a warranty as to the kind, proportion, quality, quantity, value of the goods, etc., and upon these points refers the court to numerous authorities.

The general principle for which the plaintiff in error contends, that "where a written contract is plain and unambiguous on its face parol evidence is not admissible to explain or alter its meaning," is one of universal application. In *Bast v. Bank*, 101 U. S. 93, 96, 25 L. Ed. 794, the court said:

"No principle of evidence is better settled at the common law than that, when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, 'conclusively presumed that the whole engagement, and the extent and manner of their undertaking, was reduced to writing.' 1 Greenl. Evid. § 275. * * * In *Martin v. Berens*, 67 Pa. 463, the court say: 'Where parties, without any fraud or mistake, have deliberately put their en-

gagements in writing, the law declares the writing to be not only the best, but the only evidence of their agreement, and we are not disposed to relax the rule. It has been found to be a wholesome one, and, now that parties are allowed to testify in their own behalf, the necessity of adhering strictly to it is all the more imperative."

See 17 Cyc. 596-598, and authorities there cited.

The general rule is well defined, with exceptions and modifications, and broadly and clearly delineated in all the text-books and illustrated by numerous decisions.

In *Chandler v. Thompson* (C. C.) 30 Fed. 38, 43, cited and relied upon by the plaintiff in error, the court, after quoting from *Bast v. Hanks*, as above, and remarking that this general rule was subject to some modifications, said:

"Parol evidence of surrounding circumstances is admissible to show the subject-matter of the contract, when ambiguous or indefinite; but the express terms cannot be varied by proof of the negotiations and transactions out of which it grew, and the circumstances which surrounded its adoption. In construing the terms of a written contract, such evidence is allowable for the purpose of ascertaining the real intention of the parties, but no new obligation or duty can be imposed on a party which is not warranted by a fair and reasonable construction of the words of the instrument."

The question presented in this case is not as to the correctness of the principles of the general rule, but whether it is, under the facts of this case, applicable. The contention of the defendant in error is that the action is founded upon a breach of contract which was originally verbal and entire, and a part only of this contract was reduced to writing; that the defendant in error does not rely upon the written contract alone, but upon the whole contract; that the purpose and effect of the oral testimony produced at the trial was not to vary the terms of the portions of the contract which were reduced to writing, but to show the entire contract.

Keeping in view these contentions of counsel, it is deemed proper to state that the testimony on behalf of the defendant in error tended to sustain the averments of his complaint. It is strong, direct, positive, and clear. Among other matters it shows that on the day after the written contract was executed, W. H. Isom, manager of the plaintiff in error, sent a telegram to its agent at Nome, Alaska, as follows:

"Chicago, Ills., April 20-22, 1904.

"J. E. Ramar, Care N. A. T. & T. Co., Nome, Alaska: Arrangements made sell all stock remaining opening navigation discount below cost, therefore make every effort dispose all possible before that time for cash or little below if necessary, particularly lumber; reduce expenses; confidential.

"W. H. Isom."

When the defendant in error arrived at Nome about the middle of June, 1904, he asked Ramar what he did with the dry goods, clothing, and shoes, and Ramar replied that he had sold them. Several witnesses testified that during the latter part of April, and in the month of May, 1904, they had bought from the plaintiff in error at its store in Nome, bales of carpets, bales of dry goods, mining hose, and different things of that kind, and loads and cases of hardware, out of the warehouses. Authority to act in such a way is surely not to be found

even in the written part of the contract. Is it not apparent that in making a contract of this magnitude and character there must have been some understanding and agreement concerning this matter? The sixth clause of the written contract, "All merchandise owned by the seller, now in the warehouses at Nome, Alaska, shall be delivered to the buyer, free of storage charges," taken literally, according to its terms, would seem to prohibit the plaintiff in error from making any sale of goods whatever. In the very nature of the transaction, is it not reasonable to believe, as testified to by the defendant in error, that the plaintiff in error would have under the contract, the right to sell "from the said stock of merchandise in the ordinary and usual course of trade and business"? The written contract is certainly not clear or unambiguous upon this subject. It is incomplete and indefinite. The written contract is silent upon other matters. It does not specify the particular character, quality, or extent of the goods that were sold, to be delivered to the buyer on the opening of navigation in 1904.

Upon examination of the authorities bearing upon the legal principles applicable to this case, we find that the courts have held that where, in the application of a contract to its subject-matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made and of statements made in the negotiations which preceded it may be admitted to resolve the ambiguity, and to prove the real intention of the parties (*Kilby Mfg. Co. v. Hinchman-Renton F. P. Co.*, 132 Fed. 957, 961, 66 C. C. A. 67; *Davies v. Bierce* [La.] 38 South. 488, 492); that it is also competent to show all the transactions at the same time between the parties, only a part of which is in writing (*Chemical Company v. Moore*, 61 S. C. 166, 169, 39 S. E. 346; *Graffam v. Pierce*, 143 Mass. 386, 9 N. E. 819; *Sutton v. Griebel*, 118 Iowa, 78, 91 N. W. 825, and authorities there cited; *Schoen v. Sunderland*, 39 Kan. 758, 761, 18 Pac. 913; *Juilliard v. Chaffee*, 92 N. Y. 529, 535; *Harman v. Harman*, 70 Fed. 894, 897, 17 C. C. A. 479; *Patek v. Waples*, 114 Mich. 669, 671, 72 N. W. 995); that where a written instrument, executed pursuant to a prior verbal agreement, does not express the entire agreement or understanding of the parties, it is competent to show by parol testimony what the real contract was (*Barcus v. Gates* (C. C.) 130 Fed. 364, 367; *De St. Aubin v. Marshall Field & Co.*, 27 Colo. 414, 419, 62 Pac. 199; *Neal v. Flint*, 88 Me. 72, 82, 33 Atl. 669; *Terry v. Railroad Co.*, 91 N. C. 236, 241; *Moore v. Barber A. P. Co.*, 118 Ala. 563, 572, 23 South. 798; *Niles v. Sire* (Sup.) 94 N. Y. Supp. 586; *Mt. Vernon Stone Co. v. Sheeley*, 114 Iowa, 313, 316, 86 N. W. 301; *Anderson v. National Surety Co.* 196 Pa. St. 288, 46 Atl. 306); that, where the written memorandum of a contract of sale is incomplete, parol evidence is admissible to prove there was a verbal understanding at the time, and conditions upon which the seller would have the right to sell at retail until the completion of the sale and delivery of the property (*Quick v. Glass*, 128 Mo. 321, 30 S. W. 1031); that parol evidence is admissible where it tends to prove an independent, collateral fact about which the written contract is silent (*Fusting v. Sullivan*, 41 Md. 162, 179; *Hines v. Willcox* 96 Tenn.

148, 153, 33 S. W. 914, 34 L. R. A. 824, 832, 54 Am. St. Rep. 823; *Hardwood Log Co. v. Coffin*, 130 N. C. 432, 435, 41 S. E. 931; *Windsor v. Railway Co.* [Wash.] 79 Pac. 613).

The general rule as to the admissibility of parol evidence in connection with a written contract (covering a great variety of cases) has been stated as follows:

"Where a written instrument, executed pursuant to a prior verbal agreement or negotiation, does not express the entire agreement or understanding of the parties, the parol evidence rule does not apply to prevent the introduction of extrinsic evidence with reference to the matter not provided for in the writing." 17 Cyc. 741, 742.

In *Clinch Valley Coal & Iron Co. v. Willing*, 180 Pa. 165, 167, 36 Atl. 737, 57 Am. St. Rep. 626, the court said:

"The existence of a contemporaneous parol agreement between the parties under the influence of which a note or contract has been signed, which is violated as soon as it has accomplished its purpose in securing the execution of the paper, may always be shown when the enforcement of the paper is attempted. It is a plain fraud to secure the execution of an instrument by representations as to the manner in which payment shall be made, differing in important particulars from those contained in the paper, and, after the paper has been signed, attempt to compel literal compliance with its terms, regardless of the contemporaneous agreement without which it would never have been signed at all."

There is no conflict in the authorities upon the matters we have discussed. In a previous portion of this opinion we pointed out this fact by a reference to the case of *Chandler v. Thompson*, where the respective rules were recognized. In *Seitz v. Brewers' R. M. Co.*, 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837, which is cited and relied upon by the plaintiff in error to prove that the court below erred in giving the instruction complained of in relation to the silence of the written contract, the language of the opinion relied upon is as follows:

"Whether the written contract fully expressed the terms of the agreement was a question for the court, and since it was *in this instance complete and perfect on its face, without ambiguity, and embracing the whole subject-matter*, it obviously could not be determined to be less comprehensive than it was. And this conclusion is unaffected by the fact that it did not allude to the capacity of the particular machine. To hold that mere silence opened the door to parol evidence in that regard would be to beg the whole question."

We have italicized certain portions to show that the contract in that case was directly opposite in its character from the one under consideration in this case, and the change in the facts controlled the decision. In the course of the opinion, it is said:

"Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them."

In *Fire Ins. Association v. Wickham*, 141 U. S. 564, 576, 12 Sup. Ct. 84, 87, 35 L. Ed. 860, the court said:

"We have no disposition to overrule or qualify in any way the general and familiar doctrine enforced by this court in repeated decisions, from the case of *Hunt v. Rousmanier*, 8 Wheat. 174, 5 L. Ed. 589, decided in 1823, to that of *Seitz v. Brewers' Refrigerating Company*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837, decided at the present term, that parol testimony is not admissible to vary, contradict, add to or qualify the terms of a written instrument. The rule, however, is subject to numerous qualifications, as well established as the general principle itself, among which are that such testimony is admissible to show the circumstances under which the instrument was executed."

Further comment is unnecessary. An examination of the whole record discloses no error.

The judgment of the District Court is affirmed, with costs.

UNITED STATES v. R. F. DOWNING & CO.

SAME v. SCHOELLKOPF, HARTFORD & HANNA CO.

(Circuit Court of Appeals, Second Circuit. January 10, 1906.)

Nos. 52, 126.

1. CUSTOMS DUTIES—CLASSIFICATION—PETROLEUM PRODUCTS—COUNTERVAILING DUTY.

Paragraph 626, Free List, § 2, Tariff Act July 24, 1897, c. 11, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], providing a countervailing duty on "crude petroleum, or the products of crude petroleum, produced in any country which imposes a duty on petroleum or its products exported from the United States," is intended to provide that, when crude petroleum or any of its products is imported from a country which imposes a duty thereon when imported from the United States, it shall pay duty at the rate so imposed by such country on merchandise in the same condition. A product of petroleum is subject to the duty so imposed by the country of manufacture on such product when coming from the United States, rather than to that so imposed on crude petroleum by the country in which the petroleum was produced. If no duty is so imposed on such product by the country in which it is manufactured, it is not liable to the countervailing duty, even though produced from petroleum originating in a country which does impose such a duty thereon.

2. SAME—PARAFFIN—SPECIFIC ENUMERATION.

The proviso in paragraph 626, Free List, § 2, Tariff Act July 24, 1897, c. 11, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], providing a countervailing duty on "crude petroleum, or the products of crude petroleum," is not limited to the articles enumerated in the preceding portion of that paragraph, but should be read into every section of the tariff which enumerates a product of petroleum. The special enumeration of "paraffin" in paragraph 633, Free List, § 2, of said act (30 Stat. 200 [U. S. Comp. St. 1901, p. 1686]), does not remove that substance from the scope of the proviso.

3. SAME—PRODUCTS OF PETROLEUM—ARTICLES IN CHIEF VALUE OF PETROLEUM.

The provision in paragraph 626, Free List, § 2, Tariff Act July 24, 1897, c. 11, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], for "products of crude petroleum," does not include articles not composed in chief value of petroleum, even though the petroleum predominates in quantity.

4. SAME—DETERMINATION OF COMPONENT OF CHIEF VALUE.

The determination as to the component material of chief value of imported merchandise is to be in reference to the values of the components in the country where the compound is produced. Evidence as to the

value of one component material in one country and of another component in another country is not sufficient to overcome the sworn statement of the manufacturer of the goods.

5. STATUTORY CONSTRUCTION—SCOPE OF PROVISIO—POSITION OF PROVISIO.

The general rule that a proviso to a particular section does not apply to other sections, but is to be construed with reference to the immediately preceding parts of the clause to which it is attached, is not controlling, especially in such composite structures as tariff and appropriation acts. The true rule seems to be that while the position of a proviso in a statute has a great and sometimes controlling influence upon the question of its application, yet the inference from its position cannot overrule its plain general intent.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, § 310.]
Coxe, Circuit Judge, dissenting.

Appeal from the Circuit Court of the United States for the Southern District of New York.

These causes come here upon appeals from decisions affirming in the first cause and reversing in the second cause the decision of the Board of General Appraisers touching the rates of duty on certain importations under the tariff act of July 24, 1897. The facts are fully set forth in the opinion. The relevant paragraphs are Nos. 626 and 633, both on the free list, which read as follows:

"(626) Oils: Almond, amber * * * ; petroleum crude or refined: Provided, That if there be imported into the United States crude petroleum, or the products of crude petroleum produced in any country which imposes a duty on petroleum or its products exported from the United States, there shall in such cases be levied, paid, and collected a duty upon said crude petroleum or its products so imported equal to the duty imposed by such country." 30 Stat. 199, c. 11, § 2, Free List [U. S. Comp. St. 1901, p. 1685].

"(633) Paraffin." 30 Stat. 200 [U. S. Comp. St. 1901, p. 1686].

For decisions below, see (1) 135 Fed. 250, affirming a decision of the Board of United States General Appraisers (G. A. 5,470, T. D. 24,778), which had reversed the assessment of duty by the collector of customs at the port of New York, and (2) 139 Fed. 58, reversing decisions of the Board, which had affirmed the assessment of duty by said collector. Note G. A. 5,658, T. D. 25,237.

Charles Duane Baker, Asst. U. S. Atty.

Comstock & Washburn (Albert H. Washburn, of counsel), for appellees.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. In the Downing Case there was imported paraffin, which it is not disputed was "manufactured in Hamburg from crude petroleum produced in Russia." The collector charged a countervailing duty equal to the duty imposed by Germany on paraffin imported into Germany from the United States. The importer protested, claiming, first, that it was free under paragraph 633, and, secondly, that in view of the place of the production of the crude petroleum therein contained it should pay a less duty than that assessed.

The Board of General Appraisers overruled so much of the protest as claimed free entry, the court affirmed the Board, and the importers have not appealed. That question, therefore, is not before us in this case.

The second ground of protest was sustained, and the Board reversed the collector, holding that the duty to be assessed upon paraffin which the importers in the Downing Case concede to be a product of petroleum, should be equal to the duty imposed by Russia upon the crude petroleum out of which it was made. Their decision is based on a construction of paragraph 626, which finds that "Congress did not speak of the origin of the products made from petroleum, but only of the origin of the crude petroleum from which the products were made." We think this construction is too narrow. Evidently Congress wished to protect our own products by providing a countervailing duty against the country which assessed them, and that body recognized that the discrimination to be provided against was not only one which laid a duty upon crude petroleum, but also one which laid a duty upon the products of crude petroleum. It is to be inferred from the use of the four words, "petroleum, crude or refined," which immediately precede the proviso, that Congress intended to include refined petroleum among the products of crude petroleum. If the construction which the Board has approved is to be given to this paragraph, it would result that, where crude petroleum, produced in a country which laid no duty on our petroleum or petroleum products, was refined in a country which did impose a heavy duty upon our petroleum, etc., it should nevertheless come in free. We are of the opinion that Congress intended no such result, and that it intended to provide that when crude petroleum is imported it shall pay whatever duty is laid upon it in the country where it is produced, and that when any product of crude petroleum is imported it shall pay a duty equal to that imposed upon such product, when coming from the United States, in the country where it is produced. We think the collector correctly assessed duty on these products of crude petroleum at the rate imposed in the country where they were produced (Germany), and not at the rate imposed in the country where the crude petroleum from which they were produced originated. The decision of the Board in the Downing Case is therefore reversed.

In the Schoellkopf Case two varieties of commercial paraffin were imported, viz., Paraffin Liquid and Paraffin Molle. Two of the importations (ex. "Finland" and "Vaterland") were from Belgium. The paraffin in these two lots was manufactured of Russian crude oil at Antwerp, Belgium, and the deputy collector reports that:

"As Belgium is a country which does not impose a duty upon petroleum or its products exported from the United States [the collector], in the liquidation of the entries, charged a countervailing duty equal to the duty imposed by Russia on crude petroleum exported from the United States."

The Board sustained this assessment.

Under the construction of paragraph 626 already set forth, these products of crude petroleum were not liable to duty since the country which produced them did not impose duties on petroleum or petroleum products exported from the United States. As to these two importations, however, the protest claimed free entry only under paragraphs 633 and 695, so that this construction of paragraph 626 cannot be availed of by the importers, who indeed in the proceedings

before the Board took the ground that, if not free under paragraph 633, their goods should pay the Russian duty. The Circuit Court held that these importations and also one from Germany (ex. "Moltke") were free of the countervailing duty of paragraph 626 because they were more specifically referred to in paragraph 633 as "Paraffin."

We are unable to concur in this conclusion. It might, indeed, be a fairly arguable question whether the designation "all such products of petroleum as are commercially known as paraffin" is or is not more specific than the designation "all such products of petroleum as are produced in a country which imposes duty on similar products exported from the United States"; but we do not find it necessary to decide this question. The fundamental rule of interpretation is to ascertain the intent of Congress, and the language used in the statute evidences that intent quite plainly. It is no doubt the general rule that a proviso to a particular section does not apply to other sections, and that it is to be construed with reference to the immediately preceding parts of the clause to which it is attached. But such rule is not controlling, especially in such composite structures as tariff and appropriation acts. In *U. S. v. Babbit*, 1 Black, 55 17 L. Ed: 94, it was held that the particular proviso then under consideration was "not limited in its effect to the section where it is found, but that it was affirmed by Congress as an independent proposition, applying alike to all officers of "this class," including officers not mentioned in the section which contained the proviso. The true rule seems to be that, "while the position of a proviso in a statute has a great and sometimes a controlling influence upon the extent of its application, yet the inference from its position cannot overrule its plain general intent." *Lewis' Sutherland Statutory Construction* (2d Ed.) § 352, and authorities cited.

It will be observed that in paragraph 626 Congress enumerates as free of duty "petroleum, crude or refined." When, however, it provides in the same section for a retaliatory duty, it does not repeat the phrase "petroleum, crude or refined," nor does it import that phrase into the proviso by the use of the words "such petroleum." On the contrary, it makes a highly significant change of phraseology, laying retaliatory duty on crude petroleum and on "the products of crude petroleum." There are other products of crude petroleum besides refined petroleum, and the broad language it has used showed that Congress intended by the proviso to reach more than the crude and refined petroleum of paragraph 626. Any construction which would restrict the proviso to the articles already mentioned in the section would defeat that intent. Manifestly, Congress sought to induce reciprocity in petroleum products by discriminating against any country which discriminated against the United States. It has used language apt to express that intent, and we see no reason why the proviso should not be read into every section of the tariff act which enumerates a product of petroleum. The two sections may fairly be read together to effect such intent, as follows:

"Articles known commercially as paraffin shall have free entry, but if any of them is a product of crude petroleum—a product of which crude petroleum

is the component of chief value—and was produced in a country which lays duty," etc., "it shall pay an equal duty."

The evidence in this case would seem to indicate that all commercial paraffin is not a product of petroleum. As indicated above, two varieties are now under consideration: Paraffin Liquid and Paraffin Molle. The liquid came from Germany, accompanied by a declaration of the manufacturer that the "product consists of a mixture of ceresia and refined petroleum, * * * and that the ceresia represents the greater value and the refined petroleum the smaller value." Ceresia or ceresin is a mineral wax, and paragraph 695, referred to in the protest, accords free entry to "wax, vegetable or mineral." It is not petroleum, nor produced from petroleum. The government chemist testified before the Board that he had examined the liquid paraffin, and did not find any traces of ceresin in it; that it was a distillation product of petroleum, composed entirely of petroleum. Upon this testimony, and there was no other as to the nature of liquid paraffin, the finding of the Board that it was a product of petroleum is controlling. It should pay a countervailing duty under the retaliatory clause.

The Paraffin Molle was accompanied by a sworn statement from the manufacturer or shipper that it consisted of "a mixture of ceresin and refined petroleum, * * * and that in the manufacture ceresin represents the greater value and refined petroleum the smaller value." The government chemist confirms this by testifying that his analysis showed that it was a product of four parts liquid paraffin mixed with one part of ceresia. There was evidence, and the Board finds, that the article was probably identical, although under another name, with the albolene which was before the Circuit Court in *Ropes v. U. S.*, 123 Fed. 990, and was held not chargeable with the countervailing duty because it was not composed in chief value of petroleum. There was evidence tending to show the value of ceresin in Germany and the value of liquid paraffin in Belgium, but none showing the value of both components in either country. The determination as to component material of chief value is to be in reference to the values of the components in the country where the compound is produced. There is nothing, therefore, in the record to overcome the sworn statement, which came with the goods; and the finding of the Board that the Paraffin Molle is composed in chief value of petroleum is without testimony to support it, and must be disregarded.

The result is that the particular Paraffin Molle now under consideration cannot be held subject to the retaliatory duty, since it is not shown to be a product of petroleum.

The decision of the Circuit Court in the Schoellkopf Case must, therefore also be reversed.

COXE, Circuit Judge (dissenting). I cannot agree with the majority of the court as I think Judge Wheeler's decision was right and should be affirmed. Paraffin appears *eo nomine* on the free list. Paraffin is a well known article of commerce not necessarily a product of petroleum, as the court has found in the case at bar. When paraffin

comes to our ports and the collector finds it specifically mentioned, without condition or qualification, in the tariff act, it would seem that he need look no further—his work is done. I cannot believe that in order to levy duty upon an article thus declared free, resort can be had to the mere proviso of a separate and distinct paragraph in which that article is not named at all. Paraffin is either crude or refined petroleum, or it is not. If not, paragraph 626, Free List, Tariff Act July 24, 1897, c. 11, § 2, 30 Stat. 199 [U. S. Comp. St. 1901, p. 1685], has no application whatever. If it be refined petroleum it is entitled to free entry unless dutiable under the proviso and its status for tariff purposes is fixed; no further legislation is needed.

The subsequent specific provision for paraffin by name without the words "not otherwise specifically provided for" makes it clear that Congress intended to admit this particular article free of duty notwithstanding previous general provisions which might include it. In any view it seems to me that the construction placed upon the law by the opinion of the court is not free from doubt. If Congress intended to impose duty upon an article appearing on the free list it should have made its intention manifest by plain and unambiguous language. It cannot be pretended that it has done this and it is a cardinal principle of tariff interpretation that the importer should not be compelled to pay under a doubtful interpretation of the law.

HARDT VON BERNUTH & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 16, 1906.)

No. 32 (3,346).

CUSTOMS DUTIES—CLASSIFICATION—IMITATION SILK YARN—SIMILITUDE.

Within the meaning of the similitude clause in section 7, Tariff Act July 24, 1897, c. 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], artificial silk yarn resembles equally cotton yarn and silk yarn in quality, texture, and use, but bears a stronger resemblance in material to cotton than to silk yarn, because, unlike silk yarn, which is of animal origin, it is, like cotton yarn, of vegetable origin, and is composed almost wholly of cellulose. It is therefore dutiable by similitude, under paragraph 302 of said act (section 1, Schedule I, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1655]), as cotton yarn, and not under paragraph 385, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], as silk yarn.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (133 Fed. 800), affirming a decision of the Board of General Appraisers (G. A. 5,257, T. D. 24,155), which sustained the collector of the port of New York in the assessment of certain imports under the tariff act of 1897.

Frederick W. Brooks, for the importers.

Charles Duane Baker, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The article in question is a yarn which is known as imitation silk, the fabric woven therefrom being known and sold as "nearsilk," a fancy name, indicating that, though the fabric may present silk-like effects, it is not in fact silk. There are two provisions for yarns in the act, viz.: "Par. 385 (Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668]). * * * Silk threads or yarns of every description * * * thirty per centum ad valorem"; and "Par. 302. Cotton thread and carded yarn, warps or warp yarn, colored, bleached, dyed, etc. * * * on all numbers exceeding number twenty and up to number eighty, one-fourth of one cent per number per pound." Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 175 [U. S. Comp. St. 1901, p. 1655.]

It is conceded by both sides that the yarn here imported is not silk and is not cotton, and therefore that it is not directly covered by either of these paragraphs; also, that it is not enumerated in the schedules of the act. Both sides refer to the similitude clause, section 7 (30 Stat. 205 [U. S. Comp. St. p. 1693]), which reads:

"Each and every imported article, not enumerated in this act, which is similar, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this act as chargeable with duty, shall pay the same rate of duty which is levied on the enumerated article which it most resembles in any of the particulars before mentioned," etc.

The board held that:

"The yarns are similar to silk yarn in three of these characteristics—namely, quality, texture, and use—and are not similar to cotton yarns as to any of the characteristics named in section 7."

We are unable to assent to these propositions, in view of the findings of the board as to these particular importations. It would appear from a suggestion in the record that some imitation silk yarns have been made from silk waste, but the board finds that these yarns are made from cotton waste. The cotton waste is dissolved in a solution of cup-ammonium, a salt of copper and ammonia, and this solution is forced through fine apertures, discharging into a bath of acetic acid, forming threads of cellulose. The board describes the process as consisting in "dissolving cellulose, without decomposing the same, and causing the same to flow in a thread or fiber-like stream into a bath containing a precipitant of cellulose, whereby the latter is precipitated from its solution in a thread of fiber-like form." The analysis shows that except for 10 per cent. of moisture the substance is non-nitrated cellulose; cotton consists of nearly pure cellulose. The board finds that the yarns thus made require treatment in dyeing more nearly resembling the dyeing of cotton yarn than that of silk yarn, and that they are woven in the same manner as cotton yarns. In texture they are similar equally to cotton yarn and to silk yarn, consisting of fibrous threads or filaments. So in the use to which they may be applied, silk yarns, cotton yarns, and these yarns are all woven into fabrics for dress goods, upholstery purposes, and what not. So far as quality is concerned, they certainly

resemble cotton yarn as much as they do silk yarn. As to material, however, being made from cotton waste, a vegetable product, and being in their finished condition fiber-like threads of cellulose, they more nearly resemble cotton yarn than they do the threads or yarns of silk, which are spun from the cocoons of the silkworm. We are therefore of the opinion that they most resemble the yarns of paragraph 302, and, being nonenumerated, should be classified accordingly.

The decision is reversed.

HENRY E. FRANKENBERG CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 26, 1906.)

No. 138.

1. CUSTOMS DUTIES—CLASSIFICATION—BEADS TEMPORARILY STRUNG.

Beads are not to be included within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901 p. 1673], for beads "not threaded or strung," because they are strung only temporarily.

2. COURTS—COMITY—CONFLICTING DECISIONS.

Two Circuit Courts of Appeals reached differing conclusions in cases involving the same question, and another like case was presented to the court making the earlier decision. *Held* that, unless the court is persuaded by the decision of the other court that its former conclusion was wrong, the better course is for it to adhere to its former ruling, leaving it to the Supreme Court to secure uniformity by determining which of the conflicting decisions is correct.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 314, 327.]

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York (144 Fed. 704), which affirmed a decision of the Board of General Appraisers, G. A. 5,878 (25,891), which sustained the action of the collector.

Frederick W. Brooks, for the importers.

Charles Duane Baker, Asst. U. S. Atty.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. The articles in question are metal beads, which have been strung on cotton threads, and the only question is whether they are dutiable under Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], which reads, "beads of all kinds, not threaded or strung." Precisely similar articles, except that they were made of glass, were before this court in *Re Steiner*, 79 Fed. 1003, 24 C. C. A. 690. It appeared in that case as in this that the beads were strung on very thin cheap cotton thread; that such stringing was temporary only, for transportation and for con-

venience in selling, and that they were unstrung before they were used. We sustained the Circuit Court in holding that such articles were not within par. 445, Act Oct. 1, 1890, c. 1244, § 1, Schedule N, 26 Stat. 600, as "glass beads * * * unthreaded or unstrung."

No new facts and no new arguments are presented which would require a different decision in this cause. Reference is made to a decision of the Circuit Court of Appeals in the Seventh Circuit (*U. S. v. Buettner*, 133 Fed. 163, 66 C. C. A. 289), where the facts were apparently the same but the conclusion reached different from that in the *Steiner Case*; and it is suggested that, in order to secure an harmonious interpretation of the tariff act, we should reverse our former decision, and follow the court in the Seventh Circuit. Inasmuch, however, as the decision of this court was first in order of time, that argument might more properly have been addressed to the Seventh Circuit. Since we are not persuaded by the later decision that we were in error in our first conclusion, the better course would seem to be to adhere to our former ruling, leaving it to the Supreme Court to secure uniformity by determining which of the conflicting constructions of the paragraph is the correct one.

The authorities which are found in the exhaustive brief of counsel for the importers are not controlling, because they deal with causes where a Circuit Court in one circuit has reversed its former decision to conform to a later decision of a Circuit Court of Appeals in another circuit. Here the first decision was by a court of equal jurisdiction.

The decision of Circuit Court is affirmed.

WILSON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 2, 1906.)

No. 112.

CUSTOMS DUTIES—CLASSIFICATION—COTTON TABLE DAMASK—ARTICLES IN THE PIECE—COTTON CLOTH.

Articles of cotton table damask, woven in the piece, are included within the expression "cotton table damask" in paragraph 321, Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 179 [*U. S. Comp. St.* 1901, p. 1661], and are dutiable under that paragraph rather than under the provisions of Schedule I for "cotton cloth" because it is more specific than such provisions.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York, which affirmed a decision of the Board of General Appraisers sustaining the classification by the collector of the port of New York of certain goods for tariff duty.

For decision below, see 138 Fed. 1007, affirming a decision of the Board of United States General Appraisers, which, on the authority of previous decisions of the Board (*G. A.* 5,527, *T. D.* 24,880, and *G. A.* 5,612 *T. D.* 25,107), had overruled protests of *Thomas Wilson & Co.* against the assessment of duty by the collector of customs at the port of New York. The goods in controversy consisted of articles of cotton table damask in the piece, which had been

classified as manufactures of cotton, under Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 322, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], and were claimed by the importers to be dutiable under the provisions of said schedule for "cotton cloth." The Board was of opinion that the goods should have been classed as "cotton table damask," under paragraph 321, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661], and overruled the importers' protests because this contention was not made therein.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for the importers.

Henry A. Wise, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The Board returns that the "merchandise consists of napkins or cloths woven in the piece, composed of cotton table damask." The relevant paragraph (Tariff Act July 24, 1897, c. 11, § 1, Schedule I, 30 Stat. 179 [U. S. Comp. St. 1901, p. 1661]), is "(321). Cotton table damask, forty per centum." The record is wholly barren of any testimony as to trade meaning of these words, and the common and popular meaning is certainly broad enough to cover the merchandise in question. Whether, as suggested on the argument, it also includes individual napkins and tablecloths cut off from the piece is a question not presented by this record, since the importer does not seek to review the Board's classification of the individual articles under the countable cotton clauses; therefore, we express no opinion thereon. Certainly, the phrase "cotton table damask" is more specific than the various countable cotton provisions.

Decision affirmed.

GENERAL ELECTRIC CO. v. GARRETT COAL CO.

(Circuit Court of Appeals, Third Circuit. June 11, 1906.)

No. 12.

PATENTS—INFRINGEMENT—ELECTRIC CONTROLLERS.

The Knight & Potter patents, Nos. 587,441 and 587,442, the first for an apparatus and the second for a method for regulating the power and speed of mechanism driven by two electric motors, such as trolley cars, were not anticipated, and cover broadly the changing of the connection between the two motors from series to multiple and the reverse, the former by shunting one while protecting the other by a resistance, breaking the circuit connection of the shunted motor, and finally reconnecting the two in multiple with the resistance cut out; and in such process of change the time of cutting out the resistance, or whether all at once or gradually, are nonessential to the invention. As so constructed, *held* infringed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

For opinion below, see 141 Fed. 994.

L. F. H. Betts and Charles Neave, for appellant.

Glenn S. Noble, for appellee.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

GRAY, Circuit Judge. This cause comes before the court on an appeal from a final decree of the Circuit Court for the Western District of Pennsylvania, dismissing the bill of complaint therein.

The bill of complaint in the court below alleged that the complainant-appellant was a corporation existing under the laws of the state of New York, and, claiming as assignee the rights secured by letters patent No. 587,441 and No. 587,442, issued to William B. Potter and W. H. Knight, the first for an apparatus and the second for a method for the control of electric motors, charged that the defendant-appellee, a corporation of the state of Pennsylvania, had infringed the same, and prayed for an injunction and the usual accounting. The usual defenses of lack of invention, anticipation and noninfringement, were set up in the answer. After proofs and a hearing, the court below filed an opinion, ordering the bill of complaint to be dismissed, on the ground that the defendant had not infringed any of the claims of the two patents in suit. The claims alleged to be infringed were claims 1 and 2 of patent No. 587,441 and claims 3, 4 and 9 of patent No. 587,442.

The patents in suit are for certain new and useful improvements in regulating apparatus for electrically driven mechanism, and in methods of regulating electrically driven mechanism, respectively. The two patents are so related, that they may be considered together, as the method of the second patent, without being merely the function of the mechanism described in the apparatus patent, is necessarily disclosed therein. The gist of the invention is set forth in the apparatus patent, No. 587,441, which exhibits a mechanism by which the broad claims of the method patent, No. 587,442, can be carried out. The inventions of the patent in suit relate to motors arranged in "series" and

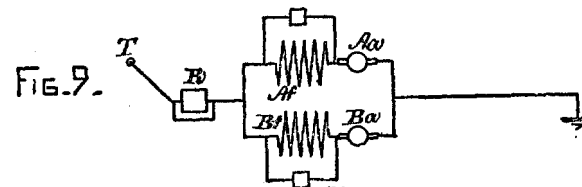
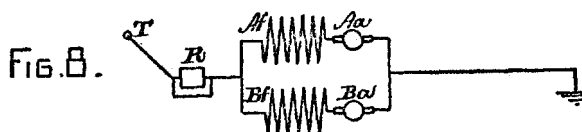
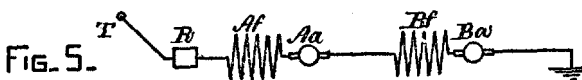
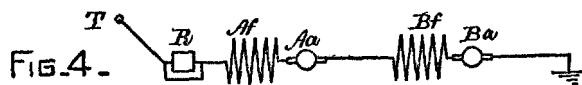
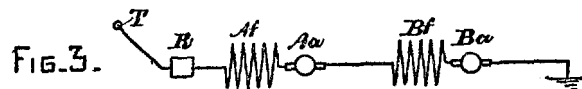
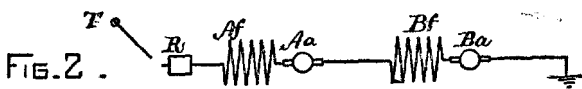
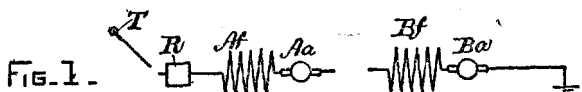
in "parallel," for electrically driven vehicles, notably trolley cars, and to means and methods of controlling the same. As the methods described in the second patent, No. 587,442, is fundamental to both patents, we quote the description thereof from its specifications:

"Our invention relates to the method of regulating the power and speed of mechanism driven by two electric motors by placing them in series for low speed and in multiple for a higher speed. Heretofore this method, although understood to be one capable of affording greater economy than the usual method of regulating by means of artificial resistance, has not come into general use by reason principally of the difficulty encountered in making the change of motor connections from series to multiple. This difficulty has been due not only to the destructive arc produced on the rupture of such current-bearing circuits as it might be necessary to break in making the change in circuit connections, but also to the wide variation in motor resistance—both ohmic and inductive—between the series and the multiple arrangements, which resistance variation produced correspondingly violent speed variation in the driven mechanism. Our invention is designed to overcome these objections to this desirable method of regulation and has demonstrated its capacity for accomplishing this result in a thoroughly practicable manner. It consists in a method of controlling the speed and power of mechanism driven by two electric motors by gradually or progressively effecting the change of motors from series to multiple by first shunting one of them, so as to leave in circuit the other one only, which continues in an active condition and is connected directly to the main circuit, as in the multiple arrangement, but is protected against the effect of the full voltage of the main circuit by an auxiliary or supplementary resistance, such as an artificial resistance of wire or any other suitable material, which is inserted in the circuit at the time of the aforesaid shunting and is maintained in circuit a sufficient length of time to bring the unshunted motor to its multiple rate of speed under the increased voltage at its terminals. The other motor, after being shunted, is disconnected from the circuit, so that for a brief period no current passes through it. It is then connected in multiple with its mate and the auxiliary resistance withdrawn. Our invention includes also the contrary method of changing from multiple to series by performing the aforesaid series of acts in a reverse order. We have, moreover, designed certain mechanism that may be conveniently used in practicing the aforesaid method, and we have disclosed the same herein as an assistance to the ready understanding in all its details of our novel method; but we make no claim herein to such mechanism, as it is embraced by another application for patent bearing serial No. 433,906, filed May 21, 1892."

In the view we take of the questions in controversy, we need only give attention to the diagrammatic explanation of the method of the patent, without concerning ourselves with the specifications that relate to a mechanism for putting the method in practice.

The advantages to result in speed regulation, from combining the series and parallel systems of motors, were recognized in the prior art, but it is said in the specification above quoted, that the series-parallel system "had not come into general use by reason principally of the difficulty encountered in making the change of motor connections from series to multiple." A sudden breaking of the circuit, when the motors are in series, the current flowing through both without artificial resistance, would result in a disastrous sparking. The same result in less degree would occur when the speed was reduced by artificial resistance. Besides the sparking, the necessity of shutting off the current, and thus leaving the car with the slow speed of its mere momentum, in order to pass from series to multiple, and of encountering

the shock of the immediate acceleration of speed thus produced, was a difficulty to be overcome. This, it is claimed, was successfully accomplished by the method and apparatus of the patents in suit. The method is a gradual, or step by step, progress from the series to the parallel supply of the electric current to the motors, by which the current may be safely broken as to one motor in series, the same be at once changed to parallel relation to the other, and the multiple rate of speed attained, without shock and without sparking, there being, during the process, no shunting off of the current or reduction of speed. This method is diagrammatically set forth in the patent in suit, No. 587,442, as follows:



"Referring to the diagrams in Figs. 1 to 9, it will be observed in Fig. 1, which represents the first condition of motor-circuits established by the switch, the two motors are out of action and there are two breaks in the circuit, one between the trolley T and resistance R and the other between the armature Aa of the motor A and the field-magnet Bf of the motor B. The first step in the series is to close the latter of these two breaks, when the two motors will be in series, as shown in Fig. 2, but still disconnected from the trolley. The second step is to close the remaining break, when the condition will be as shown in Fig. 3. This condition is the first one in which a complete circuit is made, and it gives the lowest rate of speed, the two motors being in series with each other and with a resistance. The third step is to short-circuit the resistance, when the condition shown in Fig. 4 is produced, giving a higher rate of speed, although it is to be understood that it is also of importance that the resistance be adapted to prevent the sudden influx of an undue volume of current at the moment the circuit is completed. The fourth step introduces the resistance once more into the circuit, as shown in Fig. 5, and the fifth completes a shunt-circuit around one of the motors—to wit, motor D—as appears in Fig. 6. With these two steps the process of gradually changing the motors from series to multiple begins. The shunting of one motor is a preparation for its entire removal from the series connection, and it acts at the same time to connect the unshunted motor directly to the main line circuit, which is the connection it has when in multiple; but the effect of this change is modified by the reintroduction of the resistance, which prevents an undue degree of acceleration in speed and protects the unshunted motor from injury by an undue volume of current. The sixth step, continuing the series-multiple change, produces the condition indicated in Fig. 7, in which the circuit of the shunted motor is severed, so that no current passes therein, while at the seventh step this motor is connected in multiple with its mate, which, it will be observed, has continued its active operation, the resistance at the same time being short-circuited. This completes the change of motor connections and the two motors which were formerly in series without resistance are now in multiple without resistance, as the resistance has performed its designed function of assisting in the changing-over process, which by its aid has been accomplished gradually and safely. The eighth and last step is one which we have provided for giving an extra rate of speed to the motors in multiple, and this is accomplished by shunting the field-magnets of the two motors through a suitable resistance, as is indicated in Fig. 9. The above described series of circuit combinations provides for several distinct rates of speed, between which the conditions may be regarded as more or less temporary and transitional. Thus the first rate of speed will be given by the condition in Fig. 3; the second by the condition in Fig. 4; the third by the condition in Fig. 6; the fourth by the condition in Fig. 8, and the fifth by the condition in Fig. 9."

What is claimed as new and characteristic, and involving invention, in the method here described, is the shunting of one of the motors, while protecting the other by dead resistance in series with it, and then breaking the circuit of the shunted motor and arranging it in parallel with the first motor, and the cutting out of the dead resistance, so as to attain the maximum rate of multiple speed, the live resistance of the counter electro motive force of both rapidly revolving motors supplying the requisite resistance, without the waste of electric energy involved in the use of dead resistance. As the shunted motor is attached to the axle, it revolves at the same speed as the other motor, and its counter electro current is active and available at the instant of transition to the multiple arrangement. It is apparent that the sooner the dead resistance used to protect the shunted motor, is dispensed with, and its place supplied with the live resistance of the counter current generated by the rapidly revolving motors, the greater the economy of

the electric current. But whether the cutting out of the whole dead resistance be instantaneous on the change to the multiple arrangement, or by gradual steps thereafter, does not seem essential to the method as claimed. Retaining it at the moment of change, and its elimination by one or more steps afterwards, merely means intermediate rates of speed, before the maximum multiple speed is attained.

Claims 3, 4 and 9 of the method patent, and claims 1 and 2 of the apparatus patent, the ones here under consideration, are as follows:

"Patent 587,442.

"(3) The method of regulating a car or vehicle driven by a pair of electric motors, which consists in connecting the motors in series, shunting one motor while maintaining a circuit through the remaining motor and through a resistance protecting the same, opening the circuit of the shunted motor and connecting the two motors in multiple.

"(4) The method of regulating the power and speed of mechanism driven by a pair of series-wound electric motors receiving current from a constant potential circuit, which consists in first connecting the motors in series and in circuit with a resistance, then reducing the resistance until it is substantially cut out, then shunting one motor and again making use of the resistance to protect the unshunted motor, then disconnecting the shunted motor from circuit and finally reconnecting the motors in multiple."

"(9) The method of regulating the power and speed of mechanism driven by two electric motors, which consists in placing the two motors in series for slow speed and changing them from series to multiple for higher speed by first cutting one motor out of circuit, replacing it by a resistance in series with the other motor, and finally placing the two motors in multiple with the resistance cut out."

"Patent 587,441.

"(1) In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two electric motors, and a switch connecting them in series with each other and with a resistance, the switch provided with contacts and connections arranged to shunt one motor, leaving the other in series with the resistance, to disconnect one motor and to connect the two motors in multiple, all by successive steps.

"(2) In an apparatus for regulating the power and speed of mechanism driven by two electric motors, the combination of two motors, and a switch for placing them in series with each other, and with a resistance, the switch provided with contacts and connections adapted to cut out the resistance for one rate of speed, to again cut in the resistance, to shunt one motor, to disconnect one motor and cut out the resistance, and to connect the two motors in multiple."

The learned judge of the court below has with admirable clearness stated the situation which the method of the patent in suit was designed to meet, as follows:

"It was fully recognized prior to these patents that a trolley car could best be operated by the use of two motors connected in series for slow and in multiple for high speed. If a single motor was used there was no way to control its power and speed except by putting more or less dead resistance in series with it to regulate the current to which it was subjected. But the use of such resistance is highly objectionable, for as stated by complainant's expert: 'Under such circumstances the counter electro-motive force of the motor at slow speeds would be small, while the dead resistance would be large and the impressed electro-motive force of the trolley wire would be wastefully consumed in heating the dead resistance and only to a small degree consumed usefully in overcoming the counter electro-motive force.' The practice, therefore, is to use two motors and supplement them by a minimum of dead resistance and by series or multiple connections secure two extremes

of speed under economic conditions. But the difficulty of changing from series to multiple relation with a second motor or vice versa lies in the electric arc produced by breaking the circuit or in the sudden rush of heavy current incident to the connecting of a slow moving motor, with its slight counter-electro-motive force, to a trolley wire with its great impressed electro-motive force."

We think the learned judge, however, has misconceived the essential feature of the method described, and in consequence has unduly restricted the scope of the invention, as claimed. He has, moreover, confined his discussion to claim 2 of the apparatus patent. We quote from the opinion, as follows (the italics being those of the court below):

"And the claim is: '(2) In an apparatus for regulating the power and speed of mechanism driven by two electrical motors, and a switch for placing them in series with each other and with a resistance, the switch provided with contacts and connections adapted to cut out the resistance, for one rate of speed, to again cut in the resistance, to shunt one motor, to disconnect one motor *and to cut out the resistance* and to connect the two motors in multiple.' It will thus be seen that in the transition stage 7 there is no dead resistance to counteract the current. In the reverse transition the break of the current would, owing to the absence of resistance, cause sparking which is alleged to be disastrous and is conceded to be objectionable, and the testimony would indicate the complainant later adopted a construction in type K which obviated this sparking in type J which embodied the apparatus of the patent."

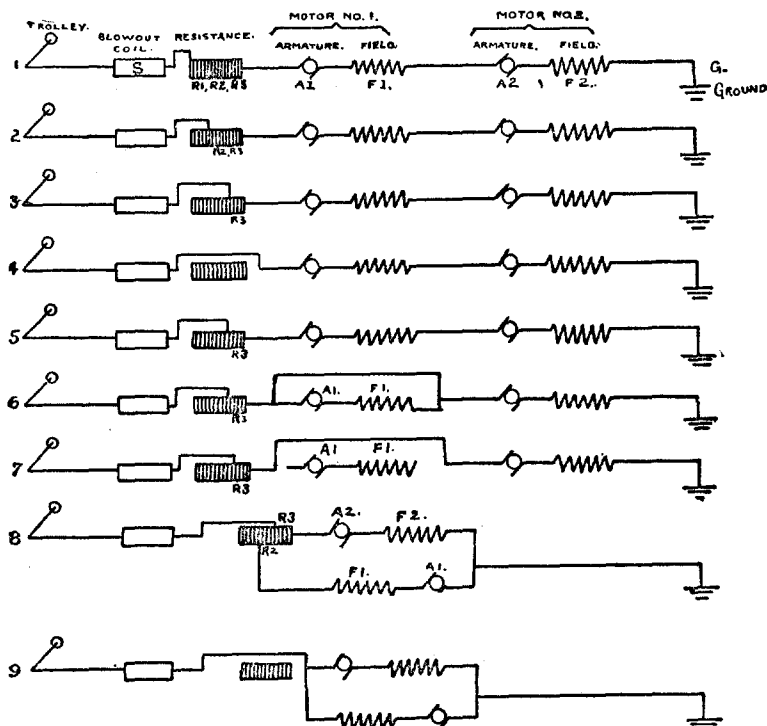
We think that, even as to this claim, it is not a necessary inference, that the resistance is to be cut out before the connection of the two motors in multiple. As we have already said, the essential characteristic of the invention claimed, is, the shunting of one of the motors while protecting the other by resistance, and then breaking the circuit connection of the shunted motor and putting it in parallel with the other motor. The time of cutting out of the resistance after it has done its work, is not important. That the cutting out and the multiple connection was in this second claim spoken of as simultaneous, would seem a fair, if not a necessary, interpretation of the language. In that case, the protection of the resistance would be continued during the transition.

We agree with counsel for appellant, that however this may be, and even if we assume that claim 2 of the apparatus patent is a detailed claim, strictly limited to what is shown in the patent, there is no reason for reading the same limitation into the other claims. Claim 1 of the apparatus patent and claims 3, 4 and 9 of the method patent, set forth the characteristic features of the invention, as we have described it, either without reference to any cutting out of the resistance after it has been cut in for the protection of the active motor, when one of the motors has been shunted, or, as in claim 9 of the method patent, which speaks of "finally placing the two motors in multiple with the resistance cut out." It is clear that these claims do not require the cutting out of the resistance after its use for the protection of the unshunted motor, at any particular time, certainly not before the connection in multiple is effected. The cutting out of the whole resistance, whether simultaneously with the multiple connection or thereafter, is necessary to the attainment of the maximum rate of speed, but it is manifestly unimportant and nonessential as to what is characteristic of the invention,

whether the resistance be cut out all at once or gradually. The claims last referred to, evidently treat the time of cutting out the protecting resistance as unimportant and irrelevant to the invention, leaving it as a matter to be determined by judgment and experience. On the view taken by the court below in this regard, hinged its judgment as to the fact of infringement by defendant.

The subjoined diagram, illustrating the method of operation of the defendant's controller, shows that the only difference between it and the method of the patent in suit, as illustrated in the diagram of the patent, is that the resistance, after being cut in to protect the motors in series, when the current is first applied, is gradually taken out by an intermediate step, instead of being all at once cut out, so as to produce the situation in figure 4 of both diagrams, where the highest rate of speed with the motors in series is attained.

GENERAL ELECTRIC CO. VS. GARRETT COAL CO.
COMPLAINANT'S EXHIBIT DIAGRAM OF DEFENDANT'S CONTROLLER
WITH RESISTANCE LOCATED IN THE CIRCUIT OUTSIDE
OF THE TWO MOTORS."



The same gradual elimination of the resistance is shown after the breaking of the current through the shunted motor, until the highest rate of speed in multiple is attained, as in figure 9 of defendant's diagram and figure 8 of the patent in suit. It is true, that the defendant, by this gradual elimination of resistance obtains several rates of

speed, both in series and in multiple arrangement, but the manner of the elimination of resistance, whether in series or in multiple, seems to us plainly not of the essence of the invention, as described in the patent, or set forth in the claims to which we have referred. These additional steps in the elimination of resistance, shown by the defendant, are speed steps, and not the steps of the gradual process of change from series to parallel arrangement, shown and claimed as the essential feature of the patents in suit. That the defendant cut out the resistance used to protect the shunted motor, gradually, thereby securing one or more grades of speed in multiple before the highest, when the resistance was all eliminated, is doubtless an advantageous and convenient way of using the method of the patent in suit, and complainant itself has adopted such a construction of its apparatus as will secure these intermediate rates of speed. But the essential features of the invention described and claimed in the patents in suit, are found, whether the elimination of the protecting resistance be accomplished all at once or gradually.

We think, therefore, the court below erred in not finding infringement of both patents in suit. The court below, in its opinion on the question of infringement, has assumed the validity of the patents, and has therefore not discussed the prior art as affecting it, or the scope of the patents in suit. It is not seriously contended that any of the patents referred to by the defendant anticipate the patents in suit. They are cited as illustrative of the prior art, and for the purpose of limiting the scope of complainant's patents. An examination of the principal patents referred to by counsel for complainant in his brief, together with the expert testimony in relation thereto, makes it plain that no useful purpose would be subserved by considering them in detail, or discussing them further than to say, that none of them, down to the Conduct patent of November 20, 1898, discloses any method of changing from series to multiple, by shunting one of the motors, while protecting the other by resistance in series with it, and then breaking the circuit of the shunted motor and arranging it in parallel with the first motor. Their mode of accomplishing the change presents all the difficulties and troublesome features which the patents in suit have sought to avoid.

The Conduct patent, the most meritorious of those referred to, was for a controller, by which motors in series and in parallel could be operated. This was done by a large use of dead resistance, which, to use the language of complainant's expert, "not only acted to moderate the starting of the motors, but also served to give intermediate gradations of speed additional to the two secured by the series and multiple arrangement respectively." The change of circuits from series to multiple was accomplished by bringing into play the large dead resistance at the moment when the change of circuits occurred. All the series circuits of the motors were opened, and the motors reconnected in multiple by a single step. Conduct's method required a very large dead resistance and wasteful loss of energy. By the entire and instantaneous cutting off of the current in series, and the turning of the same into multiple arrangement, a sudden and objectionable retardation and acceleration of speed were effected, and sparking was not avoided. They

are, however, all avoided by the simple method of shunting one motor and protecting the other by resistance, before the break in the circuit is made, and then connecting the shunted motor in multiple with the active and protected motor. And this is the method of the patent in suit.

For the reasons stated, we think the decree of the court below should be reversed, and the record remanded, with directions to enter a decree in conformity with this opinion.

DANIELS v. RESTEIN et al.

(Circuit Court of Appeals, Third Circuit. May 2, 1906.)

No. 2.

PATENTS—ANTICIPATION—PACKING.

The Miller patent, No. 524,178, for a packing for steam pistons, consisting of two wedge-shaped sections, which slide upon each other, and widen the strip when pressed upon to form a tight joint, while for a meritorious device, is void for anticipation; the form of construction having been in use in a prior unpatented packing, and the material not being claimed as a feature of the invention.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 131 Fed. 469.

Charles Howson, for appellant.

A. B. Stoughton, for appellees.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge. This action is brought to restrain the infringement of the two claims of patent No. 524,178, which was granted in August, 1894, to cover certain improvements in the packing that is used around the piston rods of engines. We agree with the conclusion reached by Judge Archbald in the court below, and think it unnecessary to add more than a few words to his very clear and satisfactory opinion. In order to understand completely the scope of the invention, the specification should be carefully read. It is as follows:

"The object of my invention is to make an improved packing which can be used until the sections forming the packing are completely worn, and which will be steam and water tight, yet will yield sufficiently to avoid undue friction.

"In the accompanying drawings figure 1 is a perspective view of a section of my improved packing; fig. 2 is a sectional view; fig. 3 is a view of the packing arranged in a stuffing box; fig. 4 is a view showing the packing after considerable wear.

"A and B are sections, wedge-shaped in cross section, the beveled edge of one section resting against the beveled edge of the other section, so that when pressure is applied one will slide upon the other. The sections, A and B., are made of flexible material, preferably of layers of cotton duck and rubber. The duck and rubber are alternately arranged, and so united under pressure as to make the sections comparatively stiff, yet they will yield sufficiently to snugly fit in the box and against the piston rod. I place be-

tween the two wedge-shaped sections, A and B, a lubricant, preferably finely divided graphite, so that one will readily slide upon the other.

"At the back of the section B, in the present instance, is a cushion, C, made of absorbent material, preferably twisted cotton, which allows for the free action of the wedge-shaped sections, A and B, and is an excellent lubricating surface, and also prevents the packing from becoming hard, and transmits the lateral pressure evenly throughout the series of layers of packing.

"The cushion section, C, is confined in a braided covering, c, and the covered cushion and sections, A and B, are confined within an outer braided covering, a, which holds the several parts of the packing in place, so that they can be readily applied to the stuffing box without requiring careful manipulation and adjustment.

"The packing is either cut in suitable lengths and placed within the stuffing box, one length of packing against another, and so arranged that the wedge-shaped section A of one length abuts the cushion, C, of the adjoining length; or, if convenient, the packing may be coiled into the stuffing box.

"As shown in fig. 3, the packing is cut in lengths, and placed within the stuffing box, D, and the gland, E, is pressed against the packing, and it will be noticed that when the packing is compressed the yielding cushion distributes the pressure evenly throughout the entire length of the packing, and when the sections, A and B, wear, by placing pressure upon the gland the section A will be forced toward the piston rod, and the section B will be forced against the shell of the box, as shown in fig. 4."

It will be observed that the patentee nowhere indicates throughout this specification, nor in the claims hereafter quoted in Judge Archbald's opinion, that he has devised a packing of which the parts will be pressed against the piston rod and the walls of the stuffing box by the force of the steam alone, the gland performing no other function than to bring the parts together. On the contrary, as we understand the specification, he describes a yielding and absorbent cushion, combined with wedge-shaped sections, to which pressure is to be applied by the gland, and we do not see how he can be allowed to extend the invention beyond what is expressly described and distinctly claimed. The claims do nothing more than restate the specification more concisely, differing only in this; that they say nothing about a lubricant, while the specification recommends its use. But the use of a lubricant is not declared to be a part of the invention, even in the specification; and, if it were so declared, we should not hesitate to say that a device so obvious to any one skilled in the art could not be appropriated as if it were the product of inventive labor.

If this view is correct, the claims can undoubtedly be read upon Exhibit A, which is a sample of the packing referred to by Judge Archbald as having been devised by the father of the patentee in 1882. This being so, it is unnecessary to consider the patent to Albert Furse, No. 208,385, granted in September, 1878, and the English patent to Samuel Turner, granted in July, 1891, each of which presents some striking resemblances to the patent in suit. It must, however, be understood that, in adopting the opinion of Judge Archbald as the opinion of this court, we refrain from approving what he has said concerning the relation of the prior art, and particularly of the Furse and Turner devices, to the patent now in litigation, postponing the consideration of that subject to a future occasion, if the controversy shall be continued. Thus limited, the opinion of the Circuit Court (131 Fed. 469) is adopted as the opinion of the Court of Appeals.

The decree dismissing the bill is affirmed, with costs.

LEVIN v. NORTHWESTERN NAT. INS. CO.

(Circuit Court, N. D. Iowa, W. D. July 3, 1906.)

No. 415.

INSURANCE—ACTION ON POLICY—AWARD PLEADED AS DEFENSE—IMPEACHMENT.

In an action at law in a federal court on a policy of fire insurance, an award of arbitrators, fixing the amount of plaintiff's loss, made in accordance with the provisions of the policy and pleaded by defendant, cannot be impeached by plaintiff on the ground of fraud or misconduct of the arbitrators, but can only be avoided by direct suit in equity.

At Law. On motion to strike reply.

Action to recover the value of property destroyed by fire, which was insured by the defendant company. The defendant admits the making of the policy sued upon and the destruction of the property by fire. The policy contains a provision: "In the event of disagreement as to the amount of loss, the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire, the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their difference to the umpire, and the award in writing of any two shall determine the amount of such loss. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within 12 months next after the fire." It is alleged in the answer that plaintiff and defendant were unable to agree as to the value of the property destroyed, and that in accordance with the foregoing provisions of the policy the amount of such loss was submitted to arbitrators, who made an award, finding the damage to the property by reason of the fire to be \$1,298.28; that defendant has offered to pay plaintiff the amount of such award, which he refuses to accept, and the defendant brings the same into court for his use. The plaintiff replies, admitting the arbitration and the award as alleged by defendant, but alleges that said award was procured to be made through fraud of the defendant and said arbitrators after they had been chosen. The defendant moves to strike these allegations of the reply upon the grounds that the award is conclusive between the parties, that it cannot be avoided in this action upon a reply to defendant's answer pleading the same, and can only be set aside or avoided in equity.

Henderson & Fribourg, for plaintiff.

Carr, Hewitt, Parker & Wright and Robinson & Lynch, for defendant.

REED, District Judge (after stating the facts). Whether or not an award of arbitrators may be successfully assailed in a court of law is a question upon which there is some confusion in the authorities. This arises mainly, if not wholly, from the fact that under the reformed procedure awards have been defeated upon equitable grounds in law actions; but this is because equitable defenses are permissible in such actions under the Code. Any defense, however, to an action upon the award or answer setting up the same, that goes to the jurisdiction of the arbitrators, or that appears upon the face of the award, is available at law to defeat the same; but at common law it seems that matters extrinsic the award, such as fraud, mistake, or misconduct of the arbitrators, cannot be set up to defeat the same, and redress in such cases

must be sought by direct proceedings in equity. This appears to be upon the theory that an award of arbitrators is analogous to a judgment, the arbitrators being a tribunal selected by the parties to adjudge their disputes (*Gordon v. United States*, 7 Wall. 183-194, 19 L. Ed. 35; *Burchell v. Marsh*, 17 How. 344, 15 L. Ed. 96), which is final as between the parties (*Burchell v. Marsh*, *supra*; *Burroughs v. David*, 7 Iowa, 154; *Thornton v. McCormick*, 75 Iowa, 285-289, 39 N. W. 502; *Emmet v. Hoyt*, 17 Wend. [N. Y.] 410; *Underhill v. Van Cortlandt*, 2 Johns. Ch. [N. Y.] 366). While it has long been settled that courts of law have concurrent jurisdiction with courts of equity in matters of fraud (*Swayze v. Burke*, 12 Pet. 11, 9 L. Ed. 980; *Smith v. McIver*, 9 Wheat. 532, 6 L. Ed. 152), yet in the national courts, where legal and equitable remedies cannot be blended in one proceeding, it is generally held that relief against awards or other instruments in writing importing a consideration, upon the grounds of fraud, which does not touch the execution of the instrument, must be obtained in equity (*Hartshorn v. Day*, 19 How. 211-222, 15 L. Ed. 605; *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232; *Wood v. Railway Co.* [C. C.] 39 Fed. 52).

In *Hartshorn v. Day*, *supra*, it is said:

"The general rule is that in an action upon a sealed instrument in a court of law failure of consideration or fraud in the consideration, for the purpose of avoiding the obligation, is not admissible as between the parties. * * * Fraud in the execution of the instrument has always been admitted in a court of law, as where it has been misread, or some other fraud or imposition has been practised upon the party in procuring his signature and seal. The fraud in this aspect goes to the question whether or not the instrument ever had any legal existence. It is said that fraud vitiates all contracts and even records, which is doubtless true in a general sense. But it must be reached in some regular and authoritative mode. * * * A record of judgment may be avoided for fraud, but not between the parties or privies in a court of law."

In *George v. Tate*, 102 U. S. 564, 26 L. Ed. 232, it is said:

"Proof of fraudulent representations beyond the recitals of the bond, to induce its execution by the plaintiff in error, was properly rejected. It is well settled that the only fraud permissible to be proved at law in these cases is fraud touching the execution of the instrument, such as misreading, the surreptitious substitution of one paper for another, or obtaining by some other trick or device an instrument which the party did not intend to give. * * * The remedy is by a direct proceeding to avoid the instrument."

In *Wood v. Railway Co.* (C. C.) 39 Fed. 52, *supra*, Judge Thayer says:

"Such provisions in contracts [for the submission to arbitrators to find the amounts or value of the property when the same is in dispute between the parties] being binding, the next question is whether an estimate made by an engineer in accordance with such a stipulation can be avoided in a strictly legal proceeding by proof of fraud, gross negligence, or mistake? Of course, if an estimate thus made is regarded in the light of an award made by an arbitrator, the authorities are practically all one way; that recourse must be had to a bill in equity, and that neither fraud nor mistake can be alleged or proven to avoid the estimate in a suit at law on the contract to recover a balance claimed to be due. * * * It appears to me, also, that on general principles, whether such estimates are or are not technical awards, courts of equity alone have authority to vacate them on the ground of mistake, fraud, or gross errors amounting to fraud, when such estimates have been regularly made in pursuance of contract provisions."

See, also, *Insurance Co. v. Bonner*, 44 Fed. 157, 11 L. R. A. 623, affirmed in 56 Fed. 378, 5 C. C. A. 524; *Robertson v. Insurance Co. (C. C.)* 68 Fed. 173.

The award in question was made pursuant to the agreement of the parties. No fraud is alleged in procuring the agreement, nor in the selection of the arbitrators; but it is alleged that after their selection the arbitrators were guilty of misconduct, in that they conspired with defendant, in some way not definitely alleged, whereby they were not to, and did not in fact, find the full amount of plaintiff's loss. This is not admissible to defeat the award in this action. Whether or not it would be sufficient to authorize a court of equity to avoid the same is not determined. The motion to strike the reply is sustained, and if plaintiff shall be advised to file a bill in equity to avoid the award, this action, upon proper application, may be stayed until the determination of such suit.

It is ordered accordingly.

H. MENDELSON & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. January 26, 1906.)

No. 3,359.

CUSTOMS DUTIES—APPEAL FROM BOARD OF GENERAL APPRAISERS—FURTHER EVIDENCE IN CIRCUIT COURT.

Held that, under section 15, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933], providing that on appeal from the Board of United States General Appraisers the Circuit Court "may" refer the case for further evidence "in such order and under such rules as the court may prescribe," importers taking an appeal should not be permitted to introduce such further evidence in a case in which, while other essential evidence had been obtainable, they had given no evidence before the board, other than to file an affidavit and produce samples of the goods involved.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question relates to merchandise imported at the port of New York, which was the subject of several protests by the importers against the assessment of duty by the collector of customs at that port. The Board gave the importers due notice of the hearing, at which they appeared and filed samples and affidavits. This evidence was held by the Board to be insufficient to establish the importers' contention, and the protests were therefore overruled. The importers duly made application for review of this decision, and within 20 days after the Board had filed its return of the record obtained from the Circuit Court an *ex parte* order referring the matter to a general appraiser to take further evidence. The authority for this procedure is found in section 15, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 138 [U. S. Comp. St. 1901, p. 1933], the pertinent part of which reads as follows:

"Sec. 15. That if the owner, importer, consignee, or agent of any imported merchandise, or the collector, or the Secretary of the Treasury, shall be dissatisfied with the decision of the Board of General Appraisers, as provided for in section fourteen of this act, * * * they, or either of them, may, within thirty days next after such decision, and not afterwards, apply to the Circuit Court of the United States within the district within which the matter arises,

for a review of the questions of law and fact involved in such decision. * * * Thereupon the court shall order the Board of Appraisers to return to said Circuit Court the record, * * * and within twenty days after the aforesaid return is made the court may, upon the application of the * * * importer, * * * refer it to one of said general appraisers, as an officer of the court, to take and return to the court such further evidence as may be offered * * * within sixty days thereafter, in such order and under such rules as the court may prescribe."

The following are among the rules prescribed by the Circuit Court for the Southern District of New York under the foregoing authority:

"(2) No order for an additional or further return will be made, where it is made to appear that the protestant had reasonable notice to appear before said Board of General Appraisers and show cause why the decision of the collector should not be affirmed, and after such notice, without proper excuse, he failed to appear in person or by attorney, and he offered no evidence in support of his contentions as presented in his protest, and no such evidence is found in the record and papers in the case, and none was taken by the board."

"(11) On the examination of a witness before the general appraiser, if any interrogatory to the witness, or any part of his testimony, is objected to as improper or irrelevant, the general appraiser shall decide upon the objection. If he decides against the objection, he shall note the objection and his decision thereon, and proceed to take down the testimony; but if he decides that the objection is well taken, the testimony shall not be taken down unless it is insisted on by the party against whom the decision is made. If the taking down of the testimony in opposition to his decision is insisted on, such fact shall be noted, and the testimony shall be taken; and in that case the party making the objection may, at the hearing, move to have the objectionable testimony expunged."

At the hearing before the general appraiser under said order of the court, counsel for the government objected to the introduction of any testimony, on the ground that no legal evidence was produced before the Board of General Appraisers. This objection was sustained by the general appraiser, on the authority of the decision of the Circuit Court for the Eastern District of Pennsylvania in *Allen v. U. S.* (C. C.) 127 Fed. 777. Counsel for the importers excepted to this ruling, and insisted upon the introduction of the evidence under rule 11, above quoted. This being granted, the government excepted.

Walden & Webster (Howard T. Walden, of counsel), for the importers.

D. Frank Lloyd, Asst. U. S. Atty.

HAZEL, District Judge. The articles in question consisted of Chinese silk goods, which were assessed for duty by the collector at \$3 per pound, under paragraph 387 of the act of July 24, 1897, chapter 11, § 1, Schedule L, 30 Stat. 186 [U. S. Comp. St. 1901, p. 1669]), as all silk goods in a piece "boiled off." Under the same paragraph the merchandise if "in the gum" may come into this country upon payment of duty at the rate of \$2.50 per pound. An examination of the record discloses that the importers appealed to this court without first giving evidence before the board, except that they filed an affidavit and produced samples of the shipment. This is not a compliance with the provisions of the customs administrative act. *United States v. China & Japan Trading Co.*, 71 Fed. 864, 18 C. C. A. 335; *Allen v. United States* (C. C.) 127 Fed. 777; *Donat v. United States* (C. C.) 124 Fed. 463. The government seasonably objected to taking testimony in this court; but, the importers insisting, the testimony was

taken under rule 11, applicable in this circuit to appeals from the Board of General Appraisers. Upon the authority of the cases cited, the preliminary motion of counsel for the government to expunge the evidence taken in this court is granted. The filing of an affidavit with the board, describing the process of manufacturing the imported article, is not thought to be sufficient to take this case out of the decisions to which attention is directed, where other essential evidence is obtainable. The decision of the Board of General Appraisers is affirmed.

SANBO v. UNION PAC. COAL CO.

(Circuit Court, D. Colorado. May 10, 1906.)

No. 4,463.

COURTS—JURISDICTION OF FEDERAL COURTS—ALLEGATIONS OF CITIZENSHIP.

Where the complaint in an action in a federal court in which jurisdiction depended on diversity of citizenship failed to allege plaintiff's citizenship, an amendment to cure the defect and show jurisdiction must allege the requisite citizenship, not only at the time it is filed, but at the time the action was commenced.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 878.

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullaghan*, 27 C. C. A. 208.]

On Motion for Leave to File Amended Complaint.

Doud & Fowler, for plaintiff.

Dorsey & Hodges, for defendant.

RINER, District Judge. The original complaint in this case, containing two causes of action, was filed in this court on June 23, 1903. A demurrer to the complaint was sustained, with leave to amend. An amended complaint, also containing two causes of action, was filed November 9, 1903, to which a demurrer was filed and sustained. The plaintiff having elected to stand upon his amended complaint, a judgment was entered in favor of the defendant dismissing the case, and the plaintiff thereupon sued out a writ of error to the court of appeals for this circuit. 140 Fed. 713. The jurisdiction of this court depending upon the citizenship of the parties, and there being no allegation in the complaint that the plaintiff was a citizen of this or any other state, the judgment was reversed, upon the ground that the circuit court had no jurisdiction of the action, and the case was remanded to this court, with instructions to allow or refuse to allow an amendment in this particular in its discretion. On the 8th of February, 1906, plaintiff applied to this court for permission to file an amended complaint, containing but a single cause of action, and in which it is averred "that the said plaintiff is a citizen of the United States and of the state of Colorado, and is a resident of the city and county of Denver in the state of Colorado." Even in this proposed amended complaint there is no allegation that the plaintiff was a citizen of the state of Colorado at the time this action was begun, two years and

seven months prior to the application to file this amendment. The necessary allegation as to the citizenship of the parties was omitted altogether in the original complaint and also in the amended complaint, and in the amended complaint now sought to be filed the averment is that the plaintiff is (which means at this time, two years and seven months after the original action was brought) a citizen of the state of Colorado; not that he was such citizen at the time the suit was begun. This question was before the Supreme Court of the United States in the case of *Menard v. Goggan*, 121 U. S. 253, 7 Sup. Ct. 873, 30 L. Ed. 914. In disposing of the case, Chief Justice Waite said:

"If the necessary citizenship actually existed at the time the suit was begun, it will be for the court below to determine when the case gets back whether the record shall be amended so as to show that fact, and thus make out the jurisdiction."

It will thus be seen that the amended complaint now sought to be filed does not come within the rule announced by the Supreme Court, and the motion for leave to file it will be denied.

Even if the amendments were allowed, I think the plaintiff's right to maintain the action may well be considered doubtful. An administrator is a statutory officer. The office and the powers of the administrator are creatures of statute, and from the averments in the complaint in this case the action is to recover for injuries resulting from an accident occurring in the state of Wyoming, and the administrator who brings this action is appointed in Colorado. Under the statutes of Wyoming, the administrator of a decedent's estate is given the right to maintain an action for his death. In Colorado, under whose laws this plaintiff was appointed and is acting, an administrator is without legal capacity to maintain such an action. Under the laws of Colorado an administrator is not only not given the right to maintain an action of this character, but the right to maintain such an action is expressly denied, and vested in certain named relatives, and the amount, if any, recovered is the individual property of such relatives, and is no part of the estate of the deceased person, and not subject to his debts. My attention has been called to no statute of this state giving an administrator authority either to maintain the action or distribute the funds realized therefrom in case of recovery, and I think none exists. However, it is neither profitable nor at all necessary to pursue this discussion, as the motion will be denied upon the first ground stated.

An order will be entered denying the motion filed herein on February 8, 1906, requesting permission to file an amended complaint, and dismissing the case at plaintiff's cost, upon the ground that this court has no jurisdiction of the action.

HARTMAN v. JOHN PETERS & CO.

(District Court, M. D. Pennsylvania. June 1, 1906.)

No. 702.

BANKRUPTCY—PARTNERSHIP—ACTS OF BANKRUPTCY.

A conveyance by a partner of his individual property, although with intent to prefer a firm creditor, does not constitute an act of bankruptcy by the firm, and will not sustain proceedings in bankruptcy against the partnership.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 57.]

In Bankruptcy. On exceptions to report of referee.

G. Wilson Swarts, for exceptions.

Harry M. Leidigh, for petitioning creditors.

ARCHBALD, District Judge. This case is ruled by in *Re Redmond*, 9 N. B. R. 408, Fed. Cas. No. 11,632, which is squarely in point. As is there pertinently said: "It seems too clear to admit of argument that, in order to maintain proceedings in bankruptcy against partners as such, it must be alleged and proven that the firm has committed an act of bankruptcy; and that, when the act charged is the fraudulent conveyance of property, it must be of partnership property. * * * A conveyance by one partner of his individual property, although an act of bankruptcy as against him, will not sustain a proceeding in bankruptcy as against the firm, even though such conveyance was made with intent to hinder, delay, or defraud firm creditors, or with a view of giving preference to a firm creditor. In such case the proceeding must be against such partner alone."

The only act of bankruptcy charged in the present instance is the transfer by John Peters, one of the members of the respondent firm, of his individual property (his farm) with intent to defraud his creditors, and upon this it is prayed that the firm may be adjudged bankrupt. By an amended or supplemental petition, the transfer is alleged to have been with intent out of the proceeds to prefer W. S. Adams, his son-in-law, an indorser for the firm, and the Gettysburg National Bank, which held a number of the firm notes which he had indorsed, and the prayer is modified so as to extend not only to the firm, but to the individual members. The referee upheld the proceedings, and directed that an adjudication be made; but upon the strength of the authority cited, as well as upon principle, this cannot be sustained. The act relied on was individual and single, being simply the conveyance by John Peters of his farm to secure certain of the firm debts. The circumstances attending the transaction and the parties benefited thereby may justify the conclusion that it was fraudulently intended, or, if not that, that it at least effected a preference of the firm creditors secured. But with this the firm itself, so far as appears, had nothing whatever to do; nor had Earl Peters, the other member of it, who could not be affected, nor could his partnership interest, by the separate and distinct act of his copartner, dealing, not with the firm property, but with his own. The petition should have been directed

against John Peters, and not, as it is, against the firm, and must therefore be dismissed. There are other questions in the record, but this is decisive, and they will not be considered.

The exceptions are sustained, and the proceedings are dismissed, at the cost of the petitioning creditors.

FAWCETT v. UNITED STATES.

(Circuit Court, S. D. New York. February 22, 1906.)

No. 3,979.

1. CUSTOMS DUTIES—CLASSIFICATION—COMBED SILK.

Combed silk that has fallen from or been caught in the machines in which it was undergoing further operations is dutiable under the provision in paragraph 384, Tariff Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668], for silk not further manufactured than combed, and is not subject to the provision for silk waste in paragraph 661, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688].

2. SAME—SILK WASTE—SILK COCOONS.

Paragraph 661, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], enumerating "silk cocoons and silk waste," includes those articles only when not manufactured at all.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by Hughes Fawcett.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for importers.

D. Frank Lloyd, Asst. U. S. Atty.

WHEELER, District Judge. This merchandise is combed silk that had fallen from, or been caught in, the machines, through which it was undergoing further operations with other silk of the same quality, which kept on toward further completion. The silk schedule of the act of 1897 lays a duty on "384. Silk partially manufactured from cocoons or from waste silk and not further advanced, or manufactured than carded or combed silk, forty cents per pound." Act July 24, 1897, c. 11, § 1, Schedule L, 30 Stat. 185 [U. S. Comp. St. 1901, p. 1668]. This material was none the less combed silk because it got out of place or dirty in the further process, so as not to be further advanced than combed silk. It was situated in the process like the steel-rail crop ends in *Robertson v. Perkins*, 129 U. S. 233, 9 Sup. Ct. 279, 32 L. Ed. 686, which were held to be none the less steel because they were an overplus in the manufacture of steel rails. "Silk cocoons and silk waste" are free by paragraph 661, § 12, Free List, 30 Stat. 201 [U. S. Comp. St. 1901, p. 1688], but that is when they are not manufactured at all; when they are, they come under paragraph 384.

Decision affirmed.

ROSENBERG v. UNITED STATES.

(Circuit Court, S. D. New York. February 22, 1906.)

No. 4,126.

CUSTOMS DUTIES—PROTEST—SUFFICIENCY—INDEFINITE CONTENTION.

Certain imported merchandise was erroneously classified as wool wearing apparel, instead of as manufactures in chief value of fur. The importers, in protesting against the classification, stated as reasons for their objection merely that the merchandise was "dutiable at the appropriate rate and under the proper paragraph according to the component material of chief value." *Held*, that this did not meet the requirement of section 14, Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], that an importer in protesting shall set forth "distinctly and specifically * * * the reasons for his objections."

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review overruled protests of J. & H. Rosenberg against the assessment of duty by the collector of customs at the port of New York.

Walden & Webster (Howard T. Walden, of counsel), for importers.
Henry A. Wise, Asst. U. S. Atty.

WHEELER, District Judge. These importations were of felt bands of wool cloth, fur coated, which were assessed as wool wearing apparel, under paragraph 370, of the Act of July 24, 1897, c. 11, § 1, Schedule K, 30 Stat. 184 [U. S. Comp. St. 1901, p. 1667], against protests as to some that they should be assessed as in chief value of fur, under paragraph 450, Schedule N, 30 Stat. 193 [U. S. Comp. St. p. 1678], and as to the rest, "that said merchandise is dutiable at the appropriate rate and under the proper paragraph according to the appropriate material of chief value." The former protests were sustained, and the latter overruled as insufficient. The question here now is as to that sufficiency.

The customs administrative act requires (section 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]), as had been long required before, that the importer shall, if dissatisfied, "give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reason for his objections thereto." There is the general provision in section 7 of the act of July 24, 1897 (chapter 11, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693]), as well as more special provisions in various schedules, laying duties according to the component material of chief value; and this protest would put the collector upon examination of the articles, to ascertain the component material of chief value, and of all of the provisions of the act, to ascertain the applicable paragraph. This does not seem to set forth either distinctly or specifically what the collector ought to know in order to understand the reasons for the objections on which the importer must stand. *Davies v. Arthur*, 96 U. S. 148, 24 L. Ed. 758.

Decision affirmed.

COLUMBIA FINANCE & TRUST CO. v. PURCELL et al.

(Circuit Court, E. D. Pennsylvania. June 6, 1906.)

No. 61.

1. BILLS AND NOTES—ANOMALOUS INDORSEMENT.

If a person puts his name in blank on the back of a note at the time it is made or before it is indorsed by the payee, for the purpose of giving the maker credit with the payee, he is an anomalous indorser, and in the federal courts is liable as a joint maker or a guarantor.

[Ed. Note.—For cases in point, see vol. 7, Cent. Dig. Bills and Notes, §§ 542-559.]

2. SAME—ALTERATION OF CONTRACT.

An anomalous indorser on a note could not be made liable on a contract written above his indorsement, reciting an agreement by such indorser to pay the note according to the terms of another agreement, which added several terms to the note.

On Motion by Defendant Yarnall for New Trial and for Judgment on Reserved Point Notwithstanding the Verdict.

Charles L. McKeehan and Joseph S. Clark, for plaintiff.

J. R. Morgan, for defendant Wm. D. Yarnall.

J. B. McPHERSON, District Judge. This suit was brought by the Columbia Finance & Trust Company, a corporation of the state of Kentucky, to the use of Attila Cox and Oscar Fenley, against R. J. Purcell, Lizzie K. Goodwin, as the executrix of Howard T. Goodwin, and William D. Yarnall, upon an agreement purporting to be signed by Purcell, Howard Goodwin, and Yarnall in the month of August, 1902. A former trial (142 Fed. 984) resulted in a verdict directed by the court in favor of the plaintiff against the three defendants, but the verdict against Yarnall was set aside, and upon the present trial, which was against him alone, a verdict in favor of the plaintiff was again directed, but with the reservation of the question whether there was any evidence to go to the jury in support of the plaintiff's claim. No judgment has been entered upon the verdict against the other two. The important question now is, whether the plaintiff has any legally enforceable claim against Yarnall.

The agreement upon which the plaintiff's case is based was signed by Yarnall under the following circumstances: About the middle of August, 1902, Purcell brought to Yarnall's office in the city of Philadelphia, and presented to him for indorsement, a promissory note, of which the following is a copy:

"\$17,000.00.

Louisville, Ky., August 19, 1902.

"Four months after date we promise to pay to the Columbia Finance and Trust Company of the city of Louisville, or order, seventeen thousand dollars, in gold coin of the United States of America, of the present standard of weight and fineness, without defalcation, for value received, with interest in like gold coin at the rate of 6 per cent. per annum from date until paid, said interest payable with note. This note is negotiable and payable at the office of the Columbia Finance and Trust Company in Louisville, Ky.

"We have this day pledged with the Columbia Finance and Trust Company the following securities:

"Note, Central Clay Product Co. to order Perfect Combustion Co., dated June 10, 1902, at four months for \$22,500.00.

"\$40,000.00 of first mortgage bonds of the Central Clay Product Co., dated June 16th, 1902, and due June 16th, 1912.

"200 shares of preferred and 240 shares of common stock of the Central Clay Product Company.

"This pledge is made to secure all sums of money for which the undersigned may be now or may hereafter become liable to the said trust company, either as principal, surety, guarantor, or indorser. The said trust company may at any time demand further collateral satisfactory to it, to be deposited for the securing of any debt owing to it by the undersigned, and, if so demanded, the undersigned promises to comply with said demands. In default of such compliance, any or all debts, without regard to the time of maturity specified in the notes evidencing the same, shall become due and payable at the option of said trust company or the holder. In default of payment of this or any other obligation of the undersigned to said trust company, or of any interest which may be due and payable according to the terms of any obligation, whether such maturity occurs by expiration of time, or by reason of declaration of maturity under the foregoing provision, or nonpayment by the undersigned of any overdraft of his account with said trust company, the said trust company may sell and deliver the whole, or any part of all collateral which may have been delivered to it, or left in its possession by the undersigned as collateral, or for safe-keeping, or otherwise, at any board of trade, or at public or private sale, at the option of said trust company, without either advertisement or notice to the undersigned, which are hereby expressly waived. If said collaterals are sold at public sale, the said trust company may purchase the whole or any part thereof, and have clear title thereto. In case of such public or private sale, the said trust company may first deduct from the amount realized all expenses of sale of the collaterals or property, and may then apply the residue to any one or more of the said liabilities, whether due according to their terms or not, as either of its officers shall deem proper; returning the surplus, if any, to any of the undersigned, all of whom shall remain liable to the company for any deficit remaining after such sale.

"It is agreed that any collateral held by the trust company may be, by mutual consent of the trust company, and any of the undersigned, exchanged for other collateral, which new collateral shall be held by the trust company subject to the terms hereinabove set forth.

"The said trust company, in dealing with said collateral, is to be under no liability or obligation whatever to any person bound as surety or indorser with the principal hereto, and may at its option, without any responsibility to any person so bound, deliver to the principal hereof any or all of said collaterals, with or without substitution of other collateral.

"The Perfect Combustion Co. of America,

"E. C. Brice, Prest.

"Benj. W. Wilson, Treas."

At the time the note was presented to Yarnall, it bore upon its back the signatures of Purcell and Goodwin in that order, but there was no other writing upon it; and it is not only a conceded fact in the case, but the jury has specifically found, that Yarnall did not agree that the contract hereinafter referred to should be written above his signature. The note was indorsed by Yarnall below Goodwin's name, and was then taken to Louisville by Purcell, where it was delivered to the Columbia Finance & Trust Company after the following further transaction had taken place: In pursuance of some previous negotiations between several persons (whether Yarnall took part or not does not appear, and the details are not very satisfactorily shown by the evidence), an agreement was completed in Louisville upon August

19th between Purcell and other persons, of which the following is a copy:

"Louisville, Ky., July 5th, 1902.

"R. J. Purcell, Esq., Louisville, Ky.—Dear Sir: We will deposit with the Columbia Finance and Trust Company of Louisville, Ky., to the joint credit of the Central Clay Product Company and the Perfect Combustion Company the sum of seventeen thousand (\$17,000) dollars, for the repayment of which to us you are to deliver to us the note of the Perfect Combustion Company of America, payable four months after date, with the privilege of renewal, and indorsed by yourself and one other responsible person; and to further secure the repayment of said seventeen thousand (\$17,000) dollars so advanced by us, there shall be deposited with the Columbia Finance and Trust Company a note of the Central Clay Product Company of date June 10th, 1902, to order of Perfect Combustion Company, due at four months for \$22,500; also forty thousand (\$40,000) dollars of first mortgage bonds of the Central Clay Product Company, twenty-six thousand (\$26,000) dollars of preferred stock and thirty-nine thousand (\$39,000) dollars of common stock of said Central Clay Product Company; the seventeen thousand (\$17,000) dollars so advanced by us to be repaid to us, with six per cent. interest from the date of its deposit with the Columbia Finance and Trust Company, four months after said date, with the privilege on the part of the makers and indorsers of said note to extend the time of payment an additional four months; it being understood and agreed that said seventeen thousand (\$17,000) dollars so deposited with the trust company shall be used for improvements to the property of the Central Clay Product Company at Cloverport, Ky., and to be paid out by the trust company only upon the joint check of the Central Clay Product Company by its president, accompanied by the certificates of the engineer in charge of the improvements of said property that the work or material for which the money is wanted has been done or furnished; it being further understood that for our compensation said seventeen thousand (\$17,000) dollars as above, we are to be paid ten thousand (\$10,000) dollars par value of the preferred stock and ten thousand (\$10,000) dollars par value of the common stock of the Central Clay Product Company out of its total issue of one hundred and thirty thousand (\$130,000) dollars of stock and cash to the amount of four per cent. of the amount of money so furnished by us. It is a condition precedent to this agreement that Bodley, Baskin & Morancy, attorneys, shall file with the trustee under the mortgage a certificate or abstract to the effect that the title to the mortgaged property is good and the bonds were legally issued.

"This proposition is based upon a proposal this day made to us by Mr. George C. Patton relative to the proposition herein set out. This is in lieu of our proposition of July 3rd, 1902.

"Signed in triplicate.

"[Signed]

"[Signed]

Oscar Fenley.

Attila Cox,

"By L. W. Butts, Atty. in Fact.

"The above proposition accepted this August 19th, 1902.

"R. J. Purcell.

"The Perfect Combustion Co. of America,

"By R. J. Purcell, Vice President.

"It is understood and agreed by all parties hereto that out of the \$39,000 of common stock and \$26,000 of preferred stock there shall be issued \$5,000 of common and \$5,000 preferred stock to Attila Cox, and \$5,000 of common and \$5,000 preferred stock to be issued to Oscar Fenley by Geo. C. Patton, all of which stock was issued and delivered at the time of the execution of these papers and the deposit of the money, August 19, 1902.

"R. J. Purcell,

"The Perfect Combustion Co. of America,

"By R. J. Purcell, Vice President."

Thereupon the agreement in suit was written upon the back of the note already referred to, above the signatures of Purcell, Goodwin, and Yarnall, as follows:

"We hereby agree in our indorsement of this note to promptly pay same, according to the terms of agreement with Messrs. Cox and Fenley, a copy of which is attached."

The Columbia Finance Company thereupon advanced \$17,000, less 4 per cent., upon the faith of the note in the condition just described, and this money was afterwards applied to the purposes and in the manner specified in the agreement that is referred to by the writing on the back of the note. The maker, the Perfect Combustion Company of America, having failed to pay the note, a joint suit was brought against the three defendants in the present action upon the writing to which their names appear to be signed upon the back of the primary obligation.

This obligation, having been drawn to the order of the Columbia Finance & Trust Company, and having never been indorsed by the payee, it is evident that when Purcell, Goodwin, and Yarnall put their names upon the back of the instrument they became what is known in the law of commercial paper as "irregular indorsers." The liability assumed by such an indorser differs in different jurisdictions, but as Yarnall's liability is asserted by the plaintiff to be fixed by the law of the federal tribunals, I shall consider it from that point of view. The suit is brought against the defendants jointly, on the theory that they are joint guarantors, their status, so it is said, having been thus determined by decisions of the Supreme Court. That an irregular or anomalous indorser will be held by the courts of the United States to the liability either of a joint maker or of a guarantor is undoubtedly true. The leading case upon the subject is *Good v. Martin*, 95 U. S. 90, 24 L. Ed. 341, in which Mr. Justice Clifford, speaking for the court, lays down three rules for determining the liability of a man who puts his name upon the back of a promissory note before it has been indorsed by the payee. His language is as follows:

"(1) If he put his name in blank on the back of the note at the time it was made and before it was indorsed by the payee, to give the maker credit with the payee, or if he participated in the consideration of the note, he must be considered as a joint maker of the note. *Schneider v. Schiffman*, 20 Mo. 571; *Irish v. Cutter*, 31 Me. 536.

"(2) Reasonable doubt of the correctness of that rule cannot be entertained; but if his indorsement was subsequent to the making of the note and to the delivery of the same to take effect, and he put his name there at the request of the maker, pursuant to a contract of the maker with the payee for further indulgence or forbearance, he can only be held as guarantor, which can only be done where there is legal proof of consideration for the promise, unless it be shown that he was connected with the inception of the note.

"(3) But if the note was intended for discount, and he put his name on the back of the note with the understanding of all the parties that his indorsement would be inoperative until the instrument was indorsed by the payee, he would then be liable only as a second indorser, in the commercial sense, and as such would clearly be entitled to the privileges which belong to such an indorser."

With the second and third of these rules we have nothing to do in the present case, because there is no evidence to call for their application, but the first rule appears to be applicable, and requires the court to consider Yarnall as a joint maker with the Perfect Combustion Company, and perhaps with Purcell and Goodwin also. If this be so, there is at least one fatal objection to the plaintiff's claim. Putting aside the question whether the proper defendants have all been sued upon the joint contract, the substantial and insuperable difficulty remains that the contract upon which Yarnall is sued is not the contract by which he became bound. If, by operation of law, he became a joint maker when he indorsed the note before delivery, no one without his consent could substitute the contract of guaranty on which it is now proposed to hold him, and writing a contract of guaranty above his name was either a void act, or was an attempted alteration of his real contract, that relieved him from liability.

And, in my opinion, the position of the plaintiff is not improved by holding that Purcell, Goodwin, and Yarnall were joint guarantors, and that any holder of the note might write a contract of guaranty above their names. I agree that whatever contract is implied by an indorsement may be lawfully written out in visible words, but I do not agree that the contract in suit goes no further than the contract implied by the law. On the contrary, it undertakes to bind the indorsers according to the terms of the writing that bears date on July 5th, and this writing adds several terms to the note. It need not be argued that Yarnall could not be bound by a contract of guaranty to which he did not expressly agree, or to which the law does not imply his assent.

Judgment may be entered in his favor upon the reserved point.

UNITED STATES v. SIMON.

(District Court, W. D. Washington, N. D. June 1, 1906.)

No. 3,253.

1. BANKRUPTCY—PROOF OF CLAIMS—WITNESSES—EXAMINATION UNDER OATH.

Bankr. Act July 1, 1898, c. 541, § 2 [U. S. Comp. St. 1901, p. 3420], provides for the allowance of claims against bankrupt estates, the determination of all controversies relating thereto, and authorizes the bankruptcy courts and its officers to enforce obedience by bankrupts of all lawful orders by fine or imprisonment. Section 7 (page 3425) requires the bankrupt to submit to an examination at the first meeting of his creditors and at such other times as the court shall order, and section 20 (page 3430) declares that oaths required by the act, except on hearings in court, may be administered by referees. Section 21 (page 3430) provides that a court of bankruptcy, on application of any officer, bankrupt, or creditor, by order may require any designated person, including the bankrupt, who is a competent witness under the laws of the state, to appear in court or before a referee to be examined concerning the bankrupt's property, and section 29 (page 3433) provides a punishment of imprisonment for the making of a false oath or account in, or in relation to, a bankruptcy proceeding. Section 38 (page 3435) confers on referees power to administer oaths and examine persons as witnesses, and section 57 (page 3443) provides for proof of claims. *Held*, that such sec-

tions authorize a referee in bankruptcy to administer an oath to a witness, including the bankrupt, appearing either voluntarily or by compulsory process, and testifying in support of claims filed against the bankrupt's estate.

2. WITNESSES—PRIVILEGE—IMMUNITY STATUTES—CONSTRUCTION—EXAMINATION OF BANKRUPT—PERJURY.

Bankr. Act July 1, 1898, c. 541, § 7 [U. S. Comp. St. 1901, p. 3425], requiring a bankrupt to submit to an examination concerning his business at the first meeting of his creditors, and providing that no testimony given by him shall be offered in evidence against him in any criminal proceeding, does not prohibit the use of a bankrupt's testimony given in any case, but applies only to testimony given by a bankrupt in his own bankruptcy case, and confines the prohibition to the use of such testimony against him in criminal proceedings.

3. SAME.

Under Bankr. Act July 1, 1898, c. 541, § 7 [U. S. Comp. St. 1901, p. 3425], providing that no testimony given by a bankrupt shall be offered in evidence against him in any criminal proceeding, a bankrupt cannot be convicted of perjury for false testimony given by him in support of a claim filed against his estate in bankruptcy.

Indictment of a bankrupt for perjury committed in giving testimony under oath before a referee in support of contested claims against his bankrupt estate. Demurrer to the indictment sustained.

Jesse A. Frye, U. S. Atty.

Richard Saxe Jones and William H. Brinker, for defendant.
Gray & Stern, *amicus curiæ*.

HANFORD, District Judge. By the indictment the defendant is accused of the crime of perjury, committed by giving false testimony under oath in support of claims against his estate (he being a bankrupt) before a referee in the investigation of the claims referred to. The defendant on being arraigned demurred to the indictment, specifying three grounds, the first of which is that the charge of perjury cannot be predicated upon false testimony in bankruptcy proceedings, under the act of July 1, 1898, c. 541 [U. S. Comp. St. 1901, p. 3418], for the reason that there is no law of the United States authorizing a witness or the bankrupt to be sworn in a court of bankruptcy to give testimony in proof of a creditor's claim, and without such a law false testimony under oath does not constitute a crime against the United States.

1. I do not agree with the defendant's counsel in their contention that the bankruptcy law has failed to confer power upon the courts to examine witnesses under oath in order to ascertain the facts upon which the validity of claims of creditors must be determined.

The second section of the act enumerates certain powers conferred upon the bankruptcy courts, including power to—

"Allow claims, disallow claims, re-consider allowed or disallowed claims, and allow or disallow them against bankrupt estates; * * * cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto except as herein otherwise provided; * * * enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment."

The seventh section provides that the bankrupt shall—

“When present at the first meeting of his creditors, and at such other times as the court shall order, submit to an examination concerning the conducting of his business, the cause of his bankruptcy, his dealings with his creditors and other persons, the amount, kind, and whereabouts of his property, and, in addition, all matters affecting the administration and settlement of his estate; but no testimony given by him shall be offered in evidence against him in any criminal proceeding.”

The twentieth section provides that:

“Oaths required by this act, except upon hearings in court, may be administered by referees; * * * any person conscientiously opposed to taking an oath may, in lieu thereof, affirm. Any person who shall affirm falsely shall be punished as for the making of a false oath.”

The twenty-first section provides that:

“A court of bankruptcy may, upon application of any officer, bankrupt, or creditor, by order require any designated person, including the bankrupt, who is a competent witness under the laws of the state in which the proceedings are pending, to appear in court or before a referee or the judge of any state court, to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act.”

The twenty-second section authorizes courts of bankruptcy—

“To refer bankruptcy proceedings generally to referees or specially with only limited authority to act in the premises or to consider and report upon specified issues.”

The twenty-ninth section provides that:

“A person shall be punished, by imprisonment for a period not to exceed two years upon conviction of the offense of having knowingly * * * made a false oath or account in, or in relation to, any proceeding in bankruptcy.”

Section 38 provides that:

“Referees respectively are invested with jurisdiction * * * to exercise the powers vested in courts of bankruptcy for the administering of oaths to and the examination of persons as witnesses and for requiring the production of documents in proceedings before them; except the power of commitment.”

Section 57 provides that:

“Proof of claims shall consist of a statement under oath, in writing, signed by a creditor, setting forth the claim, the consideration therefor, and whether any, if so, what payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor * * * Claims which have been allowed may be re-considered for cause and re-allowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.”

By the foregoing provisions of the bankruptcy law, it appears to be plain that bankruptcy proceedings are to be conducted judicially, and according to the general course of procedure in courts, and there is no doubt in my mind that this law does expressly authorize an oath to be administered by a referee in bankruptcy to a witness appearing voluntarily or under compulsory process to give testimony in support of claims presented by alleged creditors, and I hold that the indictment is not obnoxious to a demurrer upon the first of the grounds assigned.

2. The second objection to the indictment is upon the ground that perjury cannot be assigned upon the alleged false testimony given by the defendant before the referee, for the reason that said testimony was not material or relevant to any issue then being tried. This objection appears to me to be without merit, and no argument has been made in support of the same, save the bare assertion of counsel that the testimony "could not be material."

3. The third ground upon which the demurrer attacks the indictment is that the law grants complete immunity to a bankrupt from prosecution for the crime of perjury committed in giving testimony in any proceeding relating to the administration of his bankrupt estate. This contention is based upon the general and comprehensive provision contained in the ninth subdivision of section 7 of the bankruptcy act, above quoted. The statute is mandatory and absolute; that is to say, without any qualifying phrase or exception, it declares that no testimony given by a bankrupt shall be offered in evidence against him in any criminal proceeding. Of course, this provision of the statute must not be enlarged by a literal reading, so as to prohibit the use of a bankrupt's testimony given in any case; the only limitations, however, consistent with the words, will merely restrict the application of this clause to testimony given by a bankrupt in his own bankruptcy case, and to the use of such testimony against him in criminal proceedings. There is manifestly a purpose in this section to either coerce or induce a bankrupt to make a full disclosure of all knowledge and information which he may have, and which may be serviceable in securing to his creditors all of their rights, and in the due administration of his estate. The Supreme Court, however, in the case of *Burrell v. Montana*, 194 U. S. 572, 24 Sup. Ct. 787, 48 L. Ed. 1122, has determined that this statute does not grant immunity to a bankrupt from prosecution for any criminal offense committed by him and revealed by his testimony in his bankruptcy proceedings, and by the rule given in the case of *Counselman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110, this failure to provide complete immunity deprives the statute of all virtue as a coercive law, because a person cannot be compelled to answer incriminating questions by any exertion of judicial power, under a statute which does not fully protect him from being prosecuted as a criminal for any act which may be proved or detected by the use of his testimony. The decision in *Burrell v. Montana* establishes another proposition, viz.: Unless the bankrupt claims the protection of the provision in section seven (9) by objecting to the introduction of testimony given by him in his bankruptcy proceedings, such testimony may be used in a criminal prosecution against him. The converse of that proposition—viz., it would be reversible error for any court to admit testimony given by a bankrupt in his bankruptcy proceedings in a criminal proceeding against him if he interposed a timely objection to such evidence—must be true. Therefore, if the court should overrule this demurrer, and, upon a plea of not guilty being entered, should bring the defendant to trial, it would be obliged to sustain his objection to any evidence offered, tending to prove that he did in the pro-

ceedings before the referee give the testimony alleged in the indictment, and refuse to permit the government to prove that such testimony was given, and then, for lack of proof to sustain the charge in the indictment, the court would be obliged to instruct the jury to render a verdict of not guilty. This would be the necessary result, unless the defendant should waive his right to object to the introduction of the testimony essential to prove the case against him, because the testimony given before the referee is the foundation of the case, and must necessarily be proved in order to prove that perjury was committed.

I consider that it is idle to imagine that the defendant will not persist, until the final determination of this case, in asserting all the rights which the law gives him, and that it is beneath the dignity of the government of the United States to prosecute a case in the vain hope of obtaining a conviction by the defendant's consent, or by a waiver of his legal rights. This demurrer is notice to the court that the defendant will not assist the government to send him to a penitentiary by waiving a valid objection to the vital part of the government's case, for if he believed that he could vindicate himself he would not have adopted means to avoid the only good opportunity to confront his accusers.

In the written argument in support of the indictment, submitted by learned counsel as *amicus curiæ*, the court is urged to construe the last clause of section seven (9) of the bankruptcy law as a "reaffirmation of section 860 of the United States Revised Statutes," making it especially applicable to bankruptcy proceedings; the effect of such construction being to add to the clause of section seven (9) the proviso at the end of section 860, Rev. St. [U. S. Comp. St. 1901, p. 661], which reads as follows:

"Provided, that this section shall not exempt any party or witness, from prosecution and punishment for perjury committed in discovering or testifying as aforesaid."

The argument in support of this contention being that it is simply an outrage upon justice to permit a bankrupt to actively participate in an attempt to commit a fraud upon his creditors, by giving perjured testimony in support of fictitious claims, and by a literal construction of the statute shield him from the consequences to which others who commit the crime of perjury are exposed. This argument should have convincing force if addressed to the Legislative branch of the government, but addressed to a court it is nothing else than a temptation to overstep the line marking the limit of judicial power. The omission of the proviso annexed to section 860, Rev. St. U. S., and of any words of equivalent import, naturally suggests the inquiry, why the omission? If it was intentional, then necessarily Congress did not create an exception to the prohibition of the use of a bankrupt's testimony, and if it may be regarded as an inadvertent omission, still there is no exception created by Congress, and the court is not authorized to revise the statutes and amend them by ingrafting exceptions and provisos either to correct supposed inadvertent errors or to overrule the will of the legislative branch of the government. The rule on

this subject has been tersely expressed by Mr. Justice Davis in this axiom: "There is no authority to import a word into a statute in order to change its meaning." *Newhall v. Sanger*, 92 U. S. 765, 23 L. Ed. 769.

The decision of the Supreme Court in *Burrell v. Montana* in effect overrules *Mackel v. Rochester*, 102 Fed. 314, 42 C. C. A. 427, and agrees with the decision of Judge McDowell in *U. S. v. Goldstein* (D. C.) 132 Fed. 789, on the point that section seven (9) of the bankruptcy act does not deprive a bankrupt of his constitutional privilege of refusing to answer a question, if the answer may tend to incriminate him, by showing that he had committed an offense defined by the act.

In the *Marx Case* (D. C.) 102 Fed. 676, Judge Evans overruled an objection to the discharge of a bankrupt on the ground that he had made false statements in his examination, and for the reason that in his opinion the crime of perjury committed by a bankrupt in the course of his examination, pursuant to section seven (9), is not punishable. See *In re Logan* (D. C.) 102 Fed. 876. Other courts have disapproved this decision, but they have not attempted to show that perjury by a bankrupt, committed in giving testimony in the proceedings in his case, may be punished. See *In re Dow* (D. C.) 105 Fed. 889; *In re Goodale* (D. C.) 109 Fed. 783; *In re Gaylord*, 112 Fed. 668, 50 C. C. A. 415; *In re Leslie* (D. C.) 119 Fed. 406.

The most forcible expression concerning the meaning and effect of the last clause of section seven (9) of the bankruptcy law found in the above list of cases is by Judge Ray in 119 Fed., at page 409, as follows:

"This last clause was not written into the law as an encouragement to, or as a premium on, perjury. Nor was it placed there to license the bankrupt as a liar in the proceedings, and protect him from the consequences of his misstatements when he comes to apply for his discharge. The evidence cannot be used against him in any criminal proceeding. This is all."

This excerpt from Judge Ray's opinion contains two propositions. The first strongly combats Judge Evans' conclusion; the second fairly concedes his premises, and is a simple declaration that the law means exactly what its words import, and nothing else. That identical idea is controlling in this case.

It is my conclusion that, although the statute does not, in terms, grant immunity from prosecution, it does create an obstacle equally effective to prevent a conviction of the defendant.

Demurrer sustained.

BAUERSMITH v. EXTREME GOLD MIN. & MILL. CO.

(Circuit Court, W. D. Pennsylvania. June 20, 1906.)

No. 29.

1. CORPORATIONS—UNAUTHORIZED CONTRACT BY OFFICER—RATIFICATION BY ACCEPTANCE OF BENEFITS.

Plaintiff entered into a written contract with the secretary of defendant corporation, made in its name, by which he agreed to undertake the sale of its stock on commission. The secretary was without authority to make such contract, but the officers and directors were aware that plaintiff was holding himself out as the company's agent, and assuming to act for it in making sales, and, in addition to their knowledge of sales made and attempted to be made by him, they accepted by formal resolution a proposition secured by him for the purchase of a large block of stock. *Held*, that such acceptance was a ratification of the contract, whether or not they knew its terms, which they could not afterwards avoid by an attempted repudiation, and which entitled plaintiff to the stipulated commission on the sale.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 1713, 1714.]

2. BROKERS—COMMISSION ON SALE OF STOCKS—ACQUIESCENCE IN REDUCTION OF AMOUNT OF SALE.

Where a broker made a contract on behalf of a corporation for a sale of its stock, on which he was to receive a commission, but on account of difficulty in collecting the price a compromise was made with the purchaser, by which he took and paid for a smaller amount, in which the broker took part, and to which he did not at the time object, he was entitled to commission only on the amount of the actual sale.

On Rule for Judgment in Favor of Defendant Non Obstante Verdicto on Reserved Point. Also rule for new trial.

H. J. McAllister and E. L. Grantham, for the rules.
William M. Hall, for plaintiff.

ARCHBALD, District Judge.* The plaintiff, a Pittsburg broker, sues to recover commissions on the sale of certain stock of the defendant company. There was a verdict in his favor, which was taken subject to the point reserved whether there was any evidence on which he was entitled to recover, and the defendants now move for judgment non obstante veredicto upon it. The action is based on an agreement in writing, which was executed in the name and on behalf of the defendant company by W. H. Chambers, its secretary, by whom the arrangement with the plaintiff was made. That Dr. Chambers had no authority to enter into the agreement is practically conceded, he himself so testifying, as well as the other directors, and the by-laws also standing in the way. It is claimed, however, that the agreement was subsequently ratified, the company acting upon and accepting benefits under it, and it is on this that the right of the plaintiff to recover depends.

The Extreme Gold Mining & Milling Company is a South Dakota corporation, but its affairs at the time of this transaction were in the hands of parties residing in the vicinity of Pittsburg; Dr. J. Y. Scott being president, W. J. Andrews, treasurer, Dr. Chambers, secretary,

*Specially assigned.

and E. R. McClure, a director. That all of these gentlemen knew at an early day that the plaintiff was engaged in trying to make sale of the company's stock, there can be no question. Not only was the name of the company put up on the door of his office in Pittsburg, which they are shown to have visited, but letterheads were printed, and an elaborate prospectus got up and copyrighted, on which his name was prominently displayed as fiscal agent; all of which, sooner or later, came under their notice. In the latter part of June, also, soon after the agreement was executed, the plaintiff and his assistant, Mr. Houghton, went to Washington, Pa., where Dr. Scott, the president, lived, and obtained from him a letter recommending the stock to a druggist whom he knew in Pittsburg, for the purpose of enabling them to make sale, if possible, to him; and while it is true that Dr. Scott says he thought it was Dr. Chambers' stock that was being sold, this is disputed, and in the present consideration the evidence favorable to the plaintiff must be taken. But, whatever controversy there may be as to this transaction, there can be none as to the one following, for on August 11th the plaintiff, through Houghton, having secured H. C. Whitaker, of Wheeling, W. Va., as a prospective purchaser, and having taken him out to South Dakota to see the company's property, a proposition was submitted to the company, which was accepted by due resolution, to sell him 25,000 shares, at 75 cents a share, for which he was to pay \$10,000 in cash, and the balance by note to the company at one year. To assist in carrying through this sale, an effort was made by Dr. Scott, at the instance of the plaintiff, to secure a loan of \$10,000 for Mr. Whitaker at some of the Washington banks, but without success. Soon after this, the plaintiff, having been furnished by Dr. Chambers with a certificate of stock made out to Mr. Whitaker, delivered it to him on his promise to make the down payment in a few days. This he failed to do, and the matter lingered along; the plaintiff by much insistence finally getting two payments of \$500 each—one in September and the other in October—which he retained on account of his commissions. On November 15th, however, by the efforts of Dr. Chambers, Mr. Whitaker gave a 10-day note for \$10,000, payable to the order of the company. This was put in bank for collection, but by mistake was sent to Washington, Pa., instead of Wheeling, and was there protested for nonpayment; and, nothing outside of this being done by Whitaker to meet it, steps were thereupon taken to enforce the purchase. After consultation between the plaintiff and the officers of the company, an attorney was employed at Wheeling, and one or more interviews had with Mr. Whitaker there, at which he finally proposed that his subscription for 25,000 shares should be canceled, and that in place of it he would pay \$10,000 in cash, and take a correspondingly reduced amount of stock, which was agreed to. In accordance with this arrangement, after deducting the \$1,000 paid to the plaintiff, he gave a draft for \$9,000, surrendered the certificate for 25,000 shares which he had received, and took a new one for 13,333 $\frac{1}{3}$; the company, through Dr. Chambers, executing a release under seal for the balance. The plaintiff testifies that he did not agree to let Whitaker off in this way, on the strength of which he has claimed, and the

jury have allowed him, full commissions, as though the sale had gone through for the 25,000 shares. There was evidence, also, that, upon being appealed to by the plaintiff by long distance telephone, when the negotiations for a settlement with Whitaker were in progress, Dr. Scott declared that Dr. Chambers was not authorized to take anything less than the full amount, and that the company proposed to hold to the deal as it had been originally made. The settlement with Whitaker was December 21, 1904. Soon after that, Dr. Chambers says, he went to Washington to turn over the money, and have the stock which he had delivered reimbursed to him out of the stock in the treasury, but that the company refused to accede to this. Dr. Scott says that the deal fell through, and that no money was brought in, and no request made for a certificate. There is evidence outside of both that Dr. Chambers held on to the \$9,000 with the idea of getting the benefit of the transaction for himself and making it his own, and that the other directors took umbrage at this, feeling that he was not treating the company right in doing so. It was about this time that the plaintiff had a talk with Dr. Scott, in which, for the first time, he informed him that his commissions were to be 25 per cent.; Dr. Scott, in reply, stating that those which the company were allowing would warrant paying him as much as 37½, in conformity with which, he, McClure, and Andrews, acting on behalf of the company, by letter of January 14, 1905, put a block of 50,000 shares of treasury stock in the plaintiff's hands to dispose of on these terms. In addition to the sale to Whitaker, as well as several other unsuccessful efforts with others, which the directors, one or more, knew about, the plaintiff effected a further sale in September, 1904, of 666⅔ shares to a man named Dietrich in Philadelphia for \$500. For this two notes of \$250 each were given, made payable to the company, which were turned over to Dr. Chambers as secretary, and subsequently paid. The stock to complete this transaction, the same as in the sale to Whitaker, was supplied by Dr. Chambers; being transferred, as shown by the stock certificate book, from the shares standing in his individual name.

This brings us to the resolution of February 10, 1905, on which both parties in a measure rely. By the minutes of a meeting of the directors of the defendant company of that day, it appears that Dr. Chambers made two alternative propositions, based upon the transactions detailed above, in substance as follows: Reciting that, having undertaken the sale of treasury stock, he had expended large sums in advertising the property, in taking parties to investigate it, and in securing prospective purchasers, and for the purpose of effecting sales had contracted with the plaintiff in the name of the company; being compelled, however, by reason of the latter's unfaithfulness, to advance various sums, and \$1,000 having been received and kept by the plaintiff out of the proceeds of a sale, of which a settlement and compromise had been effected by the delivery of 14,000 shares of his own individual stock, he thereupon proposed: (1) That the company reimburse him for all expenses incurred in the premises, assuming the attendant obligations, and holding him harmless as agent

of the company, and recognizing and ratifying the contracts which he had made in its behalf; or (2) allowing him to make such contracts and obligations his own, issuing his own individual stock, as he had done, and receiving the proceeds, and assuming the responsibility therefor, he agreed to effect, if possible, a sale of treasury stock of the company to the amount of 14,000 shares, upon the same terms and conditions as contemplated in the sale undertaken as before mentioned; upon the acceptance of which proposition he further agreed to hold the company harmless from all expenses, liability, damage, claim, or demand, by reason of the dealings referred to. The second of these propositions was accepted; the following resolution being passed: Reciting that in his attempted sale of treasury stock Dr. Chambers had incurred large and extraordinary expenses, and to save himself from heavy financial loss had made a compromise and settlement of the same by a delivery of his own individual stock; that no money or proceeds of such sale had been paid or tendered to the company, and no treasury stock issued or demanded, nor any sale thereof made, contracted, or consummated in compliance with the rules of the company; that the company did not desire to assume any responsibility or liability for or upon such sale or settlement, or upon any sales the proceeds of which had not been received by the company; thereupon, expressing confidence in the ability of Dr. Chambers to effect a sale of treasury stock such as he suggested, and relying upon his undertaking to save the company harmless, it was resolved: (1) That the proposition to ratify the attempted sale and settlement be rejected, and that all parties be relieved from any and all liability to the company on account of them; and, further (2) that the offer to sell 14,000 shares of treasury stock be accepted; Dr. Chambers being authorized to bring or defend any action in the name of the company which he might deem proper under his obligation to protect it.

This resolution was prepared by counsel, and was evidently intended to get the benefit of the sales which had been made to Whitaker and Dietrich, without being responsible for them; but in the face of the facts, at least as to the Whitaker sale, it was not competent to do so. By due action taken August 11, 1904, the application of Mr. Whitaker for 25,000 shares had been accepted, and the sale which the plaintiff had solicited was thereby adopted and confirmed. It may be that this was done without direct knowledge of the existence of the writing on which the plaintiff relies, and so without knowledge as to the amount of commissions which he was to get, or the provision with regard to paying for the printing of prospectuses, letter-heads, etc. But it certainly was known by the directors that, in seeking to effect this and other sales, he was acting for the company on authority which proceeded from somewhere, and, in accepting the benefit of his services, they necessarily committed themselves to the means by which these services were secured. This is not to impute or presume knowledge; it is not that they might or ought to have known, and are therefore to be held as though they did. *Murray v. Nelson Lumber Co.*, 143 Mass. 250, 9 N. E. 634. But, having taken advan-

tage of what had been done in their behalf, they could not afterwards refuse to be bound thereby—a doctrine which is abundantly sustained by the authorities. *Wheeler & Wilson Mfg. Co. v. Aughey*, 144 Pa. 398, 22 Atl. 667, 27 Am. St. Rep. 638; *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520; *Clement Bane & Co. v. Clothing Co.*, 110 Mich. 458, 68 N. W. 224. As said by Sharswood, J., in *Mundorff v. Wickersham*, 63 Pa. 87, 3 Am. Rep. 531:

"Thus, where a party adopts a contract which was entered into without authority, he must adopt it altogether. He cannot ratify the part which is beneficial to himself, and reject the remainder; he must take the benefit to be derived from the transaction cum onere."

Or, as declared in *Scott v. Middletown Railroad*, 86 N. Y. 200:

"Where property bought by the president of a railroad without authority was appropriated and used for corporate purposes, it amounted to an adoption and ratification; the directors so using the material being bound to inquire and presumed to know whether it was paid for or not. It was not essential that they should have actual knowledge of the terms of the contract of purchase; that, for instance, it was made upon the credit of the corporation."

While, then, in the case in hand, Dr. Chambers may have had no authority to bind the company by a written agreement with the plaintiff, as he undertook to do, yet when the board of directors accepted the benefit of the plaintiff's services, which were so secured, as they did when they adopted the sale which he had negotiated with Whitaker, they took upon themselves the obligation to compensate him according to the terms of the agreement under which he acted, whether they knew of its existence or not. It is not as though he was acting for the purchaser in the transaction, nor as though he were a mere volunteer, and it is idle to suggest that it was supposed Dr. Chambers' stock was being sold. He acted for the company, and the directors knew it, and the shares which they agreed to sell were those of the company, as the resolution accepting the application conclusively proves. It was therefore the duty of the directors to inquire and know upon what terms he was acting, and to give timely notice if they did not propose to be bound thereby. They could not play fast and loose with the plaintiff, appropriating his services, and refusing the compensation stipulated for by which those services were obtained.

It is claimed, however, by the defendants that they got nothing out of the Whitaker sale, and that it was subsequently repudiated and annulled. But it is not true that they get no benefit from it, and it is not material that it was not carried out to the full extent that it had been made. Whether it was or not, the plaintiff's services were complete when he secured a responsible purchaser upon terms which were agreeable to the company; and, having once ratified the agreement with him by accepting the benefit of what he had done, they could not throw off the obligation, whether they went on with the sale which he had negotiated or not. The fact is, however, that by the resolution which was finally adopted, however it may be disguised, and whatever may seem to be its terms, advantage was taken of both the Dietrich and the Whitaker sales, thus unquestionably bind-

ing the company, upon the principle already alluded to, even if not previously bound. The arrangement speciously entered into with Dr. Chambers, by which he apparently undertook the sale of 14,000 shares of treasury stock, was a mere form. He never attempted any such sale, and it was not expected that he would. This was the exact amount of the combined Dietrich and Whitaker sales, as finally consummated, there being $666\frac{2}{3}$ shares of the one, and $13,333\frac{1}{3}$ of the other, and all he did was to turn over the money which had been obtained from them, which in fact already belonged to the company, but which he had kept back; being reimbursed with treasury stock for that which he had taken from his own individual holdings in order to consummate these sales. That at this time the directors knew of the agreement with the plaintiff, which had been entered into by Dr. Chambers, there can be no question; direct reference being made to it in the resolution. In thus taking advantage, mediately or immediately, of the plaintiff's labors, they acted with knowledge, if that be necessary where there has been an acceptance of benefit; so that, even upon that basis, complete liability was made out. There was abundant evidence, therefore, as this review of it will show, to sustain the verdict, and the rule for judgment notwithstanding it must be discharged.

In one respect, however, the verdict is not to my satisfaction. It allows the plaintiff commissions, as though the sale to Whitaker was carried through for the whole 25,000 shares. No doubt, in a measure, these commissions were earned when Mr. Whitaker was secured as a purchaser for that amount upon terms which were acceptable to the company. But difficulty was experienced in enforcing the sale, as we have seen, to which the plaintiff himself contributed when he delivered the stock without getting the down payment which was to have been made. At all events, in the negotiations which followed looking to a settlement, the plaintiff directly participated, and while he now says that he did not consent to the compromise by which the sale was reduced to $13,333\frac{1}{3}$ shares, he made no protest at the time when he was called upon to speak, which is much more significant. It is true that he telephoned to Dr. Scott to see whether Dr. Chambers had authority to settle for less than the whole, which may seem to lend some countenance to his present contention, but he made no objections in the end, and his only complaint in the transactions which immediately followed was that Dr. Chambers did not turn over to the company the draft which Whitaker had given, so that he could get his commissions out of it. Actions speak louder than words, and I am therefore constrained to hold that the evidence of his assent to the settlement with Whitaker is too positive and convincing to be disregarded, and that the jury ought not, in the face of it, to have allowed him commissions to the extent they did.

The rule for judgment in favor of the defendants non obstante veredicto is discharged. The rule for a new trial will also be discharged, upon condition that the plaintiff, within 20 days by paper filed agrees to remit from the verdict all over and above the sum of \$1,710.31; or otherwise will be made absolute, and a new trial awarded.

COOK v. SOUTHEASTERN LIME & CEMENT CO.

(District Court, D. South Carolina. June 14, 1906.)

SHIPPING—DAMAGE TO CARGO—DANGERS OF THE SEA.

Where it is shown that a wooden vessel was seaworthy at the inception of her voyage, that the cargo was properly stowed and protected, that she was properly provided with pumps and the same were properly worked, that her hatches were properly secured, and that she encountered on her voyage heavy seas of unusual violence adequate to strain her seams and cause her to take in an unusual quantity of water, damage to her cargo therefrom, which it is not shown could have been avoided by the exercise of ordinary skill and care, is within the exception of "dangers of the sea" in the bill of lading, for which she is not liable.

[Ed. Note.—Losses by perils of the sea, see note to *The Dunbritton*, 19 C. C. A. 465; *Southerland-Innes Co. v. Thynas*, 64 C. C. A. 118.]

In Admiralty.

Nathans & Sinkler, for libelants.

Mordecai & Gadsden and Rutledge & Hagood, for respondent.

BRAWLEY, District Judge. The libel is for the balance due as freight on a cargo of cement, and the answer admits that the amount of freight money is correctly set forth, but claims that there should be deducted therefrom an amount covering the damage to the cargo and the expense of rehandling it, which would leave nothing due, and alleges:

"That the said schooner, its master and owners, were guilty of negligence in that they left the port of New York with her bottom badly calked and in an unseaworthy condition, and without having her decks properly protected and calked, in consequence of which the cement in wood in the lower part of the hold was damaged, as well as the cement in sacks above."

The schooner sailed from New York November 30, 1905, with a cargo of 1,000 barrels and 24,000 sacks of cement, arriving in Charleston December 6th. When the cargo was unloaded, it was found that 606 barrels and 1,455 sacks had been damaged by water, requiring rehandling and sifting, and the net loss proved is 116 barrels and 319 sacks.

As it is the primary obligation of the carrier to carry with reasonable care, such an unusual damage as is proved in this case raises a presumption of fault and puts upon the ship the burden of proving that the loss falls within some of the exceptions of the bill of lading. The only exception in the body of the bill of lading is the "dangers of the sea." Further exception is stamped on it by a rubber stamp as follows, "Vessels not accountable for leakage, breakage or calking," and, as the libelants claim that the damage was due to the "dangers of the sea," it is for them to show a sea peril adequate to cause such loss in a seaworthy ship. The testimony shows that the "Mary B. Baird" was a schooner about 15 years old; that, during the fortnight preceding the taking on of this cargo, she was in the dry dock in New York for recalking and repairs, and was there examined by an inspector of the Atlantic Insurance Company, who made a careful inspection in behalf of that company, which insured the cargo. This

inspector testifies that the ship was in good seaworthy condition. One of the port wardens of Charleston, who examined the vessel on her arrival in Charleston, testifies that the hatches were well covered, tarpaulin well secured and battened, and seams well calked and cemented; that the cargo was particularly well stowed and dunnaged. The barrels were laid in a single tier upon dunnage 10 or 12 inches in depth, and the sacks were in layers on top of the barrels. Some of the damage was undoubtedly caused by water leaking through the forward hatch, but there was other damage not so caused. The port warden testified to seeing evidences of the lower part of the barrels having been wet. The chief witness for respondent testifies that some of the barrels were wet both at top and bottom, and bore signs of having lain in water; that the barrels were lined with stiff paper; and that the damage could not have been caused merely by water dashing against the outside of the barrels. It is difficult to understand how so much damage could have been caused by the ordinary leakage to be expected in rough weather, and from the blowing of the water in the rolling of a ship, but what has been called "the perversity of inanimate things" often baffles explanation.

There is no testimony which contradicts or impeaches that of the inspector who examined the ship in New York, and I am bound therefore to hold that the ship was seaworthy when she sailed. The testimony of the port warden that the hatches were well secured and battened, and seams well calked and cemented on her arrival in this port, is not contradicted, and no fault is alleged or proved as to the stowage of the cargo, which he says was rather better than the average. The testimony also shows that the ship was well provided with pumps, and that the ship was regularly pumped. The master, the mate, and a seaman were examined for the libelants. They testify that they encountered a strong gale from the northwest when they came out of New York, but after that there was no storm, but all of them say that they had very rough weather all the way down, heavy seas washing across the deck all the time, and the vessel laboring heavily. The mate and seaman both testify that it was the roughest passage they had ever had in southern waters. The question for decision therefore is whether the rough weather described was one of the ordinary incidents of a sea voyage, or whether it is to be considered one of the "dangers of the sea," within the exception of the bill of lading. "Perils of the sea" are the exceptions in almost all marine undertakings, and the phrase has been defined in innumerable cases. Sometimes it is construed as equivalent to an act of God, but it has grown to have a wider signification, and the expression is generally construed to denote those accidents at sea peculiar to navigation arising from irresistible forces or overwhelming power which do not happen by the intervention of man, and cannot be guarded against by the ordinary exertions of human skill and prudence. Any loss which might have been avoided by the exercise of reasonable skill or diligence, at the time when it occurred, is not deemed such a loss by the perils of the sea as will exempt the carrier from liability; but a loss from the effect of storms and

tempests and straining the ship or causing her to leak, whereby damage is done to the goods, may be well attributed to the perils of the sea, although in one sense they may be ordinary accidents. It is well known, and has been proved in this case, that all wooden vessels will leak a little. That does not render them unseaworthy, and wherever it is proved, as it has been here, that a vessel was seaworthy at the inception of her voyage, that her hatches were well secured, that her cargo was well stowed, that her pumps were efficient and properly worked, that she encountered heavy seas which washed across her deck, that she labored heavily, that the rolling caused by such heavy seas was calculated to strain her seams and cause her to take in water, and that such rolling prevented the pumps from discharging the water, I must conclude, upon the authority of the decided cases, that the damage must be attributed to "dangers of the sea," for which the ship was not liable under the exception of the bill of lading.

In *The Warren Adams*, 74 Fed. 413, 20 C. C. A. 486, the court says:

"Where a vessel, soon after leaving a port, becomes leaky without stress of weather or other adequate cause of injury, the presumption is that she was unsound before setting sail. The law will intend a want of seaworthiness, because no visible or rational cause other than a latent or inherent defect in the vessel can be assigned for the result. But where it satisfactorily appears that the vessel encountered marine perils, which might well disable a staunch and well-manned ship, no such presumption can be invoked."

In *The Ontario* (D. C.) 106 Fed. 329, Judge Brown, a very able and experienced admiralty judge, reviewing many of the cases, says:

"Leaks arising in the course of heavy weather to a ship proved by abundant testimony to have been carefully observed and tested in the particulars complained of, and found in all respects reasonably fit for the voyage, are held to be properly attributable to the excepted perils or 'dangers of the sea,' and not to unseaworthiness."

The rolling of the ship, in what all the witnesses testify to have been uncommonly rough and heavy seas, with the attendant straining, furnishes a sufficient and reasonable explanation of the leaking. This rolling would prevent the pumps from exhausting all the water, and the damage from the blowing of the sea water from the hold, and from the taking in of water through the hatches, was a damage which could not have been avoided by the use of ordinary care. No human strength could resist, and no human foresight could prevent, the operation of these elements. Absolute impregnability to the assaults of the elements is not the test of seaworthiness. The test is whether she was reasonably fit for the contemplated voyage. Nor is there any rule which defines with unfailing accuracy the degree of violence of winds or waves which constitute a peril of the sea. Cross-seas of unusual violence are sometimes so held, and there is a case which holds that the blowing of the vessel is a peril of the sea. It has been held, too, that the mere rolling of a vessel in a cross-sea is not of itself a peril of the sea. It has been also held that the term is not to be restricted to damage inflicted by the extraordinary violence of the winds and waves.

One of the definitions most commonly cited is that the term embraces "all marine casualties resulting from the violent action of the elements, as distinguished from the natural, silent influence upon the fabric of the vessel, casualties which may, and not consequences which must occur"; but the rule deducible from all the cases examined is that, when it is proved that the ship was seaworthy at the inception of her voyage, that the cargo was properly stowed and protected, that she was properly provided with pumps, and the same were properly worked; that her hatches were duly secured, and that she encountered on her voyage heavy seas of unusual violence, adequate to strain her seams and cause her to take in an unusual quantity of water, it is for the shipper, under a bill of lading of this character, to show that the damage could have been avoided by skill and diligence, and, there being no such proof in this case, the decree must go for the libelants.

UNITED STATES v. BOAK FISH CO.

(Circuit Court, D. Minnesota, Third Division. May 12, 1906.)

No. 115 (1,735).

CUSTOMS DUTIES—MEASUREMENT—"QUART"—DRY MEASURE—FOXBERRIES IN WATER.

As to foxberries in barrels, with water added to act as a cushion, so as to prevent crushing, *held* that, in assessing the duty "per quart," provided in paragraph 262, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], the dutiable quantity should be ascertained by the use of the dry quart and not the liquid quart.

On Application for Review of a Decision of the Board of United States General Appraisers.

Charles C. Hought, U. S. Atty.

S. C. Olmstead, for importers.

AMIDON, District Judge. This is an appeal by the United States from the decision of the Board of General Appraisers (G. A. 6,080, T. D. 26,512), touching an importation of foxberries at the port of St. Paul, Minn., by the Boak Fish Company. The berries are imported in barrels. After the barrels are filled with the berries, water is added, so as to make a cushion between the berries, and prevent them from crushing by their own weight in the process of shipment. The function of the water is not to chemically change the berry or to act as a preservative. It serves no purpose but to protect the berries against crushing. *Boak et al. v. United States* (C. C. A.) 125 Fed. 599. At the port of entry the water is first drawn off, and the quantity of the berries is then gauged and the number of cubic inches ascertained. The berries are dutiable under paragraph 262, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], at the rate of one cent a quart. The collector at St. Paul measured them by the liquid quart, which contains $57\frac{3}{4}$ cubic inches, whereas the importer insisted that they ought to be measured by the quart

of dry measure, which contains 67.2 cubic inches. The Board of General Appraisers sustained this position of the importer, and reversed the action of the collector. The government now appeals against the decision of the Board of General Appraisers.

The statute in no way defines the kind of quart by which the berries should be measured, nor is there any other statute of the United States prescribing what substances shall be measured by dry measure and what by liquid measure. In fact, Congress has failed to establish a uniform system of weights and measures, such as it is authorized to do under section 8, art. 1, of the Constitution. Those matters have, in the main, been left to executive practice. In 1830 the Secretary of the Treasury was directed to cause a comparison to be made of the standards of weights and measures in use at the principal customs houses. As a result of that investigation, large discrepancies were disclosed in the weights and measures in use at the different points. Thus, while the Constitution provides that all duties, imposts, and excises shall be uniform throughout the United States, and while the statute in that respect was uniform, still in practice a wide diversity was found. To correct this evil Prof. Ferdinand Hassler, a scholarly German scientist and the first superintendent of the coast survey, was, by resolution of the Senate, directed to prepare for the Treasury Department standards of weights and measures having the necessary degree of precision. After some years of investigation, such standards were prepared, and copies thereof distributed to the several ports of entry. For the purpose of further encouraging uniformity of weights and measures, the Secretary of the Treasury was, in 1836, directed to furnish copies of the standards thus prepared to the Governors of the several states, and in 1881 a similar provision was made for the furnishing of copies of the standards to the several agricultural colleges. In this way, while the standards have failed to attain scientific accuracy, they have been sufficient for practical purposes, and have steadily tended to build up uniformity in weights and measures. I am not aware of any statute or regulation of the Treasury Department prescribing what articles shall be measured by the standards of dry measure and what by the standards of liquid measure. This has evidently been left largely to business experience. In the statutes of the several states, however, specific directions may be found upon this subject. I cite by way of example the statutes of California. Section 3209 of the Political Code adopts as the standards for that state the standards furnished by the United States government, and specifies the contents of each.

Section 3216 provides:

"The standard gallon and its parts are the units or standards of measure of capacity for liquids, from which all other measures of liquids are derived and ascertained."

Section 3218 provides:

"The standard half bushel is the unit or standard measure of capacity for substances that are not liquids, from which all other measures of such substances are derived and ascertained."

Similar provisions will be found in the statutes of other states. These enactments leave no doubt that all articles except liquids ought to be measured by dry measure. The foxberries would, therefore, be properly measured by dry measure. In view of the character of the article, this would seem to be the only sensible standard to adopt. The testimony of several retail grocers in St. Paul was taken by the government in this case, from which it appears that only one quart measure is used by them in their establishments. The evidence leaves it doubtful whether that measure is the dry measure or the liquid measure as to its capacity. Such evidence, however, is of no practical worth in determining the question that is under consideration. The fact is that in recent times nearly all articles that we formerly measured by the dry measure quart are now put up in boxes or other receptacles in which they are delivered to the purchaser.

But if the question raised by this appeal were not thus plain, as I think it is, there is another rule by virtue of which the decision of the Board of General Appraisers ought to be affirmed. It is the settled rule of the courts that, wherever any ambiguity is left in tariff statutes, the doubt ought to be resolved in favor of the importer. *Hartman v. Wiegmann*, 121 U. S. 609, 7 Sup. Ct. 1240, 30 L. Ed. 1012; *Twine Co. v. Worthington*, 141 U. S. 468, 12 Sup. Ct. 55, 35 L. Ed. 821.

The decision of the Board of General Appraisers is therefore affirmed.

SMITH v. ALEXANDER et al.

(Circuit Court, D. Rhode Island. June 7, 1906.)

No. 2,692.

INJUNCTION—RIGHT TO PRELIMINARY INJUNCTION—DOUBTFULNESS OF COURT'S JURISDICTION.

A suit in a federal court against a board of state commissioners for an injunction, the real purpose of which is to secure the enforcement of a contract between complainant and the state, in accordance with the interpretation placed thereon by complainant, the correctness of which is denied by defendants, is one in which the jurisdiction of the court is so doubtful under the eleventh constitutional amendment denying jurisdiction of suits against a state that a preliminary injunction will not be granted.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 309.]

In Equity. On motion for preliminary injunction.

Vincent, Bass & Barnfield and Walter B. Vincent, for complainant.
Wm. B. Greenough, Atty. Gen. of Rhode Island, for defendants.

BROWN, District Judge. I am of the opinion that the complainant's rights are so doubtful that this court would not be justified in granting a preliminary injunction. The contract between the state of Rhode Island and the complainant, relating to the steel structure of a bridge upon the site of the present Rhode Island Stone Bridge, pro-

vides, in section 5 of the specifications, for the loads for which the steel structure shall be designed. Controversy has arisen over the following language:

"The live or moving load shall be taken at 100 pounds per square foot of area of roadway and sidewalk, in addition to one loaded electric car in any position on the bridge at the same time. The electric car load shall be taken at 80,000 lbs.," etc.

Plans submitted by the contractor were rejected by the engineer, on the ground that they did not conform to these requirements. In disposing of this petition, it is not necessary to consider other objections made by the engineer.

The complainant has repeatedly, and in most positive terms, refused to accept the engineer's interpretation of the contract. Although the contract provides that the engineer shall decide as to the meaning and intent of the specifications, complainant insists upon his own interpretation of this clause, which is, in substance, that the steel structure shall be designed, not to carry the electric car load of 80,000 pounds in addition to the live or moving load of 100 pounds per square foot of roadway and sidewalk, but to carry either, and not both, of these loads; in other words, that the provision is not for combined loads, but for alternative loads. The complainant seeks to support his interpretation of the contract by evidence of an understanding between him and one or more of the commissioners and the engineer prior to the execution of the contract, and thereby to explain, control, and qualify the language of the contract. It is doubtful whether this evidence is of any value from a legal point of view, in view of the decisions of the Supreme Court in *The Barnstable*, 181 U. S. 464, 472, 21 Sup. Ct. 684, 45 L. Ed. 954, and *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 12 Sup. Ct. 46, 35 L. Ed. 837.

Passing this question, there arises the further question whether the parties to the contract have not, by their own agreement, conferred upon the engineer full power to determine such a question of interpretation of the specifications as that which complainant has raised.

It is not necessary, however, to consider the grounds upon which the complainant bases the argument that he is not bound by the interpretation of the engineer, for there is the further and most serious objection that this court has no jurisdiction for the reason that the suit is, in effect, a suit against the state of Rhode Island, and therefore substantially within the prohibition of the eleventh amendment to the Constitution of the United States, which declares that:

"The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state."

The gist of the case is the interpretation of a contract between the state of Rhode Island and the contractor. It is plain that the state of Rhode Island has a substantial interest in the question, what shall be the strength of the structure which is to be built by the contractor? Whether the state is a party is not to be determined by the nominal parties to the record, but by the effect of the judgment

or decree which is sought. If this complainant could prevail, the engineer would be required to accept plans which in his judgment do not conform to the contract between the complainant and the state.

I am unable to accept the complainant's contention that this bill seeks the enforcement by state officers of purely ministerial duties imposed by law. The complainant seeks to establish a particular interpretation of the contract, and to introduce evidence in aid of this interpretation. He seeks to enjoin particular acts, on the ground that they constitute a violation of his rights under the contract. It was said in *Re Ayers*, 123 U. S. 443, 503, 8 Sup. Ct. 164, 182, 31 L. Ed. 216:

"The defendants as individuals, not being parties to the contract, are not capable at law of committing a breach of it. There is no remedy for a breach of a contract, actual or apprehended, except upon the contract itself, and between those who are by law parties to it."

See, also, pages 489, 491, 501, 503, of 123 U. S., page 164 of 8 Sup. Ct., 31 L. Ed. 216.

The decisions of the Supreme Court upon this subject are numerous. On behalf of the defendants, the following cases are cited: In *re Ayers*, 123 U. S. 443, 497-507, 8 Sup. Ct. 164, 31 L. Ed. 216; *Union Trust Co. v. Stearns et al.* (C. C.) 119 Fed. 790, 793; *Harkrader v. Wadley*, 172 U. S. 148, 159, 19 Sup. Ct. 119, 43 L. Ed. 399; *Minn. v. Hitchcock*, 185 U. S. 386, 22 Sup. Ct. 650, 46 L. Ed. 954; *Chandler v. Dix*, 194 U. S. 590, 24 Sup. Ct. 766, 48 L. Ed. 1129; *Cunningham v. R. R. Co.*, 109 U. S. 446, 456, 3 Sup. Ct. 292, 27 L. Ed. 992; *Pennoyer v. McConnaughy*, 140 U. S. 1, 8, 9, 11 Sup. Ct. 699, 35 L. Ed. 363; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128, 27 L. Ed. 448; *Antoni v. Greenhow*, 107 U. S. 769, 2 Sup. Ct. 91, 27 L. Ed. 468; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608, 29 L. Ed. 805. The complainant cites especially *Tindal v. Wesley*, 167 U. S. 204, 17 Sup. Ct. 770, 42 L. Ed. 137; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *Davis v. Gray*, 16 Wall. 203, 21 L. Ed. 447; *Pennoyer v. McConnaughy*, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. Ed. 623; *Fitts v. McGhee*, 172 U. S. 516, 19 Sup. Ct. 269, 43 L. Ed. 535.

Having in mind the distinctions drawn in these cases between cases against state officers to enjoin or compel the performance of purely ministerial duties, suits to enjoin action under unconstitutional statutes, and suits which, though nominally against officers, are held to be, in substance, suits against the state, I am strongly inclined to the view that the present case is of the latter class.

Petition for a preliminary injunction denied.

In re KNOFF.

Ex parte SANDERS.

(District Court, D. South Carolina. June 12, 1906.)

BANKRUPTCY—FRAUDULENT SALE OF GOODS BY BANKRUPT—RECOVERY BY TRUSTEE.

A purchaser of the entire stock of a retail merchant is put upon inquiry as to the seller's solvency and motive in selling and will not be protected as a bona fide purchaser as against the creditors of the seller in bankruptcy where he made no inquiry of the seller, who in fact was insolvent and sold for the purpose of hindering, delaying and defrauding creditors and where the sale was made hurriedly without inventory and for a price considerably less than the actual value of the goods, even though he had no knowledge of such fraudulent purpose and paid for the goods.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 264.]

In Bankruptcy. Ex parte C. H. Sanders.

Jacob Gazan and J. A. Willis, for creditors.

Bates & Simms, for Sanders.

Davis & Best, for bankrupt.

BRAWLEY, District Judge. The opinion filed March 3, 1906 (144 Fed. 245) upon petition for review of the finding of the referee and for vacating the order of said referee for the taking possession of the stock of merchandise of the bankrupt alleged to have been illegally transferred to C. H. Sanders, states the facts which in the opinion of the court sustain the action of the referee. Leave was then given to C. H. Sanders to set up by an appropriate proceeding his claim of title to said stock of merchandise, and his petition was referred to the referee, who has taken testimony offered by Sanders in support of his claim, and the case is now before me upon a report of the testimony so taken, and argument has been heard thereon.

There is nothing in this testimony that has shaken the conclusions of the court heretofore reached that the purpose of Knopf in the disposal of his stock of merchandise at the time and in the manner stated was to hinder, delay and defraud his creditors. All the testimony tends to confirm the correctness of that conclusion. At the time of the transfer to Sanders, September 30, 1905, Knopf was indebted to his creditors for merchandise bought for the fall trade in the sum of \$6,000 or \$7,000, and some of the notes were then due and the creditors were beginning to press him for payment. The money paid by Sanders for the stock of merchandise was \$3,000. The goods were nearly all fresh stock, bought for the fall trade, and in addition to this stock which Sanders bought for 75 per cent. of its cost, all of the accounts due Knopf were transferred to him. No inventory of the stock was taken. The transaction was hurriedly made, the offer having been made on Thursday afternoon, and the transaction concluded Saturday morning. Of the money received by Knopf, \$1,500 was paid to one Loadholz, a local creditor; about \$700 to his brother, J. J. Knopf, and about the same amount is alleged to have been sent to another brother. The creditors

who sold the merchandise in the autumn of 1905 received nothing, and Knopf has no other assets from which they can expect to receive anything. The sale was clearly made for the purpose of hindering and delaying these creditors, and that purpose has been accomplished. On this point there is no room whatever for a doubt, nor is it disputed. The only question is whether Sanders is so far a bona fide purchaser that his title to the goods is to be protected. That he has by his conduct enabled Knopf to consummate his scheme of fraud, and that the creditors who sold the goods, the title to which is now disputed, will receive nothing if the transfer to Sanders is sustained, is not contested. The testimony presented by Sanders in support of his claim as a bona fide purchaser is that he was a farmer in the neighborhood of Fairfax, in a small way, living upon rented land, and that by his honesty, industry and economy he had saved about \$1,500. The witnesses produced all testify to his good character, and leave no reason to doubt that he actually paid the money which he claims to have paid for this stock of goods, \$1,500 of this amount being his own money, and \$1,500 borrowed from another party for that purpose. Assuming then that the money was actually paid and that Sanders had no actual knowledge of or intentional participation in Knopf's fraudulent purpose with respect to his creditors, is he entitled to be protected as a bona fide purchaser? It is well settled that a conveyance made for a fraudulent purpose may be set aside, and that the fraud of the vendor from whom the vendee derives his title will vitiate it if the vendee has either actual or constructive notice of the fraud, and constructive notice is such a knowledge of facts as should excite the suspicions of a man of ordinary prudence, and such as ought to have put him upon inquiry as to the reasons and motives of the vendor, which inquiry if followed with ordinary diligence would have led to the discovery of the fraudulent intent.

The case of *Walbrun v. Babbitt*, 16 Wall. 577, 21 L. Ed. 489, cited in the former opinion, and the other cases there cited, establish the principle that a transfer by a retail merchant of his entire business is not a sale in the usual course of trade, that it is *prima facie* fraudulent, and imposes upon the purchaser the active duty of inquiring into the vendor's financial situation. In *Walbrun v. Babbitt*, the court considered a transaction very similar to the one under review. In that case *Mendleson*, a retail merchant in a small town, sold his entire stock of goods to one *Somerfield* at 25 per cent. below cost, and *Somerfield* sold the goods to *Ritter*. There is no question that the money was actually paid. The court says:

"The usual and ordinary course of *Mendleson's* business was to sell at retail a miscellaneous stock of goods common to country stores in a small town in the interior of the state of Missouri. It was to conduct a business of this character that the goods were sold to him, and as long as he pursued the course of a retailer his creditors could not reach the property disposed of by him, even if his purpose at the time was to defraud them, but it is wholly a different thing when he sells his entire stock to one or more persons. It is an unusual occurrence, out of the ordinary mode of transacting such a business, is *prima facie* evidence of fraud, and throws the burden of proof on the purchaser to sustain the validity of his purchase."

The unusual character of the transaction raises a presumption of fraud. Knopf being insolvent, the law required an equal distribution of his as-

sets among his creditors. By reason of this transaction he was enabled to evade this obligation, and with the money received he has been enabled to make a fraudulent preference of one creditor, and to pay over to his two brothers the balance of the purchase money, so that the creditors who sold the goods received nothing. Sanders, who paid the money, has enabled him to consummate this fraud, and assuming his innocence of any intentional participation in the fraud, it is a familiar principle that where one of two innocent parties must suffer, the loss should fall upon that one by whose action the injury was inflicted.

The testimony shows that Sanders was desirous of embarking in the mercantile business, and for that purpose he made a contract with one Harter for the purchase of his stock; that he was to give the cost price of said stock, and a careful inventory was made of it. In the purchase of Knopf's stock he was to pay only 75 per cent. of the cost, and while mere inadequacy of price is not always a sufficient reason for vitiating a sale, it is sometimes considered a badge of fraud. He evidently thought that he was making what he called a "good deal" in purchasing the stock at 75 per cent. of its cost. He was so desirous of consummating it that he did not take time to make an inventory. The testimony is that Knopf told him that his business was not good; that one of his clerks in another store, to wit, his brother J. J., "was not doing exactly right"; that several notes were due, and that he expected to leave Fairfax. There is no testimony to show that Knopf told Sanders how much he owed, and Sanders admitted that he did not inquire. Sanders testifies that he did inquire of one Terry as to whether Knopf owed much money and that Terry told him that he did not know. He also says that he inquired of McClendon, who had been Knopf's clerk, but McClendon said he did not know how much Knopf owed. He also says that he asked Loadholz; Loadholz told him that he did not know anything of his debts. The only person of whom Sanders made any inquiry as to Isaac Knopf's financial condition who was in a position to know anything about it, was his brother, J. J. Knopf, who told him that Isaac was doing well, that he had made money; but Sanders had already been informed by Isaac himself that his business was not good, and had been informed of his suspicions of the dishonesty of J. J. Knopf. Sanders testifies that he did not believe these suspicions were well founded, and he took J. J. Knopf in his employment. He says that he did not examine the books of the concern because he was no bookkeeper and could not have learned anything from them; but he could have employed some one competent to examine the books for him, and such an inquiry would probably have disclosed the fact that the goods bought for the fall trade had not been paid for. I am constrained to hold, therefore, upon the authority of the case already cited, that the transaction being *prima facie* fraudulent, Sanders has not shown that he made proper inquiry to ascertain Knopf's pecuniary condition; that, in the words of the opinion already cited, he "knew or ought to have known that a retail dealer in selling out his entire stock was presumptively guilty of intending to defraud his creditors"; that he took the hazard of Knopf's insolvency and of the invalidity of his title. It is therefore adjudged and decreed that the petition of Sanders that the stock of goods be restored to him be dismissed, and the trustee is di-

rected to dispose of the same in the ordinary course of administration of the estate of bankrupts and to distribute the proceeds among the creditors of Knopf.

A question was made upon the last hearing as to Sanders' claim to have returned to him so much of the money proved to have been paid out of the purchase money on the note to Loadholz. It may be that he has some claim of subrogation in the event that the trustee recovers from Loadholz, but that question is not now before me.

SPENCER & CO. v. UNITED STATES.

(Circuit Court, S. D. New York. February 22, 1906.)

No. 3,973.

1. CUSTOMS DUTIES—CLASSIFICATION—NUTS—APRICOT KERNELS.

Apricot stones come within the common definition of "nuts," and apricot kernels are dutiable as "nuts * * * not specially provided for," under paragraph 272, Tariff Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652].

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision under review affirmed the assessment of duty by the collector of customs at the port of New York, on the authority of a former decision of the Board of General Appraisers, reported as G. A. 5,274 (T. D. 24,206).

Comstock & Washburn (J. Stuart Tompkins, of counsel), for the importers.

Henry A. Wise, Asst. U. S. Atty.

WHEELER, District Judge. This importation is of apricot kernels, which have been assessed for duty as shelled almonds at 6 cents per pound, under paragraph 269, Act July 24, 1897, c. 11, § 1, Schedule G, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1651], against a protest, among others, that the duty should be but 1 cent per pound, under paragraph 272, 30 Stat. 172 [U. S. Comp. St. 1901, p. 1652], which provides for "nuts, of all kinds, shelled or unshelled, not specially provided for in this act one cent per pound." Almonds are in the nut schedule, and these kernels that are shelled from apricot stones are as well nuts as the meats shelled from the stones of the almond are. Both are drupe fruits, and the stones of each seem to come within the common definition of nuts which have to be cracked to get the kernel. The almonds are nuts specially provided for, and the apricot stones or pits, including the kernels, of much less value, seem to be nuts not otherwise specially provided for, but left to go in the general provision at the much lower rate.

Decision reversed.

GAMBLE v. RURAL INDEPENDENT SCHOOL DIST. OF ALLISON et al.

RURAL INDEPENDENT SCHOOL DIST. OF ALLISON,
et al v. GAMBLE.

(Circuit Court of Appeals, Eighth Circuit. March 16, 1906.)

Nos. 2,212, 2,300.

1. CONSTITUTIONAL LAW—OBLIGATION OF CONTRACTS—NEGOTIABLE MUNICIPAL BONDS—RIGHTS OF BONA FIDE PURCHASER.

A bona fide purchaser of negotiable bonds for value before maturity, and without notice of any infirmity therein, is entitled, as an incident to his ownership, to transfer the title to another, with all the rights with which he is vested; and such right, once accrued, is one of contract, which cannot be destroyed or impaired by state legislation.

[Ed. Note.—Bona fide purchasers of municipal bonds, see note to *Pickens Tp. v. Post*, 41 C. C. A. 6.]

2. SAME—IOWA STATUTE.

In 1888 the Legislature of Iowa enacted an amendment to section 2114 of Code 1873, by which it was provided that if negotiable paper "has been procured by fraud upon the maker no holder thereof shall recover thereon of the maker a greater sum than he paid therefor with interest and costs." Code 1897, § 3070. At the time of such enactment, a negotiable bond issued by an Iowa school district having statutory power to issue the same was held by an innocent purchaser for value, who, although the bond was fraudulently issued, was protected by the recitals therein, and both by the law merchant and the state statute entitled to recover its full face value. After its maturity such holder sold and transferred the bond for less than its face to complainant, who had knowledge of its fraudulent character. *Held*, that the statute could not affect the right of such holder to transfer the bond with all of her vested rights as an innocent purchaser, and that complainant succeeded to such rights, and was entitled to recover from the district the full amount of the bond and interest, regardless of the sum he paid therefor.

3. SCHOOL DISTRICTS—SUIT BY BONDHOLDER OF DIVIDED DISTRICT—EQUITY JURISDICTION.

Under Code Iowa 1873, § 1715, which provides that upon the division of an independent school district the assets and liabilities of the old district shall be equitably divided between the new districts, a suit by a bondholder of a district which has ceased to exist by reason of the subdivision of its territory into new districts, to enforce payment by the new districts, is within the equity jurisdiction of a federal court.

Appeal from the Circuit Court of the United States for the Northern District of Iowa.

For opinion below, see 132 Fed. 514.

Eric A. Burgess (Elbert H. Hubbard, on the briefs), for Gamble.

E. C. Roach, for Rural Independent School Dist. of Allison and others.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This is a proceeding in equity to compel the defendants to pay their proportionate and equitable share of two negotiable bonds, numbered, respectively, 43 and 46, each for \$1,000, issued by the Independent school district of Riverside, their territorial predecessor. Pursuant to the provisions of chapter

132 of the 18th General Assembly of Iowa, approved March 25, 1880 (Laws Iowa, 1880, p. 127), the Independent school district of Riverside, on February 15, 1882, issued 34 negotiable bonds, payable 10 years after that date, for the purpose, as stated, of refunding an outstanding bonded indebtedness of the school district. The bonds on their face, and over the signatures of the president and secretary of the board of directors of the district, contained the recital that they were—

"Executed and issued by the board of directors of said Independent school district in pursuance of and in accordance with chapter 132, Acts of the 18th General Assembly of Iowa, in conformity with a resolution of said board of directors passed in accordance with said chapter 132 at a meeting thereof held the 15th day of February, 1882."

In 1885 the territory embraced within the Riverside school district was divided into two districts—the Rural Independent school district of Allison and the Rural Independent school district of Jackson, the defendants herein. Its assets and most of its liabilities were divided between the two new districts, and its existence came to an end. At that time the bonds in question were not taken into consideration, or their payment provided for, because they were regarded void and unenforceable. The contention then was that the bonded indebtedness for the refunding of which the bonds in question were issued was fraudulent and void, and that the new issue created an indebtedness in excess of the permissible constitutional limit of 5 per centum of the value of the taxable property of the district, and was therefore void. Litigation ensued touching the validity of refunding bonds, and in the cases of *Independent School District v. Rew*, 111 Fed. 1, 49 C. C. A. 198; *Fairfield v. Rural Independent School District*, 116 Fed. 838, 54 C. C. A. 342; *Salmon v. Rural Independent School District* (C. C.) 125 Fed. 235, it was settled and declared that the recitation on the face of the bonds that they were issued "in pursuance of and in accordance with chapter 132, p. 127, Acts of the 18th General Assembly of Iowa," would have estopped the Riverside district, were it in existence, and estops the defendants, as its successors, from asserting as against innocent holders of the bonds for value that the district had no fundable debt, or that the new bonds created an indebtedness in excess of the constitutional limit. One Julia Spafford, in 1883 or 1884, purchased bond No. 43 from its former owner, paying its full face value therefor. She died in 1890, prior to the maturity of the bond, and her daughter, Mrs. Mason, by bequest from her mother, became owner of the bond, and after its maturity in 1901 sold it to complainant for the sum of \$50. Some facts are disclosed in the record from which inferences are attempted to be drawn that Mrs. Spafford, or the agent acting for her at the time of the purchase of this bond, had knowledge that it, with other existing indebtedness of the district, exceeded the constitutional limit, but we are unable to find the fact to be so; and, after careful consideration of the evidence, agree with the conclusion reached by the trial court that she purchased the bond in good faith, relying upon the recital of conformity

to the law found on its face, and without notice of any defense thereto. Her daughter took the bond by inheritance, with all the valuable incidents attached to it in her mother's hands. Complainant purchased bond No. 46 before maturity for its full face value, and without notice of any defense thereto.

Section 2114 of the Iowa Code of 1873, which was in force at the time of the issue of the bonds in question, provided as follows:

"The want or failure in whole or in part of the consideration of a written contract may be shown as a defense, total or partial, as the case may be, except to negotiable paper transferred in good faith and for a valuable consideration before maturity."

But in the year 1888 the Legislature amended section 2114 by adding thereto the following words:

"Provided that if said paper shall have been procured by fraud upon the maker thereof, no holder of such paper shall recover thereon of the maker a greater sum than he paid therefor with interest and costs." Laws 1888, p. 129, c. 90.

These sections appear in the Code of Iowa (1897), as section 3070, and reads as follows:

"The want or failure in whole or in part of the consideration of a written contract may be shown as a defense, total or partial, except to negotiable paper transferred in good faith and for a valuable consideration before maturity, but if such paper has been procured by fraud upon the maker no holder thereof shall recover thereon of the maker a greater sum than he paid therefor with interest and costs."

The court below decreed in favor of the complainant on bond No. 43 the sum of \$50, with interest thereon at the rate of 7 per cent. per annum from the date complainant acquired it, and on bond No. 46 the full face value thereof, with interest from its maturity. Both sides appeal to this court.

Complainant contends that he was entitled to the full face value of bond No. 43, with accrued interest, and defendants contend that the court below, as a court of equity, had no jurisdiction of the cause because complainant had an adequate remedy at law, and should have proceeded by an action at law instead of in equity. These questions will be considered in the order mentioned.

The Riverside school district was estopped, so far as Mrs. Spafford or her daughter was concerned, by the recital on the face of bond No. 43 from denying its validity, or their right to recover its full face value. In their hands the bond was purged of all infirmity or illegality. Story on Promissory Notes, § 191, and cases cited. They possessed, as an incident to the ownership of the bond, the right of free and unembarrassed alienation on terms satisfactory to them and the purchaser. So far the rights of the parties are not debatable, but the question is raised whether complainant, a purchaser of the bond from the daughter, takes it impaired in value by reason of his purchase of it after maturity, or whether he takes it with all the legal incidents or rights possessed by her.

Story, in his work on Promissory Notes (section 191), after referring to the rule of immunity against antecedent frauds enjoyed by

an innocent purchaser for value before maturity, and without notice of any infirmity, says:

"The same rule will apply, although the present holder has such notice, if he yet derives a title to the note from a prior bona fide holder for value. This doctrine * * * is indispensable to the security and circulation of negotiable instruments, and it is founded in the most comprehensive and liberal principles of public policy. No third person could otherwise safely purchase any negotiable instrument."

Daniel, in his first volume of *Negotiable Instruments* (section 803), says:

"It is to be observed further, that as a general rule the purchaser can never be placed on a worse footing than his transferrer, although he himself could not in the first instance have acquired the vantage ground occupied by such transferrer. And, therefore, even if he have notice that there was fraud in the inception of the paper, or that it was lost or stolen, or that the consideration has failed between some anterior parties, or the paper be overdue and dishonored, he is, nevertheless entitled to recover, provided his immediate indorser was a bona fide holder for value unaffected by any of these defenses. As soon as the paper comes into the hands of a holder, unaffected by any defect, its character as a negotiable security is established; and the power of transferring it to others, with the same immunity which attaches in his own hands, is incident to his legal right, and necessary to sustain the character and value of the instrument as property, and to protect the bona fide holder in its enjoyment."

In *Cromwell v. County of Sac*, 96 U. S. 51, 59, 24 L. Ed. 681, Mr. Justice Field, speaking for the Supreme Court, says:

"The rule has been too long settled to be questioned now, that whenever negotiable paper [and he was here speaking of dishonored municipal bonds] has passed into the hands of a party, unaffected by previous infirmities, its character as an available security is established, and its holder can transfer it to others with the like immunity. His own title and right would be impaired if any restrictions were placed upon his power of disposition."

In *Wade v. Chicago, S. & St. L. R. Co.*, 149 U. S. 327, 344, 13 Sup. Ct. 892, 899, 37 L. Ed. 755, the Supreme Court, after citing *Cromwell v. County of Sac*, and many other cases, says:

"By the decisive weight of authority in this country, where negotiable paper has been put in circulation, and there is no infirmity or defense between the antecedent parties thereto, a purchaser of such securities is entitled to recover thereon, as against the maker, the whole amount, irrespective of what he might have paid therefor."

In *Gunnison County Commissioners v. Rollins*, 173 U. S. 255, 275, 19 Sup. Ct. 390, 397, 43 L. Ed. 689, affirming *Rollins & Sons v. Board of Com'rs*, 80 Fed. 692, 26 C. C. A. 91, 99, decided by this court, it is said:

"A bona fide holder of commercial paper is entitled to transfer to a third party all the rights with which he is vested, and the title so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper."

In *Rondot v. Rogers Tp.*, 99 Fed. 202, 213, 39 C. C. A. 462, 473, Judge Taft, speaking for the Circuit Court of Appeals for the Sixth Circuit, in a case involving the enforcement of municipal bonds and coupons, says:

"The contention is that one who acquires negotiable paper after its maturity from one who bought it in good faith before its maturity may not enjoy the same immunity from equitable and other defenses as his transferror. This contention cannot be sustained."

He cites *Cromwell v. County of Sac*, supra, *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26, 33 L. Ed. 261, and other cases.

The case we are now considering is one founded on legislation in which ample power was conferred to issue bonds pursuant to the provisions of the act referred to in the bonds, and what we have said or may say concern bonds of this character only, and can have no bearing upon the right to recover on bonds where power in the abstract to issue them did not exist. After Mrs. Spafford acquired bond No. 43, the act of 1888 was adopted, limiting the right of recovery on bonds "procured by fraud upon the maker," (as that bond, for the purpose of this case, is conceded to be) to the amount which the holder may have actually paid for it, with interest and costs.

It is contended that because complainant, Gamble, purchased the bond in 1901 from the legal successor of Mrs. Spafford for the sum of \$50, that sum, with interest, is the maximum of his right of recovery in this case.

We are unable to agree with this contention. At the time the act of 1888 was passed Mrs. Spafford, both by the law merchant and by the statute of Iowa of 1873 (section 2114, ante), was the innocent holder for value of the bond, had a fixed and vested right of property in it, one which entitled her to recover its full face value at maturity, or one which she could alienate for a consideration based on the existence of that valuable right, and one which, in our opinion, she could not be, and was not, deprived of by the passage of that act. She or her successor in title exercised one of these incidental rights in 1901, and, probably induced so to do by the doubt which pending litigation cast upon her title, she sold it for a small sum. This circumstance, however, cannot be allowed to affect the principle involved. She conveyed, whether for \$50 or \$1,000, all the right she had in the bond, and that was, as already seen, the right to recover its full face value.

If the act of 1888 was intended by the Legislature to so retroact as to strike down this right, it was clearly an unwarranted and ineffective invasion of a vested right—an impairment of the obligation of the contract existing between Mrs. Spafford and the Riverside school district. *Temple v. Hays*, *Morris* (Iowa) 9; *Jordan v. Wimer*, 45 Iowa, 65; *Schmidt v. Holtz*, 44 Iowa, 446, 449; *Lay v. Wissman*, 36 Iowa, 305; *Gelpcke v. City of Dubuque*, 1 Wall. 176, 17 L. Ed. 520; *County of Ralls v. Douglass*, 105 U. S. 728, 26 L. Ed. 957; *Green County v. Conners*, 109 U. S. 104, 3 Sup. Ct. 69, 27 L. Ed. 872. The act of 1888 undoubtedly placed a restriction upon the exercise of an existing right of alienation, made it less valuable, because it cut down one of its most valuable incidents, and if, as said by Mr. Justice Field in *Cromwell v. County of Sac*, supra, the holder's "title and right would be impaired if any restrictions were placed upon his power of disposition," surely Mrs. Mason's title and right were impaired by the statute, which so materially affected the salable value of

her bond. If the act of 1888 was intended to affect the remedy only, and thereby to escape constitutional condemnation, it was equally ineffective to destroy such a right as Mrs. Spafford possessed to bond No. 43 at the time of its passage.

No change of remedy, so called, can impair an existing substantial right fixed by contract. The Supreme Court in *Von Hoffman v. City of Quincy*, 4 Wall. 535, 553, 18 L. Ed. 403, says:

"It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired."

In *Seibert v. Lewis*, 122 U. S. 284, 294, 299, 7 Sup. Ct. 1190, 1194, 1197, 30 L. Ed. 1161, it is said:

"It is well settled by the decisions of this court that the remedy subsisting in a state when and where the contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void. * * * It is within the power of the state to change the remedy as long as it does not essentially affect the right embodied in the contract."

To the same effect is *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793, *Barnitz v. Beverly*, 163 U. S. 118, 16 Sup. Ct. 1042, 41 L. Ed. 93.

This court, in *Harrison v. Remington Paper Co. (C. C. A.)* 140 Fed. 385, after full consideration and citation of authorities, sums up the doctrine thus:

"The remedies for the enforcement of a contract existing in a state when the contract is made are a part of its obligation. Any repeal or change of any of these remedies, which substantially obstructs or retards its enforcement or lessens the value of the agreement, impairs its obligation, and is unconstitutional and void."

From the foregoing, we reach the conclusion that the trial court erred in limiting complainant's recovery on bond No. 43 to the amount paid by him therefor. He was clearly entitled to the face value of the bond, with interest thereon from its maturity.

If the Riverside district, which issued the bonds, had remained in existence, complainant's remedy would be clear—a simple action at law, founded on the promise of the school district—but after the bonds in question had been issued by the district, it was divided into two constituent districts, the defendants herein. No question is made in argument or brief as to the legality of this subdivision, or as to many of the legal incidents resulting therefrom. Upon the division of its territory into two independent districts, the Riverside district ceased to exist as a corporation, and its liabilities devolved, not by any express statutory provision to that effect, but from the reason and necessity of the case, upon the two constituent districts. All school property was then and now exempt from execution, and could therefore not be resorted to for the payment of any of the debts of the district. By the dissolution of the old district, its power to levy taxes for paying its debts ceased. The new districts alone had that power. The same property and persons which were originally subject to taxa-

tion for the payment of the debts of the original district went over as property and persons subject to the authority of the constituted agents of the new districts. The liability which attached to them when in the old district equitably followed them in the changed form of their corporate existence. These principles have been recognized and accepted, not only in Iowa, but elsewhere. *Stevenson v. Dist. Tp. of Summit*, 35 Iowa, 462; *Dist. Tp. of Knoxville v. Ind. Dists. of Liberty et al.*, 36 Iowa, 220; *Knoxville Nat. Bk. v. Independent Dist. of Washington*, 40 Iowa, 612; *Kennedy v. Ind. School Dist. of Derby Grange*, 48 Iowa, 189; *Dist. Tp. of White Oak v. Dist. Tp. of Oska-loosa*, 52 Iowa, 73, 2 N. W. 965; *Dist. Tp. of Clay v. Ind. Dist. of Buch-annan*, 63 Iowa, 188, 18 N. W. 859; *Fairfield v. Rural Independent Dists. (C. C.)* 111 Fed. 108; *Morgan v. Beloit*, 7 Wall. 613, 19 L. Ed. 203; *Broughton v. Pensacola*, 93 U. S. 266, 23 L. Ed. 896; *Mount Pleasant v. Beckwith*, 100 U. S. 514, 25 L. Ed. 699; *Shapleigh v. San Angelo*, 167 U. S. 646, 17 Sup. Ct. 957, 42 L. Ed. 310. There was no privity of contract between complainant or any holder of the bonds of the old district and the new constituent districts. See cases, *supra*. At best, the law provided for an assumption of those debts by the new districts. Such an assumption by a third party of the debt of another does not ordinarily create a legal liability which the creditor, not a party to the agreement of assumption, can assert against him in an action at law. As his right does not rest on privity of contract, but is purely equitable, he is required to resort to equity to enforce it. Whatever may be the decisions of state courts (and we admit they are contradictory on this question), the rule of the national courts is clear and uniform. *Keller v. Ashford*, 133 U. S. 610, 622, 10 Sup. Ct. 494, 33 L. Ed. 667; *Willard v. Wood*, 135 U. S. 309, 314, 10 Sup. Ct. 831, 34 L. Ed. 210; *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, 190, 12 Sup. Ct. 437, 36 L. Ed. 118; *Constable v. Nat. Steamship Co.*, 154 U. S. 51, 73, 14 Sup. Ct. 1062, 38 L. Ed. 903; *Willard v. Wood*, 164 U. S. 502, 519, 17 Sup. Ct. 176, 41 L. Ed. 531; *Episcopal City Mission v. Brown*, 158 U. S. 222, 15 Sup. Ct. 833, 39 L. Ed. 960; *Winters v. Hub Min. Co. (C. C.)* 57 Fed. 287, 289; *Knapp v. Conn. Mutual Life Ins. Co.*, 85 Fed. 329, 332, 29 C. C. A. 171, 40 L. R. A. 861; *Green v. Turner*, 86 Fed. 837, 30 C. C. A. 427; *Mercantile Trust Co. v. Baltimore & O. R. Co. (C. C.)* 94 Fed. 722, 725.

Not only did the equity of the creditor, resting on the ground just stated, exist in favor of the complainant in this case, but by the statute of Iowa in force in 1885, when the subdistricts were created (section 1715 Code Iowa 1873), there was to be an "equitable division of assets and liabilities" between the constituent districts. That equitable division would reasonably, and we think necessarily, involve an inquiry into taxable property and population of the two districts. Their equitable shares of the debts would depend largely upon the resources possessed by them, respectively, for raising money to pay them, and this could only be done by taxation. It is true the parties in the progress of the trial stipulated that a fair division of liabilities between the defendants was in the proportion of two-thirds for the district of

Allison and one-third for the district of Jackson. This stipulation as to one of the important facts of the case cannot affect the equitable jurisdiction of the court over the case if it existed when the suit was instituted. It very laudably saved time and expense in making proof of facts from which such equitable division might be made.

In *Kennedy v. School Dist.*, *supra*, which was a bill in equity to secure payment from several subschool districts of a debt contracted by its predecessor before the subdivision, the Supreme Court of Iowa, after giving reasons for entertaining jurisdiction in equity like those heretofore adverted to, says: "That a court of equity should have jurisdiction in such an action, we have no doubt."

In *Fairfield v. Rural Independent School Dists.*, *supra* (a case involving the same issue of bonds now under consideration), Judge Shiras makes use of the following language:

"This apportionment [between the two constituent districts] cannot be properly made in a trial at law before a jury, but can only be reached through a proceeding in equity wherein the court will ascertain and decree the amount due the creditor from the original district, and will then apportion and decree the parts of this sum that are chargeable against each of the several independent districts."

In *Mt. Pleasant v. Beckwith*, *supra*, it is held that when a municipal corporation is legislated out of existence, and its territory merged into several other corporations, the latter become liable for a proportionate share of the debts of the former, and vested with its power to levy taxes upon the property transferred and the persons residing thereon, for the purpose of raising money to pay such debts, and that the remedy of creditors of the old corporation is in equity against the corporations succeeding to its property and powers.

In the case of *Morgan v. Beloit*, *supra*, a question arose concerning the liability of two municipal corporations for the payment of bonds issued by one of them prior to the organization of the other, the latter embracing the territory of the former. The Supreme Court, in disposing of the case, says:

"The authority to tax for the payment of municipal liabilities in cases like this is in the nature of a trust. The jurisdiction of a court of equity to interfere in all cases involving such an ingredient is too clear to require any citation of authorities. It rests upon an elementary principle of equity jurisprudence."

We find nothing in the case of *Shapleigh v. San Angelo*, *supra*, inconsistent with the views expressed in the cases just cited. The old city of San Angelo was superseded by a new corporation, embracing substantially the same territory and corporators as the old one had. The Supreme Court held that the Legislature intended a continued existence of the same corporation, and that, in the absence of express provision otherwise, it will be presumed that the Legislature intended that the liabilities as well as the rights to property of the old corporation should accompany the new. We find no discussion in that case of the question whether the remedy of the creditor is by action at law or in equity. Moreover, it is obvious that the facts of that case are entirely different from the facts of the one before us, where two

separate school corporations, with different territory, different taxable values, and different populations, are substituted for one which originally incurred the debt sued on.

We conclude that the trial court correctly held that it had jurisdiction in equity of this cause, but that it erred in not decreeing to complainant the face value of bond No. 43, with simple interest thereon at the rate of 7 per cent. per annum from its maturity to the date of the decree. It should also have decreed in favor of complainant the further sum of \$35, represented by coupon No. 20 on bond No. 43, with interest thereon from its maturity to the date of the decree. In all other respects the conclusions reached by the learned trial judge are approved.

It results that the decree must be reversed, and the cause remanded to the trial court, with directions to enter one in accordance with the conclusions just stated.

VERNON v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 30, 1906.)

No. 2,239.

1. CRIMINAL LAW—WRIT OF ERROR—REVIEW—EXCEPTIONS.

Assignments of error cannot be reviewed on a writ of error in a criminal case, where no exceptions were saved at the trial to the matters complained of in such assignments.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 2656.]

2. SAME—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.

Circumstantial evidence is insufficient to warrant a conviction in a criminal case unless it is such as to exclude every reasonable hypothesis but that of guilt of the offense charged, and cannot be reconciled with the theory of innocence.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1259-1262.]

3. BRIBERY—GOVERNMENT OFFICERS—EVIDENCE.

In a prosecution for alleged bribery of a government officer in violation of Rev. St. § 5451 [U. S. Comp. St. 1901, p. 3680], evidence *held* insufficient to warrant a finding that defendant made any promise or offer, or gave any money or other valuable thing to such officer in order to effect his official action.

4. CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE—PROOF OF CIRCUMSTANCES.

Where circumstantial evidence is relied on to establish defendant's guilt of an offense, the circumstances must be proved, and cannot themselves be presumed.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1260.]

5. SAME—VENUE—PROOF.

Under Const. Amend. 6, providing that in all criminal prosecutions the accused shall enjoy the right to a speedy trial by an impartial jury of the state and district wherein the crime shall have been committed, a conviction cannot be sustained where the evidence, so far as it showed the

commission of an offense, indicated its commission in districts other than that in which the trial was had.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1277, 1278.]

In Error to the District Court of the United States for the Eastern District of Missouri.

James H. Harkless (Charles S. Crysler and Clifford Histed, on the brief), for plaintiff in error.

David P. Dyer, for defendant in error.

Before SANBORN and HOOK, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The defendant was indicted for violation of section 5451, Rev. St. [U. S. Comp. St. 1901, p. 3680]. There were four indictments, each of them containing three counts. By order of the court all the indictments were consolidated and tried at one time. As the defendant was, by direction of the court, acquitted on one of the indictments and on the third count of all the indictments, it is only necessary to consider the first two counts in the three indictments, in which the jury returned verdicts of guilty. As the three indictments are identical except as to the dates and locality of the sites selected, and the second count only differs from the first in charging a promise of money to Charles L. Blanton, a copy of the first count of one of the indictments will be sufficient to show clearly the issues involved. That count charges:

"That J. B. Vernon, whose Christian name is to the grand jurors aforesaid unknown, on the 1st day of August, in the year 1902, in the Northern Division of the Eastern Judicial District of Missouri, and within the jurisdiction of said court, did unlawfully, feloniously and corruptly offer and give a large sum (the exact amount thereof being to the grand jurors aforesaid unknown) of the lawful money of the United States to one Charles L. Blanton, who was then and there, as he the said J. B. Vernon then and there well knew, a person acting for and on behalf of the United States in an official function, under and by authority of a department of the government, to wit, the Treasury Department of the United States, with the intent then and there of him the said J. B. Vernon to unlawfully, feloniously and corruptly influence the action of the said Charles L. Blanton on a matter then and there pending before him in said official function as aforesaid, that is to say, in making examination of and reporting and recommending to the Secretary of the Treasury a site for a United States post office at Kirksville, Missouri, contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States."

One of the other indictments charges the offer and payment of money to influence the action of Blanton in the examination and recommendation of a site for a post office at Columbia, Mo., and the other at Moberly, Mo. Kirksville and Moberly are both within the jurisdiction of the court, while Columbia is in another district, the Western District of Missouri.

Eleven errors are assigned in the assignment of errors; but as no exceptions were saved at the trial to any of the matters complained of except those set forth in the first and fourth assignments, none other can be reviewed by this court. United States v. Breitling, 20 How.

252, 15 L. Ed. 900; *Tucker v. United States*, 151 U. S. 164, 14 Sup. Ct. 299, 38 L. Ed. 112; *Lindsay v. Turner*, 156 U. S. 208, 15 Sup. Ct. 355, 39 L. Ed. 399; *Kansas & A. V. Ry. Co. v. Dye*, 70 Fed. 24, 16 C. C. A. 604; *Drexel v. True*, 74 Fed. 12, 20 C. C. A. 265. The assignments properly before us relate solely to the refusal of the court to direct a verdict in favor of the defendant on all the counts of the consolidated indictments. The gist of the offense charged in the indictments is the promise, offer or giving of money to Charles L. Blanton, who was then a person acting for and on behalf of the United States, for the purpose of unlawfully influencing his action on a matter then and there pending before him in his official function. No matter how reprehensible the conduct of the defendant might have been, under the indictments there could be no conviction unless there was substantial evidence justifying a finding by the jury that he had offered, given or promised to Blanton money for the purposes in the indictment set out. There is nothing in the statute under which he was indicted forbidding Vernon from persuading or influencing Blanton to select the sites he recommended to the end that he (Vernon) may receive a fee from the owners of the sites. It is no violation of this statute to take compensation from owners to present their sites to any officer of the government and to portray and plead their eligibility and desirability, provided he did not promise, offer or give to such officer a bribe for the purpose of unlawfully influencing his action. Was there substantial evidence to show these facts? In view of the verdict of the jury, it must be assumed that they disbelieved the explanations and denials of the defendant and Blanton. The jury, being the triers of the facts and the sole judges of the credibility of the witnesses, had a right to do that, and this cause must therefore be determined upon the evidence introduced by the government.

As there was no direct evidence to establish the fact that the defendant made any promise or offer or gave any money or other thing of value to Blanton, but the conviction was secured solely upon circumstantial evidence, the question to be determined now is whether this evidence was of such a nature as to warrant a submission of it to the jury. Circumstantial evidence warrants a conviction in a criminal case, provided it is such as to exclude every reasonable hypothesis but that of guilt of the offense imputed to the defendant; or, in other words, the facts proved must all be consistent with and point to his guilt only and inconsistent with his innocence. The hypothesis of guilt should flow naturally from the facts proved and be consistent with them all. If the evidence can be reconciled either with the theory of innocence or of guilt the law requires that the defendant be given the benefit of the doubt and that the theory of innocence be adopted. *People v. Bennett*, 49 N. Y. 144; *United States v. Babcock*, 3 Dill. 581, Fed. Cas. No. 14,487; *United States v. Hart* (D. C.) 78 Fed. 868, 873, affirmed in *Hart v. United States*, 84 Fed. 799, 28 C. C. A. 612; *United States v. McKenzie* (D. C.) 35 Fed. 826; *People v. Ward*, 105 Cal. 335, 38 Pac. 945; *Asbach v. Chicago, etc., Ry. Co.*, 74 Iowa, 248, 37 N. W. 182; *Smith v. First National Bank*, 99 Mass. 605, 97 Am. Dec. 59.

In *United States Fidelity & Guaranty Company v. Des Moines National Bank* (decided at the present term of this court) 145 Fed. 273, Judge Van Devanter, who delivered the opinion of the court, held that:

"A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature and are so related to each other that it is the only conclusion that can fairly or reasonably be drawn from them. If the facts are consistent with either of two opposing theories, they prove neither."

The learned trial judge, in overruling the motion of the plaintiff in error made at the close of the government's case to direct a verdict of acquittal, after reviewing all of the evidence except that of the witness Kelley, hereinafter referred to, said:

"Now, that, in and of itself, would not reach, it seems to me, the requirement of the law here as to certainty so as to be in itself sufficient evidence to connect the defendant with what is the gist of this action—the payment of money or the promise of money to Blanton. So that, as we went along in the trial, I was impressed that there was a failure to connect this defendant with the accusation as made against him; but the connection is made, in the opinion of the court, in the testimony of witness Kelley in the interview which Kelley had with Vernon in the city of St. Louis on the 29th or 30th day of August, 1902. I was particular to understand that testimony and requested last night, so that I might give it the consideration which I would be able to, to have the same transcribed from the reporter's notes."

The testimony of Kelley to which the learned judge thus refers was that having gone to St. Louis at the request of Vernon, they had a conversation in relation to the selection of a site in his town, and in speaking of what took place he testified:

"When I met him (Vernon) in the lobby of the hotel, he, by way of explaining his reasons for getting me down there, said that he had been interested himself in the various selections for government buildings and that he had found that there was a number of cases where the sites were satisfactory for the purpose and through his inside information that he had been in possession of, that he had been able to buy and speculate in surrounding property and had sold that at a profit through that knowledge and that the money that he had made out of it, that he—I can't remember just the words, but the sense was—the substance of it was that he had been able to give the fellows that had helped him to make this money and that had given the information, and still leave him a nice sum. That was the substance of the statement, as near as I can remember it."

In another place further on Kelley testified:

"I said to him, 'Now, suppose I go back there and get these options (I wanted to draw him out) and possibly tie up some money of some friends of mine and myself and the thing don't come out that way, I will be left to hold the bag, won't I?' He says, 'Don't you fret about that. If I say it goes, it goes. You can depend on that.'"

These statements testified to by Kelley as having been made to him by plaintiff in error, the court held, in connection with the other circumstantial evidence in the case and especially the fact that every one of the sites which are the subject of the different indictments now before the court were favorably reported on by Blanton, were sufficient to justify the jury to draw the inference that plaintiff in error meant that the money he received from the owners of sites selected

was by him divided with Blanton. The case was, therefore, submitted to the jury entirely upon the presumption and inference drawn from these statements testified to by Kelley. Is the presumption of guilt the only one to be adduced from these facts? The testimony of Schwabe, one of the witnesses introduced on the part of the government, showed that the fee secured by plaintiff in error for procuring the selection of the site at Columbia was divided by Vernon with the witness, and the testimony of Dr. Andrews, another one of the government's witnesses, also shows that Vernon paid him a part of the money which he received from the owners of the site selected at Harrison, Ark. Both of these witnesses testified that this money was paid to them for assisting plaintiff in error in getting options and getting him into communication with the owners of the different sites.

Kelley, in his testimony in relation to that same conversation which he had with plaintiff in error at St. Louis, testified that he was told by Vernon:

"That through inside information he had been able to buy or get options on some land surrounding other locations, and in that way had been able to make considerable money, and said that he, of course, had made some money, but he believed in dividing it with the fellows that had made it possible for him to make the money, and after doing that he still had a nice net sum."

In another place, in repeating this conversation, Kelley testified:

"He said that from the inside information he had been able to make considerable money out of it, and that the fellows that gave him this information that made it possible—I think that is the words he used—that after giving them something it left him a nice sum. He said he had speculated in property surrounding sites, that he couldn't remember just the words, but the substance of it was that he had been able to give the fellows that had helped him to make this money, that had given him the information, and still leave him a nice sum."

On the part of the government it is insisted that these statements made to Kelley constituted substantial evidence that Blanton was the man with whom Vernon had divided; while the defendant maintained that those words related to the real estate agents and parties who had assisted him in getting options and introducing him to the owners of the sites. Assuming that the jury would be justified to draw either of these inferences, the rule of law is that in case of conflicting presumptions that which assumes innocence must be adopted. *Persons v. State*, 90 Tenn. 291, 16 S. W. 726; *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; *State v. McDaniel*, 84 N. C. 803; *Sharpe v. Johnson*, 22 Ark. 79. It is equally well settled, not only in criminal cases, but also in civil cases, that whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. *U. S. Fid. & Guar. Co. v. Des Moines National Bank*, supra; *United States v. Ross*, 92 U. S. 281, 284, 23 L. Ed. 707; *Manning v. Insurance Company*, 100 U. S. 693, 698, 25 L. Ed. 761.

In the latter case the court say:

"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved.

but the presumed fact must have an immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote. The only presumptions of fact which the law recognizes are immediate inferences from facts proven."

In the case at bar there is not a scintilla of direct evidence that there was any money ever paid or promised to be paid by Vernon to Blanton. The fact that in all of these instances the sites recommended by the defendant were selected is, no doubt, a strong circumstance to show that he had some influence with Blanton; but in the absence of direct testimony that this influence was obtained by bribery, the presumption of law is that it was exercised without the commission of a crime. The legal presumptions are all in favor of the innocence of the accused and of the dutiful official action of Blanton. The fact that Kelley testified on two occasions that Vernon in that conversation alluded to "fellows" would rather indicate that he referred to Schwabe and Andrews, two men who testified that they received a part of the money paid to Vernon, than to Blanton.

But aside from these facts, there is not a scintilla of evidence that, if money was promised, offered or paid to Blanton by Vernon, it was done in the Eastern District of Missouri. The sixth amendment to the Constitution of the United States provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law," etc.

Under this constitutional provision, the venue is as material as any other allegation in the indictment, and the burden to prove it rests upon the government. Even if it be conceded that there was sufficient evidence to show that there was a bribe, promised or given by Vernon to Blanton, it was error to submit the cause to the jury in the absence of evidence that the offense was committed in that district. While the venue may be proved by circumstantial evidence (Wharton *Crim. Ev.* § 108; *Commonwealth v. Costley*, 118 *Mass.* 2; *Bloom v. State*, 68 *Ark.* 336, 58 *S. W.* 41; *State v. Chamberlain*, 89 *Mo.* 129, 1 *S. W.* 145), a failure to prove the venue is fatal (*Wharton on Crim. Law*, § 601; *Frazier v. State*, 56 *Ark.* 242, 19 *S. W.* 838; *Jones v. State*, 58 *Ark.* 390, 24 *S. W.* 1073). Even if it was permissible to draw the inference of Vernon's having promised or paid a bribe to Blanton from the statements made by Vernon to Kelley, the inference that the crime was committed in the district in which Vernon was tried can only be drawn from the other inference. That presumptions cannot be based on presumptions is well settled. *United States v. Ross*, 92 *U. S.* 281, 283, 23 *L. Ed.* 707; *Globe Accident Ins. Co. v. Gerisch*, 163 *Ill.* 629, 45 *N. E.* 563, 54 *Am. St. Rep.* 486; *State v. Lackland*, 136 *Mo.* 26, 37 *S. W.* 812; *Simpson v. State*, 56 *Ark.* 8, 17, 19 *S. W.* 99.

In *United States v. Ross*, in speaking on this subject, it was said:

"These seem to be nothing more than conjectures. They are not legitimate inferences even to establish a fact, much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of law is gen-

erally, if not universally inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain."

Not only is there no evidence to show that the offenses, if committed at all, were committed in the district in which the trial was had, but the only evidence that throws any light on that subject would indicate that, if the offense was committed, it must have been committed outside of the district. In every instance Vernon came to the place where the site was to be selected and made his arrangements some time before Blanton reached there. He came to Columbia two months before Blanton; to Kirksville several weeks before, and to Moberly 15 or 20 days before Blanton. If there was any conspiracy between them, these facts would indicate that the promise to pay must have been made before Blanton came to the district. The same facts appear as to the payments made by the different site owners to Vernon. As to the Columbia site, the evidence shows that the payment of the first \$500 to Vernon was made in Centralia and the arrangement for the payment of the money by the site owners was made in Columbia, both of these cities being in the Western District of Missouri, while the last \$750 seems to have been paid at Moberly. As to the Kirksville site, the arrangements were made at Kirksville, and \$300 of the money was paid to him there, but before Blanton had arrived there, and \$500 was sent to him at Memphis, Tenn. In reference to the Moberly site, the evidence shows that \$200 was paid to him at Moberly 15 or 20 days before Blanton came there, and nothing indicates that at that time Blanton was in the district. The only place where any money was paid to Vernon for his services in procuring the selection of a site when Blanton was in the same city was in Nevada, and that is outside of the Eastern District of Missouri.

As there is no substantial evidence to warrant a finding that the offense was committed, and a total failure of proof as to the venue, the defendant was entitled to a peremptory instruction of acquittal, and, for failing to give this instruction the cause must be reversed and remanded, with directions to grant a new trial.

SCHMITZ v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 5, 1906.)

No. 58.

1. CUSTOMS DUTIES.—SUBSTANTIAL COMPONENT.—THREAD IN STRAW LACE.

The cotton thread used to sew straw lace together, being essential for that purpose, is a substantial component, and sufficient in quantity to affect the classification of the goods.

2. SAME.—CLASSIFICATION.—THREAD IN STRAW LACE—"COMPOSED WHOLLY."

Straw laces sewn with cotton thread are not within the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N. par. 409, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], for laces "composed wholly" of straw.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decision of the Circuit Court, Southern District of New York, which affirmed a decision of the Board of General Appraisers sustaining the action of the collector of the port of New York touching certain importations under the tariff act of July 24, 1897 (chapter 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1626]):

For decision below, see *Kurtz v. U. S. (C. C.)* 136 Fed. 268. This appeal was brought in the name of C. Schmitz, doing business under the name of Kurtz, Stuboeck & Co.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importer.

Charles Duane Baker, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

LACOMBE, Circuit Judge. The articles in question are certain chip and straw laces, stitched or sewn together with cotton thread. The relevant paragraphs are:

"(449) Manufactures of bone, chip, grass, horn, india-rubber, palm leaf, straw, weeds, or whalebone, or of which these substances, or either of them, is the component material of chief value, not specially provided for in this act 30 per centum ad valorem; but the terms 'grass' and 'straw' shall be understood to mean these substances in their natural form and structure, and not the separated fibre thereof." Schedule N, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678].

"(409) Braids, plaits, laces, and willow sheets or squares, composed wholly of straw, chip, grass, palm leaf, willow, osier, or rattan, suitable for making or ornamenting hats, bonnets, or hoods, not bleached, dyed, colored, or stained, 15 per centum ad valorem. If bleached, dyed, colored, or stained, 20 per centum ad valorem. Hats, bonnets, and hoods composed of straw, chip, grass, palm leaf, willow, osier, or rattan, whether wholly or partly manufactured, but not trimmed, 35 per centum ad valorem," etc. 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673].

The collector classified the articles imported under paragraph 449. The importer contends that, although within the language of 449, they are more specifically provided for in paragraph 409. The government concedes that they would be within 409 were it not for the cotton thread, and the sole controversy is as to the meaning of the words "composed wholly."

The importers argue that the cotton should be disregarded, because it is an insignificant element of the cost, and the thread or cord is essential to hold the merchandise together as a merchantable article. Small though the relative cost of the cotton may be, it is yet appreciable. The Board of General Appraisers held that it was substantial, and the article in which it appears would seem to be excluded by the use of the words "composed wholly" of some other substance. There is no evidence that the thread is used temporarily only to prevent the ends of the braids from unraveling, as was the case in *Schiff v. U. S.* (reported in T. D. 26,457). So far as appears, it is a permanent component of the article, and remains in place when the latter is put into the hat. Moreover, practically the articles, of which a sample is submitted, are a variety of braid or plait more loosely put together. They are called "Fiesole," made in Italy. One

of the witnesses says that he does not know of any straw laces in Italy which have no binder or fastening of any other substance about them. Whether elsewhere than in Italy straw lace composed wholly of straw may or may not exist does not appear. The other witness, when asked if he had ever known of an article designated as straw lace to consist of straws fastened together with other straw, answered, "No; not in Italian manufacture." He added that if fastened together with straw they would not be called laces, but "would be a braid or plait." It would seem strange that Congress should exclude braids or plaits from the operation of this section when thread was used to hold them together, but did not exclude the same when more loosely woven, although an equal amount of thread was so used.

Moreover, we are of the opinion that, in view of the course of legislation, a broad comprehensive meaning should be given to the phrase "composed wholly." The section now under discussion is the well-known hat material clause, which appeared in the free list as paragraph 448, of March 3, 1883 (22 Stat. 511, c. 121). The braids, plaits, laces, etc., of that paragraph might be composed, not only of straw, chip, or grass, but of "any other substance or material," provided only they were hat materials. By the amendatory act of February 18, 1890 (26 Stat. 8, c. 13), this paragraph was restricted by changing "any other substance or material" to "any vegetable material." In the tariff act of 1890 (paragraph 518, 26 Stat. 604, c. 1244), it was still further restricted by striking out the words "any vegetable material," leaving only the enumerated materials, "straw, chip, grass, palm leaf, willow, osier, or rattan." Under this act it was held by this court that it was sufficient to make the paragraph applicable if the "predominant and characteristic component" was one of those specifically enumerated. *Schiff v. U. S.*, 99 Fed. 555, 39 C. C. A. 652. In the tariff act of August 27, 1894 (paragraph 417, 28 Stat. 538, c. 349), it was further restricted by eliminating "willow" from the enumeration of materials. In the act of 1897, now before us, the hat material paragraph was transferred from the free list to the duty list; a lower rate of duty being accorded to such articles than that imposed on similar articles not suitable for hats. But the paragraph was again restricted by for the first time inserting the word "wholly," thus bringing within the paragraph with its reduced duty only hat materials "composed wholly of" the enumerated materials. Under these circumstances, we think the words last quoted should be given their ordinary and natural meaning, and that hat materials composed at all of anything else should be left to pay their appropriate duty under other paragraphs.

The decision of the Circuit Court is affirmed.

UNITED STATES v. 59,650 CIGARS et al.

(Circuit Court of Appeals, Second Circuit. March 23, 1906.)

No. 187.

INTERNAL REVENUE—FORFEITURE PROCEEDINGS—JUDGMENT AGAINST SURETY.

Where goods, seized by a collector for violation of the internal revenue law, under Rev. St. § 3453 [U. S. Comp. St. 1901, p. 2278], are attached while in his hands by the marshal on process issued in proceedings for their forfeiture, and a bond for their release is thereafter given by the claimant under section 3459 [U. S. Comp. St. 1901, p. 2281], the proviso to said section, requiring notice of the pendency of the proceedings in court to be given to the parties executing the bond, is inapplicable; such notice being intended to take the place of an actual seizure by the marshal where the goods have been returned to the claimant under the bond before such seizure has been made, and unnecessary where the attachment has been made, and the proceeding in rem is pending when the bond is given.

Appeal from the District Court of the United States for the Southern District of New York.

This is an appeal by Betty Gluck, one of the claimant's sureties on a bond for value, given pursuant to section 3459, Rev. St. [U. S. Comp. St. 1901, p. 2281], from a summary judgment entered against the surety after verdict rendered in favor of the United States forfeiting the goods. The opinion of the district judge is found in 138 Fed. 166.

Hugh G. Miller, for appellant.

Henry A. Wise, for appellee.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

PER CURIAM. The only point raised is that notice of the pendency of the proceedings in court to forfeit the property seized should have been given to the surety by personal service or publication. The only notice given was to the attorney for the claimant.

Appellant relies upon a provision in the section which reads as follows:

"In case said bond shall have been executed and the property returned before the seizure thereof by virtue of the process aforesaid, the marshal shall give notice of pendency of proceedings in court to the parties executing said bond by personal service or publication, and in such manner and form as the court may direct, and the court shall thereupon have jurisdiction of said matter and parties in the same manner as if such property had been seized by virtue of the process aforesaid."

The "process aforesaid" is the process of the court, the "monition" commanding the marshal to attach and detain the property.

The record shows that the provision above quoted is inapplicable. On September 25, 1903, the collector of internal revenue seized the goods under the authority conferred on him by section 3453 [U. S. Comp. St. 1901, p. 2278]. On September 28th the bond was executed, on September 29th the information was verified, and on September

30th monition issued to the marshal, who on the same day attached the property which he found in the hands of the collector. Subsequently, on September 30th, the claimant applied to the court, presenting the bond, and asking for delivery of the cigars, "as the same are attached by the marshal." Thereupon the court ordered that they be delivered to the claimant. Had the collector returned them before seizure by the marshal, the provision above quoted would have applied; but since it is manifest that they were actually seized by virtue of the monition before they were returned, personal service of notice was unnecessary, the proceeding being in rem.

The judgment is affirmed.

OLIGSCHLAGER v. TERRITORY OF OKLAHOMA.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1906.)

No. 2,244.

DISORDERLY HOUSE—EVIDENCE OF LOCATION OF BUILDING WHERE CHARGED IN INDICTMENT FOR UNLAWFUL USE ESSENTIAL WHEN NOT OTHERWISE IDENTIFIED.

In the trial of a charge of permitting the use for an unlawful purpose of a frame building owned and controlled by the defendant situated upon a certain lot in a town, but not described or identified in any other way, the absence of any evidence that the defendant owned or controlled any building situated upon the lot specified is fatal to a conviction.

(Syllabus by the Court.)

In Error to the Supreme Court of the Territory of Oklahoma.

Samuel B. McPheeters and Warren D. Harris, for plaintiff in error.

Don C. Smith (W. O. Cromwell, on the brief), for defendant in error.

Before SANBORN, VAN DEVANTER, and HOOK, Circuit Judges.

SANBORN, Circuit Judge. Two indictments were found against the defendant below, Peter Oligschlager, each of which charged in the same words that he knowingly allowed "a certain frame building located on lot fourteen (14) in block fourteen (14) of the original townsite of the city of Enid," which was owned and controlled by him to be used for a purpose denounced by the statute. The building was not described or identified in any other way. The two cases presented by these indictments were tried together before the same jury, and the defendant was found guilty, and sentenced under each charge. There was evidence about the ownership and use of some buildings on a lot fronting on West Railroad Avenue, south of the opera house, but no evidence that this was the lot 14 in block 14 described in the indictments, and none that there were any buildings either owned or controlled by the defendant or by another upon the latter lot. The testimony concerning the buildings on the lot south of the opera house was admitted after repeated objections of the defendant that it was incompetent, irrelevant, and immaterial,

and at the close of the trial he interposed a general demurrer to the evidence. The court disregarded this demurrer, and submitted the case to the jury. This was a fatal error. The charge in the indictments was permitting the unlawful use of a building owned and controlled by the defendant on lot 14, and, in the absence of any evidence that there was any building on that lot, and that there was any building owned or controlled by the defendant thereon, the court could not lawfully permit the jury to find the defendant guilty as charged in the indictments. There were other alleged errors at the trial of the case, but, as that which has been considered necessitates a new trial, it is useless to discuss them. The judgments of the courts in the territory of Oklahoma (79 Pac. 913) are accordingly reversed, and the case is remanded to the District Court, with instructions to grant a new trial.

LOUIS METZGER & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 26, 1906.)

No. 131.

CUSTOMS DUTIES—CLASSIFICATION—SPANGLED HAT CROWNS.

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], for "articles * * * composed * * * in part of * * * spangles made of * * * gelatin," being more specific than that in paragraph 450, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], for "manufactures of gelatin." Hat crowns composed chiefly of gelatin spangles are dutiable under the former provision.

Appeal from the Circuit Court of the United States for the Southern District of New York.

For decision below, see 141 Fed. 381, affirming a decision of the Board of United States General Appraisers, G. A. 5,788, T. D. 25,578, which had affirmed the assessment of duty by the collector of customs at the port of New York.

The subject of the controversy consists of hat crowns composed chiefly of gelatin spangles. They were classified under the provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 408, 30 Stat. 189 [U. S. Comp. St. 1901, p. 1673], for "articles * * * composed * * * in part of * * * spangles made of * * * gelatin," and were claimed by the importers to be dutiable under the provision in paragraph 450, 30 Stat. 193 [U. S. Comp. St. 1901, p. 1678], for manufactures of gelatin or of which gelatin is the component material of chief value.

Frederick W. Brooks, for the importers.

Charles Duane Baker, Asst. U. S. Atty.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. We are clearly of the opinion that the phrase "articles * * * composed * * * in part of * * * spangles made of * * * gelatin," is more specific than the phrase "manufactures of gelatin," and for that reason affirm the decision of the Circuit Court.

WINANS v. PERRING et al.

(Circuit Court of Appeals, Sixth Circuit. July 30, 1906.)

No. 1,524.

PATENTS—INFRINGEMENT—PORTABLE BOATS.

The King patents, No. 389,817, claim 1, and No. 507,439, claim 2, each for a combination of elements in the construction of a portable boat, held not infringed by a construction which did not contain all of the elements of the combination of either claim.

Appeal from the Circuit Court of the United States for the Western District of Michigan.

F. L. Chappell, for appellant.

Dallas Bondeman, for appellees.

Before LURTON and SEVERENS, Circuit Judges, and COCHRAN, District Judge.

SEVERENS, Circuit Judge. In his bill, the appellant complained of the infringement of two patents, Nos. 389,817 and 507,439, both of which were issued to C. W. King, the licensor of the appellant, for improvements in "portable boats"; the former on September 18, 1888, and the latter October 24, 1893. The patentee had previously taken out patents relating to such structures; one in 1882 for a "sectional boat frame," and the second in 1886 for a "portable boat." Both of these, as well as other patents, were relied upon in the court below as anticipations of the patents in suit, and the patent of 1888 was claimed to be an anticipation of the patent of 1893, and prior public use was set up against the patent of 1888. Infringement was charged of one claim in each of the patents in suit. At the final hearing on pleadings and proofs, the bill was dismissed upon the ground that neither of the patents sued on were infringed.

Portable boats are made of canvas stretched on the outside of a frame, which holds it in form and is built in sections, in such manner that they can be detached from each other, folded together, and then rolled up in a package for convenient transportation. Fig. 1 of the patent of 1888, here shown, exhibits the general form and appearance of such boats. This boat is in three sections, meeting where the longitudinal ribs slightly cross each other.

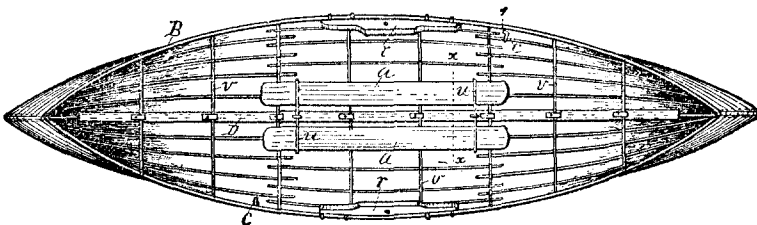


Fig. 1

The particular feature of the invention on which the patent of 1888 rests consists in a short rib inserted in a loop of the fabric which incloses the upper side rails or ribs of the boat. This short rib laps at either end the upper longitudinal side rails which are cut off short at each end of the section. The purpose of the short rib is to hold the side rails in the same relative longitudinal position, and prevent the boat from collapsing at the joints. The short rib was provided with a handle standing at a right angle to it. Fig. 2, here shown, is an enlargement of this part of the boat and clearly exhibits this feature.

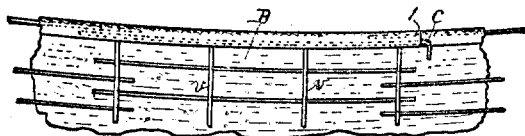


Fig. 2

1 is a perpendicular slot in the loop of the canvas. The rib has been slipped into it, but the handle is shown at c. The patentee says:

"When the handle of the rib, c, is turned down as in said figure, the rib can be readily withdrawn; but when the rib, c, is pushed farther in and the handle is turned upward its contact with the fabric retains it in place. This position is not here shown."

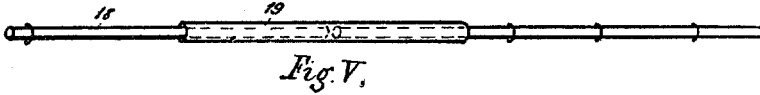
How the handle is held in place when turned up is not apparent. Probably by some peculiarity in the form of the rib, whereby some stress is put upon the canvas in turning up the handle. The first claim, which is the one involved, is as follows:

"(1) The combination of the canvas or flexible boat body, a series of longitudinal ribs in sections, a section being in each end of the body and a section at each side within the body and between the end sections, and the ribs having the angled end, one of said ribs being inserted in the fold at the upper edge of the body above the central sections of ribs, substantially as set forth."

It will be noticed that he makes the short rib with an angled end an element in his combination. The defendant uses a short rib or splice inserted in the canvas and passing the joint. But it has no angled end, but a circular end, used for the purpose of thrusting in and pulling out the rib, and is not turned in use. We cannot think there would be anything patentable in simply splicing the ends of the ribs of the sections so as to hold the parts in proper relation, and invention, if there be any, must be found in the peculiar formation of the rib having an angled end. At all events the patentee has made a rib of that construction a material element in his claim and it is represented as the novelty of the invention. As the defendants do not use such a rib, there is no infringement.

The patent of 1893 was for improvements in the construction of portable boats. The particular improvement was in the means for fastening the sections of the boat together. The two improvements which enter into the second claim were, first, in providing a tube in which the ends of the longitudinal ribs of the sections were inserted, whereby the ribs became in effect continuous from section to section

along the side of the boat. This tubular connection is shown by Fig. V of the drawings.



19 is the tube, and 18 one of the ribs. As is seen, the ends of the ribs meet near the middle of the tubular connection. No doubt this was a very material improvement upon the method employed and described in his patent of 1888. Whether it was a patentable novelty to use this old device in the construction of these boats we need not decide. The other of the improvements mentioned was the securing the ribs in permanent position on the canvas by stitching the sections of the ribs within tucks or folds of the canvas or other fabric which constitutes the inner lining of the boat. The second claim is as follows:

"(2) In a boat as described, the inner flexible lining and the longitudinal ribs arranged in sections and united at their ends by removable tubular connections and attached by stitching to the said lining, all substantially as described."

This combination includes the tubular connection of the ribs and the stitching of the ribs to the canvas. The method of connecting the ribs by the defendant has already been described, and consists of splicing the ends of the ribs of the sections by using a short rib to lap for a space upon the end of the ribs to be connected, and all the parts which are employed in making the connection are inclosed in the loop of the fabric. There is still less similarity in this feature of the defendant's means for effecting the connection and that of the patent of 1893 than there is between the former and those of the patent of 1888. If the patent of 1893 is materially distinguishable from former constructions of the parts concerned, it is so mainly in the improvement made by slipping the ends of the ribs in one section into one end of a tube and the ends of the ribs in the next section into the other end of the tube. At all events the patentee makes that peculiarity an element in his claim, and the combination is not that used by the defendant. Walker on Patents (4th Ed.) § 349, and cases there cited. The complainant encounters the same difficulty in supporting his claim of infringement of the two patents, namely, that in each he has in his combination made an element material which is not found in the supposed infringement.

We come to the same conclusion as that reached by the judge who heard the case in the court below, and must therefore affirm the decree, with costs.

UNITED STATES FASTENER CO. v. DUTCHER.

(Circuit Court, N. D. New York. July 9, 1906.)

PATENTS—ANTICIPATION—SEPARABLE BUTTONS.

The Pringle patent, No. 573,532, for a separable button, claims 3 and 4, which cover a button-head having a stud-catch therein, are void for anticipation by prior patents for glove fasteners.

Suit in equity to restrain alleged infringement of claims 3 and 4 of United States letters patent No. 573,532, dated December 22, 1896, and issued to Eugene Pringle for separable button, and also for an accounting.

Horton D. Wright (Donald Campbell, of counsel), for complainant.

Richardson, Herrick & Neave (A. D. Salinger, of counsel), for defendant.

RAY, District Judge. The claims in suit, permitting the complainant now to rely upon both, read as follows:

"(3) A button-head comprising a cap or shell containing a stud-catch having the catch-lips thereof turned down within itself, and said parts secured to the material, substantially as described.

"(4) A button-head comprising a cap or shell containing a stud-catch having the catch-lips thereof turned downward within its body and its lower end clenched to hold the parts to the material, substantially as described."

Claim 3 has as elements: (1) a cap or shell; (2) a stud-catch having the catch-lips thereof turned down within itself; and (3) means for attaching to the fabric or garment, as described. There is no claim of any peculiarity or novelty in either the button-head, cap, or shell, or the means of attachment. The novelty and utility, if any, is asserted to reside in the "stud-catch having the catch-lips thereof turned down within itself."

Claim 4 differs from claim 3 in that the catch-lips of the stud-catch are "turned downward within its body," instead of "turned down within itself"; a difference in words merely, unless there is some subtle and hidden meaning which this court is not astute enough to discover, and in that the lower end of the stud-catch is clenched to hold, or aid in holding, the parts to the material. This clenching may be regarded as allowable, under claim 3, broadly construed.

The defendant denies the validity of claims 3 and 4 of the complainant's patent because anticipated. He says in view of the prior art no patentable invention is disclosed. The defendant cites, has put in evidence, and relies, among others, upon the Richardson patent, No. 300,508, dated June 17, 1884, for improvements in fastenings for gloves and other articles, and also upon the Daniel A. Carpenter patent, No. 383,702, dated May 29, 1888, for glove fastener. After a careful reading of all these patents with their specifications with the evidence in the case, especially in view of figure 11 of the said Richardson patent, and that part of the specification describing it, I cannot escape the conclusion that, in view of the prior art, claims 3 and 4 of the patent in suit (those in issue) fail to disclose patentable invention, and are therefore void. In the Richardson patent, after describing the eyelet

constituting the stud-catch and two forms thereof, both operative, the patentee says:

"In Fig. 11 the yielding sides are turned into the eyelet or tube space, and form a socket for the reception of the other member of the fastening within the tube or eyelet and below their under surface. The principle of the construction is, however, the same; the only difference being that the socket is made lower by bending the sides inwardly and downwardly, as shown."

This is nothing more or less than a stud-catch having the catch-lips thereof turned down within itself. It is substantially the same thing shown in the patent in suit as the stud-catch, and presents the same exact idea of means and general form of construction. True, the Richardson patent does not have this in combination with or placed within a button-head, but to do that would add nothing to the invention. Taking claims 3 and 4 of the patent in suit, we have a combination of three old elements to produce an old result in the same way, viz., a cap or shell in which is placed the catch, which cap or shell is old, a stud-catch having the catch-lips thereof turned down within itself, and this is old in the Richardson patent, and means to attach same to the fabric or garment, also old. In the Carpenter patent we have precisely the same idea as to form and construction and utility of a stud-catch. With these patents and drawings before him any mechanic skilled in the art would readily produce the complainant's device in question.

The question of infringement will not, therefore, be considered. Neither will I remark upon other phases of the controversy, which in my judgment make the claim of complainant doubtful.

There will be a decree dismissing the bill of complaint, with costs.

FRANK et al. v. BERNARD.

(Circuit Court, S. D. New York. June 2, 1906.)

PATENTS—VIOLATION OF INJUNCTION AGAINST INFRINGEMENT.

A fine imposed for contempt of court in violating an injunction against infringement of a patent.

On Motion to Punish for Contempt.

See 131 Fed. 269.

Andrew Fowlds, Jr., for the motion.

Henry D. Williams, opposed.

LACOMBE, Circuit Judge. It makes no difference that defendant's manufacturers have made match stands having the leather ring, inserted in the base, held between perpendicular walls. It is not disputed that defendant sold the article Ex. No. 2 since the service of the injunction. Mere inspection of the article will show that the top of the inner wall is inclined sufficiently towards the opposite wall to pinch the leather ring. It may be that this is a sporadic case, where some accident of manufacture has produced a result sought to be avoided. Therefore the penalty for disobedience of the injunction will be made

slight (\$10); but should the discovery of other articles of like construction sold subsequent to injunction indicate persistent infringement a heavier penalty will be exacted.

The exhibit has been marked on the base "E H L."

In re KOLSTER.

(District Court, D. Nevada, June 18, 1906.)

No. 44.

1. **BANKRUPTCY—GROUNDS FOR REFUSING DISCHARGE—CONCEALMENT OF ASSETS.**

Where a bankrupt had voluntarily surrendered a lease giving him an option to purchase the leased property more than four months prior to the bankruptcy proceedings, he is not chargeable with concealing property from his trustee because of his failure to schedule such property, in the absence of proof that the surrender was not in good faith.

2. **SAME—OBJECTIONS TO DISCHARGE—SUFFICIENCY OF PROOF.**

The burden of proof rests upon a creditor objecting to the discharge of a bankrupt, and, while the acts charged may be established by inference from the facts proved, it is not sufficient that such facts justify a suspicion of fraud, but they must be inconsistent with honesty and good faith.

In Bankruptcy. On application for discharge and objections thereto.

G. W. Shutter-Cottrell, for the bankrupt.

John S. Orr, Dodge & Parker, and E. D. Knight, for the creditors.

HAWLEY, District Judge (orally). The objections filed by the creditors of the applicant are based upon the ground that he had knowingly and fraudulently concealed while a bankrupt from his trustee property of the value of at least \$5,000, which property, it is alleged, consists of an equity of redemption to certain real estate in Reno, Washoe county, Nev. On October 14, 1899, one Westlake and his wife conveyed to Jacob Gooding the property in question for the sum of \$2,500. This purchase was made at the request of Kolster, and for his benefit; Kolster raising \$500 of the purchase money. Kolster did not have sufficient money, and Gooding advanced the balance, and took the deed in his own name, and then, on October 16, 1899, leased the property to Kolster for five years at a stipulated monthly rental, and in this lease covenanted and agreed that Kolster should have the right to purchase the property for \$2,000 during the life of the lease. This lease and privilege to purchase expired October 16, 1904. According to the testimony of Kolster, about a week or two before the lease expired he informed Gooding that he could not raise the money to pay for the property, and by agreement between them the lease and privilege to purchase was given up. Kolster filed his petition in bankruptcy February 14, 1905. From the testimony produced at the trial, the transactions between Kolster and Gooding with reference to the property were closed more than four months prior to the time when the petition in bankruptcy was filed. The only other evidence introduced was that, after Kolster gave up his interest in the property, Gooding

leased the property to the minor children of Kolster at the same rent, and that Kolster received the first month's rent, and paid for repairs upon the property. Here the testimony ended, Kolster being the only witness examined. From this testimony, the transactions may have been bona fide, not fraudulent. There was no need of a suit to foreclose the right which Kolster had in the property. If he could not raise the money to pay it within the time specified in the lease, he had the right to surrender it, and, having surrendered it, Gooding had the right to lease it to anyone else; and the mere fact that he leased it to the minor children of the petitioner would not, of itself, be proof sufficient to authorize the court to declare the transaction fraudulent.

The basic foundation on which the specifications rest is missing. The evidence fails to show that there was any "equity of redemption" in Kolster at the time he filed his petition in bankruptcy, or at any time within four months prior thereto. In *Re Cornell* (D. C.) 97 Fed. 29, it was held that specifications in opposition to a bankrupt's application for discharge, on the ground of his having concealed property from his trustee in bankruptcy, must be supported by evidence showing the existence of property in the bankrupt, or in trust for his use, at the time of filing the petition in bankruptcy. There is no evidence in this case of any secret trust or agreement with Gooding, who held the legal title to the property at the time Kolster surrendered his interest therein, by which the property in question was to be held by Gooding for the benefit of the bankrupt; and, in the absence of such a trust or agreement, it cannot be held that the property, or any interest therein, belongs to the estate in bankruptcy.

If suit had been brought by the creditors against Gooding to enforce the equity of redemption claimed to exist in favor of Kolster, and no other testimony had been offered than is here presented, the proceedings would have failed for want of sufficient proof to show that the right of redemption still existed. A petition was filed by the creditors in this case March 5, 1906, praying for leave to have the trustee bring such a suit; but no further action was ever taken by the creditors. The failure to obtain sufficient evidence that the right of redemption continued may have been the cause.

The proceedings relative to the objections to Kolster's discharge have been twice continued, at the request of the creditors, and ample time has been given them to find such evidence, if any existed. They rest alone upon the testimony of Kolster, and claim that his testimony is sufficient to enable the court to infer that there must have been some understanding that the right of redemption should be kept alive.

As was said by the court in *Re Dauchy* (D. C.) 122 Fed. 688, 695:

"This court fully recognizes the rule of evidence that in cases of this kind, as in others, the existence of the main fact to be proved may be established by inference from other facts proved, when such inference is legitimate. But when from such other facts proved two or more inferences may be drawn, and the facts point as clearly to the one result as to the other, the court cannot say a case is made out."

The most that can be said is that the circumstances proven "look suspicious." This is not enough. Mere conjecture or surmise is not sufficient. Something more is required in order to justify the court

in declaring that the transactions were fraudulent, and made and entered into and carried out for the purpose of enabling Kolster to conceal his property in order to defraud his creditors. It is manifest that this testimony does not march up to the full proof required by the act of bankruptcy to sustain the specifications of objections filed by the creditors.

In *Re Ferris* (D. C.) 105 Fed. 356, where similar objections were made, and the creditors relied solely upon the testimony of the bankrupt, which was suspicious and unsatisfactory, the court said:

"The testimony given by the bankrupt is in a very unsatisfactory condition, and it is impossible for the court to ascertain therefrom the exact position of the affairs of the bankrupt, or to find with any certainty that in truth when the proceedings in bankruptcy were filed the bankrupt retained any interest in the mortgaged property or its proceeds. The opposing creditor having failed, therefore, to sustain the specifications by sufficient evidence, the same must be overruled, and a discharge must be granted."

In *Re McGurn* (D. C.) 102 Fed. 743, 745, which bears a close resemblance in its facts to the present case, this court said:

"Specifications in opposition to a bankrupt's application for a discharge and the proofs in support thereof should be clear, positive, and direct. The opposing creditor or creditors must distinctly allege and prove one or more of the statutory grounds for refusing a discharge. * * * The burden of proof rests upon the opposing creditors to establish their charge against the petitioner by satisfactory and sufficient evidence. * * * No such evidence has been produced."

Numerous authorities were cited in support of the principles announced. The decisions since rendered declare the same rule. In *re Logan* (D. C.) 102 Fed. 876; In *re Fitchard* (D. C.) 103 Fed. 742, 744; In *re Bryant* (D. C.) 104 Fed. 789, 792; In *re Corn* (D. C.) 106 Fed. 143, 144; In *re Chamberlain* (D. C.) 125 Fed. 629; In *re Hamilton* (D. C.) 133 Fed. 823, 826.

The creditors having failed to sustain their objections, the bankrupt is entitled to his discharge.

In re OPPENHEIMER.

(District Court, M. D. Pennsylvania. June 20, 1906.)

No. 792.

BANKRUPTCY—ACCOUNTS OF RECEIVER—ALLOWANCE FOR COUNSEL FEES.

A receiver in bankruptcy is entitled to the assistance of counsel, and a reasonable allowance (keeping in view the economy enjoined by the general policy of the bankruptcy act, and, taking into consideration the value of the estate) will be made to him in the settlement of his accounts for services rendered in the administration of the estate while in his hands; but not otherwise. He is not entitled to an allowance for services rendered by the attorney for the petitioning creditors in instituting the proceedings and obtaining the receiver's appointment, or for other services rendered primarily in the interest of his clients, and the former is a matter for consideration if at all on settlement of the estate in the hands of the trustee, with which the receiver has nothing to do.

In Bankruptcy. On exceptions to receiver's account.

W. N. Reynolds, Jr., for exceptions.

John H. Dando, for receiver.

ARCHBALD, District Judge. The receiver asks credit for \$400 attorney and counsel fees—\$200 for Mr. Dando, his own immediate counsel, and \$200 for Mr. Davis, attorney for the petitioning creditors. A receiver in bankruptcy is undoubtedly entitled to the assistance of counsel, the same as an executor or administrator, and upon the same grounds, and a reasonable allowance therefor will be made him in the settlement of his accounts. They come in, however, as part of the expenses of administering the estate, and not otherwise, and there is no place for anything outside of this. The services of Mr. Davis consist, as stated at the argument, in putting the respondent into bankruptcy, securing the appointment of a receiver, supervising the appraisal which followed, advising the sale of the bankrupt's stock, interesting possible buyers, and promoting an advantageous disposition of it, closely approximating the appraised value, and finally sustaining such sale, upon argument before the court, against exceptions made. Mr. Dando petitioned for and obtained the appointment of appraisers, and drew up and filed their schedules, saw to the setting aside by the receiver of the bankrupt's exemption, which was allowed under bond, petitioned for and obtained an order for a private sale of the bankrupt's stock, and made due return thereof, appearing, also, in opposition to exceptions filed, and finally drew up and filed the receiver's account which is now excepted to, appearing and arguing in support of the same.

There can be no question as to the character of the services rendered by Mr. Dando, nor the right of the receiver to the allowance therefor. The only thing is the amount. Economy is strictly enjoined, by the well-known policy of the bankruptcy act, in the administration of bankrupt estates, and there is no exception with regard to the compensation of counsel. The estate passing through the hands of the receiver in the present instance amounts to about \$4,200, so that there was no great responsibility involved in its management, nor any intricacy in advising with regard to it, both of which bear on the value of the services rendered and the amount to be allowed. It may be that, as ordinarily measured, \$200, the sum asked for, would not be out of the way. But, according to the standards which prevail in bankruptcy, one-half that sum, in my judgment, is all that could be reasonably expected, and is a fair compensation for the work done.

The services of Mr. Davis, however, are entirely outside of anything which is entitled to come in here. They were rendered in the interest of the petitioning creditors, whom he directly represented, and not for the receiver; or, if in any respect for the latter, they overlapped or supplemented those of Mr. Dando, and there cannot be a double allowance because of two counsel being employed. The distinctive thing about them is that they were steps taken primarily in behalf of the claims of creditors which had been put in his hands, which may call for compensation from his own particular clients, but are not to be imposed as a charge upon the estate. It may be that

obtaining the appointment of a receiver is an exception to this, and the filing of a petition by which proceedings are instituted has also been recognized and quite generally allowed for. Collier (5th Ed.) p. 472. But if there is anything of that kind which obtains, the receiver has nothing to do with it. Claim is to be made, if at all, before the referee, as for a charge against the estate in the hands of the trustee, and not, unless all distinctions are to be dispensed with, has it any right to consideration here.

The exceptions are sustained, the credit item of \$200 paid to B. W. Davis, attorney, is disallowed, and the further item of \$200 counsel fees is reduced to \$100, making the balance to be accounted for in the hands of the receiver, \$3,830.86, with which corrections the account is finally confirmed.

In re WATKINSON et al.

(District Court, E. D. Pennsylvania. June 22, 1906.)

No. 1,184.

BANKRUPTCY—PROVABLE CLAIMS—SURRENDER OF PREFERENCE.

An increase of a bankrupt's estate as a net result of transactions between the bankrupt and a creditor within four months prior to the bankruptcy, where the last transaction was a payment on account of the indebtedness, is not sufficient to relieve the creditor from surrendering this last payment as preferential before he is permitted to prove the balance of his claim, under Bankr. Act July 1, 1898, c. 541, § 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], when the account runs far back beyond the four-month period, and the transactions end with a large payment on account of the whole indebtedness.

In Bankruptcy. On question certified by referee.
See 142 Fed. 782, 143 Fed. 602.

Arthur G. Dickson, for trustee.
Max L. Powell, for claimants.

HOLLAND, District Judge. The plaintiff in this case sold merchandise to the alleged bankrupts, and received payments on account, as set forth in the following statement:

1901.	To Mdse.	Terms.		
Feb. 14		4 Mos.	\$ 176 58	
June 5		"	175 38	
7		"	173 64	
15		"	122 30	
28		"	59 68	
29		"	103 80	—\$11 36
July 19		"	220 00	
23		"	10 00	
26		"	535 32	
Aug. 14		"	364 02	
24		"	180 60	
Sept. 6		"	175 08	1901
11		"	176 04	June 29 By Cash..... \$176 58
30		"	178 20	Oct. 10 " 634 78—\$ 811 36
26		"	177 78	Balance 2,565 92
Oct. 8		"	183 30	
"		"	182 88	
2		"	182 70	
			<u>\$3,377 28</u>	
1902				
Jan. 1	To balance		\$2,565 92	<u>\$3,377 28</u>

It will be noticed that there are payments amounting to \$811.36. Goods sold from February 14, 1901, to June 29, 1901, inclusive, total the same amount.

The question certified is whether or not Joseph Wild & Co., the claimants, can prove the balance of their claim, to wit \$2,565.92, without surrendering the sum of \$634.78, received by them on October 10, 1901, which is said to be preferential. The bankrupts were insolvent from January 1, 1901, but the first goods were delivered by the plaintiffs to them on February 14, 1901. The account was open long prior to four months preceding the filing of the petition in bankruptcy, and had been running from February 14, 1901, down to October 8, 1901, when the last delivery of merchandise to the bankrupts took place. Two days later, October 10, 1901, the sum of \$634.78 was paid to the plaintiffs. This was the last transaction between them, and within four months of the time of the presentation of the petition in bankruptcy. There were no subsequent credits. It was simply a payment on account of a former indebtedness, and it is ruled by *In re Colton Export & Import Co.*, 10 Am. Bankr. Rep. 14, 121 Fed. 663, 57 C. C. A. 417. The cases of *Jaquith v. Alden*, 118 Fed. 270, 55 C. C. A. 364 (same case decided by the Supreme Court of the United States, and reported in 9 Am. Bankr. Rep. 773, 23 Sup. Ct. 649, 47 L. Ed. 717), and *Yaple v. Dahl-Millikan Grocery Co.*, by the same court, reported in 11 Am. Bankr. Rep. 596, 24 Sup. Ct. 552, 48 L. Ed. 776, rule that where a debt for goods sold to the bankrupt upon a running account was all incurred within four months prior to filing a petition in bankruptcy, and while the alleged bankrupt was insolvent, of which fact the creditor was ignorant, payment on account did not constitute preferential transfers, under section 60a of the bankrupt act of July 1, 1898 (chapter 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3445]), which must be surrendered, under section 57g, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443], before the creditor can prove his claim, although the greater part thereof was for goods sold before the last payment was made. In the *Jaquith v. Alden* Case the last transaction was a purchase of goods by the bankrupts. We therefore hold that an increase of the bankrupt's estate, as a net result of the transactions between the bankrupt and a creditor within four months prior to filing the petition in bankruptcy, where the last transaction was a payment on account of the indebtedness, is not sufficient to relieve the creditor from surrendering this last payment as preferential before he is permitted to prove the balance of his claim against the bankrupt's estate, when the account runs far back beyond the four months before the petition is presented, and the transactions between them end with a large payment on account of the whole indebtedness. Under such circumstances, it is a preferential claim, and must be surrendered before the balance of the account of the creditor can be proven. *Kimball v. Rosenham Co.*, 114 Fed. 85, 52 C. C. A. 33; *In re Sagor Bros.*, 9 Am. Bankr. Rep. 361, 121 Fed. 658, 57 C. C. A. 412. Where in a running account payment by the bankrupt within the four months has induced new credits, which resulted in a net increase to the estate, the creditor may be said to have once surrendered his preference by the giving of the subsequent credit;

but where, as in this case, the bankrupt, beginning far beyond the four-month limit, makes a number of purchases, and then finally, within the four months makes a large payment on account, the creditor has been preferred. To hold otherwise would clearly give him a greater percentage of his debt than would be given to others of the same class. Any other creditor in this estate who might have from time to time sold goods to the bankrupt beginning subsequent to January 1, 1901 (date of insolvency), down to a time within the four months, without receiving payments on account, would certainly be in the same class with the claimant here, and would receive a less per cent., if claimant be not required to surrender the alleged preference.

The order of the referee directing the trustee to pay to Joseph Wild & Co. a dividend on \$2,565.92 of the same percentage as other creditors of the same class, without surrendering the said preferential payment of \$634.78, is reversed.

EIMER & AMEND v. UNITED STATES.

(Circuit Court, S. D. New York. January 27, 1906.)

No. 3,937.

CUSTOMS DUTIES—TREASURY REGULATIONS—SCIENTIFIC APPARATUS.

Certain scientific apparatus, etc., imported for educational institutions, was claimed to be subject to paragraph 638, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 200 [U. S. Comp. St. 1901, p. 1686], exempting such articles from duty when imported in compliance with regulations of the Secretary of the Treasury; but the importers had not filed a certificate of delivery to the institutions within 90 days after entry, as required by such regulations. *Held*, that that requirement is a reasonable one, and that the collector, in default of a compliance therewith, properly exacted duty on the apparatus.

On Application for Review of Decisions of the Board of United States General Appraisers.

The decisions in question relate to importations by Eimer & Amend at the port of New York, consisting of importations of scientific apparatus, etc., which the importers contended was subject to paragraph 638, Tariff Act July 24, 1897, c. 11, § 2, Free List, 30 Stat. 200 (U. S. Comp. St. 1901 p. 1686), admitting such apparatus free of duty when imported for educational institutions, on compliance with regulations prescribed by the Secretary of the Treasury. The Board of General Appraisers affirmed the action of the collector in denying free entry, on the ground that the following regulations were not complied with: Within 90 days after the date of the entry, and before liquidation thereof free of duty, there shall be filed with the collector a certificate, signed by an authorized officer of the society or institution, that the articles named in the order for "special importation" have been delivered to said society or institution, and are to be retained as its permanent property, and that said articles were not delivered out of the stock on hand of any dealer or agent. * * * On the filing of the above certificate, and not before, the collector may order the liquidation of the entry free of duty. In case of failure to file the said certificate, the entry will be liquidated for duty, and the duty will be collected.

Walden & Webster (Howard T. Walden, of counsel), for the importers.

Henry A. Wise, Asst. U. S. Atty.

HAZEL, District Judge. The merchandise, consisting of philosophical and scientific apparatus, utensils, instruments and preparations, was entered free of duty by the importers, but the appraisers returned the same as "manufactures of glass and metal, glass chief value, 45 per cent.," "mf. of metal, 45 per cent.," and as "blown glassware, 60 per cent." The said apparatus, described on the invoices Nos. 2,183, 2,188, and 2,189, were imported for the use of the University of Wisconsin and the Worcester Polytechnic Institute. The oaths of an authorized executive officer of each institution and of the importers, as required by the treasury regulations, were duly and seasonably filed. But the importers failed to conform with the treasury regulations (T. D. 24,616, art. 9), which require the filing of a certificate by an officer mentioned in the regulation within 90 days after entry, and before liquidation thereof free of duty, stating that the importation has been delivered to such institution, "and are to be retained as its permanent property, and that said articles were not delivered out of the stock on hand of any dealer or agent." Certificates conforming to the requirement, instead of being delivered to the collector, were delivered to the Board of General Appraisers at the hearing, more than a year after the liquidation. On account of the importer's failure to comply with the treasury regulation, the collector charged a duty upon the articles at 45 per cent. ad valorem, under paragraphs 112 (Act July 24, 1897, c. 11, § 1, Schedule B, 30 Stat. 158 [U. S. Comp. St. 1901, p. 1635]), and 193 (section 1, Schedule C, 30 Stat. 167 [U. S. Comp. St. 1901, p. 1645]), and 60 per cent. ad valorem under paragraph 100 (section 1, Schedule B, 30 Stat. 157 [U. S. Comp. St. 1901, p. 1633]), and 25 per cent. ad valorem under paragraph 3 of the act of July 24, 1897, c. 11, § 1, Schedule A, 30 Stat. 151 [U. S. Comp. St. 1901, p. 1627]. The board held that compliance with such regulations as the Secretary of the Treasury had prescribed for the administration of paragraph 638 was a condition precedent to the right of free entry. From that determination the importers have appealed to this court. Their position is that the regulations mentioned are simply for the guidance of the collector; that they are not binding on the court, and, the protest being meritorious, the rule of liberal construction should prevail. That the regulations were inconsistent with law or unreasonable is not claimed. In *Eimer v. United States* (C. C.) 87 Fed. 202, Judge Townsend held that a regulation prescribed by the Secretary of the Treasury under the tariff act of 1894, which required the filing of an affidavit before the arrival of the articles, was reasonable, and failure to conform to such treasury rule justified the collector in requiring payment of the prescribed duty. The case of *Hensel v. United States* (C. C.) 72 Fed. 52, cited by the importers, is not analogous to the situation presented here. There no particular time was prescribed for filing the certificate. Upon the authority of the *Eimer Case*, the action of the Board of General Appraisers is affirmed.

CASSEL v. UNITED STATES.

(Circuit Court, S. D. New York. January 30, 1906.)

No. 3,969.

1. CUSTOMS DUTIES—FINALITY OF LIQUIDATION—"ENTRY."

In construing Act June 22, 1874, c. 391, § 21, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], which provides that the "settlement of duties shall, after the expiration of one year from the time of entry, * * * be final and conclusive," *held*, that the "entry" referred to does not mean the entire transaction leading up to the liquidation, but the act of the importer in presenting to the collector the document known as an "entry."

2. SAME—RELIQUIDATION—PENDENCY OF PROTEST.

Act June 22, 1874, c. 391, § 21, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], provides that, in the absence of protest, an entry may not be reliquidated more than one year after entry. *Held*, that the presence of a protest relating to a portion of an importation does not give the collector the right to reliquidate as to another portion to which the protest does not relate.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below is reported as G. A. 5,962 (T. D. 26,147), and affirmed the assessment of duty by the collector of customs at the port of New York on merchandise imported by F. C. Cassel.

Comstock & Washburn (Albert H. Washburn, of counsel), for the importer.

Henry A. Wise, Asst. U. S. Atty.

HAZEL, District Judge. This appeal from the decision of the Board of General Appraisers is sought to be sustained on the ground that the increased duty assessed by the collector upon the merchandise specified in the protest was owing to a reliquidated entry made more than one year after the original entry. Section 21 of the act of June 22, 1874, c. 391, 18 Stat. 190 [U. S. Comp. St. 1901, p. 1986], provides:

"That whenever any goods, wares, and merchandise shall have been entered and passed free of duty and whenever duties upon any imported goods, wares, and merchandise shall have been liquidated and paid, and such goods, wares, and merchandise shall have been delivered to the owner, importer, agent or consignee, such entry and passage free of duty and such settlement of duties shall, after the expiration of one year from the time of entry in the absence of fraud and in the absence of protest by the owner, importer, agent, or consignee, be final and conclusive upon all parties."

The principal contention seemingly arises over the question whether certain protests filed with the collector by the importer were lodged against the merchandise upon which there was a reliquidation. On October 24, 1903, the importer protested against the reliquidation, on the ground that the entry was more than one year old and had previously been liquidated and the duties paid, and the merchandise delivered to the importer. There were two protests filed challenging the original liquidation, which were not sent to the Board of General Appraisers, nor were they acted upon by the collector until later. On

October 14, 1903, the collector sustained the first protest and reliquidated the entry on the other, which specified articles consisting of toys. Instead of reducing the duties upon the latter, against which there was no protest, the reliquidation increased them.

It is now contended by the government, as I understand the point, that, as a protest had previously been filed to the liquidation of some of the goods, the collector acted within his right in reliquidating the entry as to the other goods entered, even though more than a year had elapsed from the time of entry. The Board, in construing section 21 of the act of 1874, held that the word "entry" related to the various transactions leading up to the liquidation; that "the entire transaction by which the importer obtains entrance of his goods into the body of the merchandise of the United States" must be given effect. This interpretation of the word "entry," however, is not in harmony with the decisions construing that term. It is practically admitted by counsel for the government that the legal conclusions of the Board are erroneous. The government contends that the year within which the collector can, under the statute, reliquidate the entry, begins at the time the importer presents the entry to the collector, and not from the original liquidation of the duty. This view, apparently, finds support in the following cases: *United States v. Frazer*, 10 Ben. 347, Fed. Cas. No. 15,161; *United States v. Seidenberg* (C. C.) 17 Fed. 227; *United States v. Legg*, 105 Fed. 930, 45 C. C. A. 134; *Mosle v. Bidwell* (C. C.) 119 Fed. 480; *United States v. Leng* (D. C.) 18 Fed. 15; *Beard v. Porter*, 124 U. S. 437, 8 Sup. Ct. 556, 31 L. Ed. 492; *Gandolfi v. United States*, 74 Fed. 549, 20 C. C. A. 652. These adjudications firmly settle the point under consideration, namely, that the usual meaning attached to the word "entries" has reference to the documents to which the statutes in *pari materia* refer, and which they designate as entries. *United States v. Legg*, *supra*. Coming now again to the question of the original protests which were filed by the importer, the position of the government is that, as final action had not been taken thereon, they were still effectual for the purpose of reliquidation, although more than one year had elapsed since making the entry. The importer insists that none of the protests mentioned were directed to the items specified as "artificial fruits," and yet the collector singled out such items and assessed them at a higher rate of duty, although there was no dissatisfaction with the original liquidation. The original protests are not included in the record, and therefore I accept the facts as contended by the importer. The collector, in my opinion, was not justified in reliquidating the particular entry in question. In other words, the filing of a protest which has remained unacted upon by the collector for more than one year does not authorize a readjustment of the duties in the absence of fraud, where there has been a liquidation upon some of the merchandise not covered by the protest, though included in the entry. As the protests that were pending at the time of the reliquidation did not cover the merchandise reliquidated, I am constrained to hold that such action by the collector was a violation of the statute and should be overruled.

The decision of the Board is reversed.

KRAEMER v. UNITED STATES. JOHNSON & JOHNSON v. SAME.
AMERICAN EXPRESS CO. v. SAME. PITT & SCOTT v. SAME.

(Circuit Court, S. D. New York. February 22, 1906.)

Nos. 4,076, 4,079.

CUSTOMS DUTIES—COMPONENT OF CHIEF VALUE—ASCERTAINMENT.

Tariff Act July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], defines the component material of chief value in imported merchandise as that material "which shall exceed in value any other single component material." As to certain catheters and similar articles composed of a fabric of silk or cotton covered with varnish made from linseed oil and copal, it appeared that the cotton or silk exceeded the value of the linseed oil and copal taken singly, but did not exceed their value when combined into varnish. *Held*, that the varnish, and not either of the two substances of which it was made, constituted a "single component material," within the meaning of the law, and that it should be considered the component material of chief value.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision below, which is reported as G. A. 6,112 (T. D. 26,609), affirmed the assessment of duty by the collector of customs at the port of New York.

Hatch & Clute (J. Stuart Tompkins, of counsel), for the importers.
Henry A. Wise, Asst. U. S. Atty.

WHEELER, District Judge. This merchandise consists of catheters and bougies made some of cotton, and others of silk, covered with a varnish composed of linseed oil and copal made and elaborately applied by hand. According to the evidence and finding, if the oil and copal are each considered as separate materials, the cotton and silk would, respectively, be of greater value than either of the other materials, and the articles were assessed, against protests, as of cotton and silk chief value accordingly.

The Tariff Act of July 24, 1897, c. 11, § 7, 30 Stat. 205 [U. S. Comp. St. 1901, p. 1693], provides that the component material of chief value shall be that "which shall exceed in value any other single component material," in its condition as found in the article. The question here seems to be whether the materials found in these articles are cotton or silk and varnish, or cotton or silk, linseed oil and copal. The manufacturers of these particular articles purchased the linseed oil and the copal, and compounded them for this use, but those are suitable materials for varnish, and this would not make the condition of this composition as found in these articles any different from what it would have been if they had bought the varnish as such. The composition is applied to the surface of the cotton or silk foundation as varnish is, although by hand, and, although it adds to the body of the articles, it is finished to a polished surface as varnish usually is. In *Seeberger v. Hardy*, 150 U. S. 420, 14 Sup. Ct. 170, 37 L. Ed. 1129, Mr. Justice Brown, in speaking of wood and plush furniture under these statutes

says: "The true rule would seem to be to take each of them as they go into the furniture." The plush, and not the fiber of which it was made, would be the component material. So, here, the varnish, and not the linseed oil, and the copal separately, would seem to be the component material found in the articles. In this view the articles are not of cotton or silk chief value, and should not be assessed as such, but should be under section 6, as nonenumerated manufactured articles.

Decision reversed, and assessment ordered accordingly.

UNITED STATES v. LUEDER.

(Circuit Court, S. D. New York. February 22, 1906.)

No. 3,339.

CUSTOMS DUTIES—EVIDENCE—TREASURY REGULATIONS.

The Board of General Appraisers, in deciding as to the polariscope test of certain sugar drainings, based its findings on evidence of tests other than the government tests made according to the treasury regulations. *Held*, that the Board was not restricted to evidence of the government tests alone.

On Application for Review of a Decision of the Board of United States General Appraisers.

The decision in question reversed the assessment of duty by the collector of customs at the port of New York on an importation by A. Lueder.

Charles Duane Baker, Asst. U. S. Atty.

William J. Gibson, for importer.

WHEELER, District Judge. This importation is of sugar drainings which, by paragraph 209 of the act of July 24, 1897 (chapter 11, § 1, Schedule E, 30 Stat. 168 [U. S. Comp. St. 1901, p. 1647]), is subject to a duty of, when testing by the polariscope, "above forty degrees and not above fifty-six degrees, three cents per gallon; testing fifty-six degrees and above, six cents per gallon." The collector assessed it at six cents against a protest that it would be but three as "testing above 40° and not above 56° polariscope." The majority of the Board of General Appraisers appears to have found from reports of the government chemists and evidence of other tests that a true test would be not above 56 degrees. The evidence to sustain this finding seems to be ample, unless it should have been confined to the government tests made according to the treasury regulations. The law makes no such restriction, and the regulations are made for the guidance of the customs officials in the assessment and collection of duties when no protest is made, and not as a judicial rule on appeal.

Decision affirmed.

CONSOLIDATED GAS CO. v. MAYER et al.

(Circuit Court, S. D. New York. June 8, 1906.)

1. CONSTITUTIONAL LAW—DENIAL OF EQUAL PROTECTION OF LAWS—STATUTE FIXING GAS RATES.

The New York Gas Commission Act, Laws 1905, p. 2100, c. 737, § 21, provides that, if it shall be established in any action to collect a charge for gas that a price has been demanded in excess of that fixed by the commission or by statute, no recovery shall be had therein, but the fact of such excessive charge shall be a complete defense. Laws 1906, c. 125, limits the price which may be charged for gas in the borough of Manhattan to 80 cents per 1,000 feet, and provides that any corporation or person violating the act shall forfeit the sum of \$1,000 for each offense. *Held* that, in view of the right of a gas company affected thereby to invoke the decision of the courts as to the constitutionality of the rates fixed by the statute or commission, the other provisions which would in the meantime subject it to ruinous penalties were a practical denial of the equal protection of the laws, and that in a suit in a federal court to test the constitutionality of the rates complainant was entitled to a temporary injunction restraining the officers charged with that duty from enforcing or attempting to enforce such provisions until the final determination of the suit; all charges collected, however, in excess of those fixed by the statute or commission, to be impounded, to abide the event of the suit.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 691.]

2. INJUNCTION—PRELIMINARY ORDER—SCOPE.

The rate fixed by the state, however, being in the exercise of its unquestioned powers, and presumed to be just and proper unless the contrary is shown on final hearing, the terms of such an injunction should not be enlarged so as to undertake to restrain the actions of individual consumers, who are not parties to the suit.

In Equity. On motion to continue temporary injunction.

James F. Beck, Charles F. Mathewson, John A. Garver, and John F. Leillon, for the motion.

Charles E. Hughes, and William P. Burr, opposed.

LACOMBE, Circuit Judge. The parties to this suit are all citizens of the state of New York, but the main contention—practically, the sole contention—of the complainant is that certain statutes of this state and an order of the gas commission are obnoxious to various provisions of the Constitution of the United States, and for that reason void. This court, therefore, from which appeal lies direct, without review by any intermediate tribunal, to the Supreme Court of the United States, not only has jurisdiction, but is the appropriate forum, because through a suit brought here a final decision by the ultimate interpreter of that Constitution can be most quickly obtained.

This is a motion by the complainant for a continuance of the temporary injunction, which was issued as the condition of an adjournment asked for by defendants, and also for an enlargement of the terms of such injunction. It is in no sense a hearing upon the merits of all the issues presented. The fundamental propositions in dispute involve many controverted questions of fact, and it is the practice of this court not to resolve such questions upon affidavits, but to reserve them for final hearing, where every sworn statement comes to the court, not

ex parte, but after the test of a cross-examination. The matters to be passed upon here and now can be most tersely and quickly presented by an analysis of the injunction order already made.

1. In entering that order the court did not find, nor did it express nor even intimate an opinion, that the action of the gas commission in fixing the price to be charged for gas at 80 cents per 1,000 cubic feet was confiscatory, nor that the act of the Legislature establishing the same price (chapter 125 of 1906) was in that respect unconstitutional and void. It did not undertake to abrogate or nullify that provision of the statute. As between the consumer and the manufacturer, it left the question as to what the former should pay to the latter precisely where it stood before. Any consumer who might be asked to pay the old rate was left by the order entirely free to decline to pay it, and to make a tender at the new rate for the gas he had consumed. Naturally so, because, except for the city of New York, whose situation is exceptional, the individual consumer was not a party to the suit, and had not been served with process. In the case of a consumer, who upon demand chose to pay the old rate, the order provided that the company should not cover the 20 cents difference into its treasury, but should leave it impounded under direction of the court, so as fully to insure its return to the person paying the same in the event of the company's failing to succeed in its litigation. In the case of a consumer who chose to make tender at the new rate, and to stand upon whatever rights were secured to him by the action of the gas commission in fixing that rate, and by the action of the Legislature in establishing the same rate, the order left him entirely free and untrammelled to apply for such relief as the law afforded him in the event of the company's seeking to compel payment of the difference. It was not perceived when the order was made, nor is it perceived now, upon what theory this court could by an injunction restrain any individual who was not a defendant, and had never been served with process, from himself applying to an appropriate court if he should conceive himself to be aggrieved. What relief he might obtain when he so applied would be for that court to determine when it heard his application. The order did, however, provide that the gas company might charge or demand payment at the old rate, and might collect at that rate from such as chose to pay, and it enjoined the defendants (who are public officers, and, as such, the proper persons to institute and prosecute actions, to enforce and recover certain statutory penalties) from in any way enforcing, or attempting to enforce, two acts of the Legislature and an order of the gas commission, or any of the provisions thereof, against the complainant, until it should have its day in court, upon such a case as it might be able to make, to question the constitutionality of that order and of those acts. The reason why it was thought that a court of equity, irrespective of any question of the merits of the controversy as to the propriety of the new rate, should upon mere inspection of the statutes themselves grant such temporary relief will be apparent upon the statement of a few elementary propositions of law, and an analysis of certain provisions of those statutes.

A corporation which undertakes, for its own emolument, to supply gas to the inhabitants of a municipality, under charters and franchises

from the state which allow it to embark in such industry, and invite its stockholders to invest their money therein, is engaged in what is called a "public service" or a "public utility," and therefore is under the supervision, inquisition, and regulation of the state as to the manner in which it conducts its business. If, untrammelled by competition, it charges a price far above all reasonable cost to the helpless consumer, who must pay that price or go without, while it receives an exorbitant return on such of its property as is invested in the enterprise, the state may step in and reduce that price to such sum as will, taking everything into consideration, be a reasonable return upon what has been adventured in the enterprise on the faith of the state's franchises. No one disputes this proposition. But in fixing such price the state should itself be fair and reasonable—should certainly stop short of confiscation. If it were established by uncontroverted proof that, in materials, labor, and wear and tear of plant at the lowest conceivable valuation, the actual cost of producing gas of a proper standard in the holders was 50 cents per 1,000 cubic feet, it would be confiscation for the state to require the manufacturer to deliver such gas to all consumers at 5 cents per 1,000 cubic feet. Such an act of the Legislature would be obnoxious to the Constitution of the state, to the Constitution of the United States, and to common right and justice. There may be persons who dispute this proposition, but it may safely be assumed that it is accepted by every community which lives under law and not under anarchy. These are the two extremes, and somewhere between them there lies a dividing line. Who is to determine where that dividing line lies? Under our system of government that question has always been left to the decision of the courts. *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819. Every individual who feels himself aggrieved either by the action of some other individual or of the state or the nation is secured the right to bring his grievance before some court. It may be a court of law or of equity, a court established by a statute or by a Constitution, a state court or a federal court, but somewhere or other there is provided for him a forum to which he can present his case, can support it by proof, and have his hearing. That is "due process of law," a heritage from long centuries of struggle, which this nation and its constituent states have deposited in the corner stones of their written Constitutions. Every one is entitled, sometime, somewhere, to his "day in court." The most swollen aggregation of capital, crystallized into an individual by the act of the state or national government which has made it a corporation, is as much entitled to have free access to the courts as is the humblest toiler by night to whom every additional cent, disbursed for the light he works by, means a shrinkage of his food supplies.

There are two statutes dealing with the matter now in controversy. Neither of them, in express terms, undertakes to deny the complainant access to any court to test the merit of the contention it makes, viz., that the new rate is confiscatory, and that, therefore, the old rate should be paid. But there are two sections in those acts which challenge consideration. In the gas commission act (chapter 737, p. 2100, of the Laws of 1905) we find:

"Sec. 21. Defense in cases of excessive charges. If it be alleged and established in any action brought in any court for the collection of any charge for gas or electricity, that a price has been demanded in excess of that fixed by the commission or by statute in the municipality wherein the action arose, no recovery shall be had therein, but the fact that such excessive charges have been made shall be a complete defense to such action."

In the act which provides that companies furnishing gas in the borough of Manhattan "shall not charge or receive for gas manufactured, furnished or sold * * * a sum per 1,000 cubic feet in excess of * * * 80 cents," we find the following:

"Sec. 3. Any corporation, association, copartnership or person violating any provision of this act shall forfeit the sum of \$1,000 for such offense to the people of the state."

The drastic character of these provisions will be perceived when their results are considered. If the gas company, pending the final determination of a suit such as this to determine whether the Legislature has fixed a just and proper price, should charge its consumers the lower rate, and receive the same without protest or demand of payment at the higher rate, it could never recover the difference, even should it be decided by the court of last resort that it was entitled to demand such higher rate. Having delivered its product for the particular month, and received the amount it asked for such product, that transaction would be finally closed. Both parties having agreed upon the price, without any reservation, it would be the contract price for that month's delivery, which the seller could not thereafter dispute. If it should take two or three years to get a final decision on the merits, the 20 cents difference of rate, all claim to which during the interim the company had thus abandoned, would concededly amount to several millions of dollars. Should the company ultimately prevail in the test suit, this would be an enormous fine to pay for the privilege of having its day in court. It could escape that fine only by demanding, on presentation of each monthly bill, payment at the higher rate, preserving its claim to the difference, whenever the lower rate was paid and received, by a protest, which would reiterate the demand. The statute (chapter 737, p. 2092, Laws 1905) undertakes effectually to close up that avenue of escape.

Ordinarily, when there is a dispute between seller and buyer as to the rate to be paid for anything, the question is settled by the seller bringing suit for the price of what he has sold calculated at the higher rate. The statute, however, practically undertakes to debar the company from bringing any such suits against its customers. The twenty-first section (quoted, *supra*) provides that if in any action brought to collect any charge for gas it shall appear that a price has been demanded in excess of the rate fixed by the gas commission or by statute, that fact shall be a complete defense to the action—to the whole action—not only to so much of it as seeks to collect the excess, but also to so much of it as seeks to collect the amount concededly due. Now, whenever the seller of anything verifies a complaint to be used in an action at law, which asserts that he is entitled to receive and asks to recover a sum of money, he may fairly be said to be preparing to make a de-

mand therefor; and the moment he serves such complaint upon the buyer he has indisputably made such demand. But the statute says that the mere making of such a demand shall constitute a complete defense; in other words, if the statute is valid, the cause of action which the plaintiff may think it has is slaughtered at the very moment it sets foot within the halls of justice. The merits of the controversy as to what rate should be charged will never be litigated in that action, because no defendant would be so foolish as to discuss any such issue, when the mere fact that action is brought relieves him from all payment whatsoever.

The only course left for the gas company is to bring some direct suit, such as this, to test the constitutionality of the action of the gas commission and of the Legislature in fixing an 80-cent rate, and meanwhile to preserve its rights to the difference by demanding payment thereof, as each monthly bill is presented to each consumer. To close up this avenue of approach to the courts, however, the other act (chapter 125 of 1906) provides that, whenever a manufacturer and seller of gas in the borough of Manhattan shall charge or receive anything in excess of 80 cents per 1,000 cubic feet, it shall for each offense forfeit \$1,000 to the people of the state; and section 1962 of the Code of Civil Procedure makes it the duty of the defendants, the Attorney General, and the District Attorney to institute suits for recovery of such penalties. Every time the company demands payment for gas furnished at the higher rate, every time it receives such payment from any consumer who may be willing to pay temporarily, and abide the result of the test suit, it incurs such a penalty. For very many years it has been the custom in this borough to present monthly bills for gas sold, and it appears from the record that the complainant has upwards of 390,000 customers. The calculation is a simple one. Long before this test suit could be heard next fall, the aggregate of the penalties incurred would utterly wipe out the entire property of the complainant, whether it were worth the amount found by the gas commission, or were worth the highest estimate at which the most astute and experienced financiers might capitalize it.

Commenting upon a statute which prescribed similar cumulative penalties for every charge of more than a certain sum per head for yarding cattle, where a few days' violation of the statute by merely charging a higher rate would exhaust the entire value of the property in satisfaction of the penalties incurred, Mr. Justice Brewer, writing the opinion in *Cotting v. Kansas City Stock Yards Co.*, 183 U. S. 79, 22 Sup. Ct. 30, 46 L. Ed. 92, says:

"Do the laws secure to an individual an equal protection when he is allowed to come into court and make his claim or defense subject to the condition that upon a failure to make good that claim or defense the penalty for such failure either appropriates all his property, or subjects him to extravagant and unreasonable loss? Suppose a law were passed that, if any laboring man should bring or defend an action, and fail in his claim or defense, either in whole or in part, he should in the one instance forfeit to the defendant half of the amount of his claim, and in the other be punished by a fine equal to half the recovery against him, and that such law by its terms applied only to laboring men, would there be the slightest hesitation in holding that the laborer was denied the equal protection of the laws? The mere fact that the courts are

open to hear his claim or defense is not sufficient, if upon him alone there is visited a substantial penalty for a failure to make good his entire claim or defense. * * * Suppose a statute providing that every corporation failing to establish its entire claim or to make good its entire defense should as a penalty therefor forfeit its corporate franchise, and that no penalty of any kind except a matter of costs was attached to like failures of other litigants, could it be said that the corporations received the equal protection of the laws? * * * A statute, although, in terms, opening the doors of the courts to a particular litigant, which places upon him as a penalty for a failure to make good his claim or defense a burden so great as practically to intimidate him from asserting that which he believes to be his rights, is, when no such penalty is inflicted upon others, tantamount to a denial of the equal protection of the laws."

In the case cited the judges who concurred in reversing the judgment appealed from did so upon another ground, but the language of Mr. Justice Brewer, dictum though it be, commends itself as a clear and forceful exposition of the law.

It is difficult to see in what respect the provisions of the two acts now under consideration differ from those passed upon in the Kansas City Stock Yards Case, except that they are perhaps more drastic. On this branch of the case there is no controversy as to the facts, and under the opinion last quoted, these provisions seem obnoxious to the fourteenth amendment to the Constitution of the United States. In order, therefore, to secure to the complainant its right to prosecute this suit to its orderly conclusion, without meanwhile being trammelled—or, as it may be more appropriately expressed, overwhelmed—by multitudinous actions for cumulative penalties, the temporary injunction which restrains the public officers, who are made defendants, and any one else whom the injunction may reach and hold, from enforcing, or attempting to enforce, the provisions of the acts and order of the gas commission against the complainant, will be continued until final hearing and decision of the cause in this court. The judge who hears the cause upon the merits of the whole case may find some good reason for modifying the injunction, or even for vacating it, but, on the record as it stands now, to this measure of relief the complainant seems clearly entitled.

2. The application to extend the terms of the injunction, so as to enable complainant to collect the 20 cent difference by summary measures (such as refusal to supply gas) from such consumers as may not be willing to pay it, to have it impounded, and to abide the result of this suit, presents different questions, and brings us into a field of controversy upon the facts. However obnoxious the statutory provisions already discussed may be to the prohibitions of the Constitution, it would seem that their elimination would still leave a statute consistent and complete. Provisions hampering the right to question a rate fixed by legislative action are not essential to a scheme which undertakes to fix such rate. "It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the Legislature would not have exacted that which is within, independently of that which is beyond, its powers." *Reagan v. Farmers' L. & T. Co.*, 154 U. S. 362, 14 Sup. Ct. 1047, 38 L. Ed. 1014.

The complainant contends that it should be protected against the irreparable injury it would suffer by reason of its inability after two or three years to collect, in the event of ultimate success, the unpaid differences from a floating aggregate of consumers, some of whom will disappear, and others of whom are pecuniarily irresponsible, so that a judgment against them would not be worth the cost of entering it. It is thought that complainant's apprehensions in this respect are exaggerated. On the contrary, it seems quite likely that the great bulk of its customers will prefer to pay the small amounts of excess rate demanded each month, when assured that the sums thus paid will remain secure and intact, to be repaid upon the termination of the test case should complainant not succeed therein, rather than to begin a multiplicity of suits to prevent the company from making its collections in the usual manner. The first two or three months will show how this will be. Meanwhile, each individual is left free to make his election, and a loss—possibly a heavy one—may result, which in the event of final success the company could not recover. This is an argument which has always appealed most strongly to courts of equity, and there are abundant authorities to support the proposition that, pending the decision of a doubtful question, the status quo, proper security being exacted, should be preserved. But the courts in all such cases also take into consideration what is the character and measure of the doubtfulness. Here the state, which concededly has the right to fix a proper rate, has prescribed a rate whose propriety is challenged. *Prima facie*, it is to be presumed that the state's rate is a proper one, and the burden is upon the complainant to show that it is not. If we are correct in the assumption that the penalty clauses already discussed are not an essential part of the statute, without which it would be abortive, then the question of the propriety of the rate can only be decided upon a careful and exhaustive examination of many facts and deductions therefrom, some of which will certainly be controverted. In the Kansas Stockyards Case, which is mainly relied upon, the fundamental vice of the statute was that it undertook to provide that the owner of a single stockyard should charge only a named sum for each head of cattle, while the owners of all other stockyards in the state (and there were several of them) might charge what they pleased. That vice could be as clearly demonstrated by undisputed affidavits to a court upon application for preliminary injunction as it could be at final hearing. A similar vice is alleged to inhere in the later act (of 1906), fixing the 80-cent rate, which subjects New York City gas corporations to a different rule from that applicable under the gas commission act of 1905 to all the other gas corporations in this state. But if the gas commission act be held to be itself unconstitutional (as complainant with great apparent force contends here), this argument will not be so persuasive.

3. If the only subject of inquiry were the rate fixed by the gas commission, a different situation would be presented. Under the authorities, in fixing the rate to be charged for "public service" by private corporations, two elements of calculation are of fundamental importance: What is the true present value of the property embarked in the enterprise? and what, in view of the risks of the business, is a fair annual per-

centage of return thereon? That percentage would not necessarily be the same in every variety of business. The manufacture, storage, and delivery of a highly explosive material is a more risky business than is the transforming of flour into bread, or of leather into shoes, and the delivery of such products. The commission reached the conclusion that 8 per cent. was a proper return on property invested in the gas business. In estimating the value of the property of complainant embarked in the business, the commission reached the conclusion that the franchises under which it has laid mains and is delivering gas, and which are a part of its property, should be considered as of no value whatever, although the state, through the action of its taxing officers, has declared that they are worth several millions of dollars. It is suggested that some of these franchises have expired or lapsed in some way. That proposition need not be considered, because it is not asserted that all of them have lapsed. The complainant has taken over the franchises of many different corporations, granted at different times. So long as a substantial part of these still remain, the argument is not affected, except as to details of result. The reason assigned by the commission for not including the value of the franchises is that "they were granted by the people without compensation." That is so. These franchises were granted very many years ago, at a time when there seems to have been no intelligent appreciation of the fact that they might become enormously valuable, when reckless improvidence was the rule, and all sorts of franchises were given away, without any provision for securing to the state its fair share of unearned increment thereon. Nevertheless, when the state offers a franchise to whoever will take it without requiring any money return thereon, and for the sole consideration that the taker shall promptly, continuously, and fully develop it by the expenditure of his own money, and such offer is accepted, and the terms of the agreement carried out by the taker, there results a contract, which, with due consideration of all proper conditions and limitations inherent in the nature of the particular contract, is as much within the protection of the Constitution as are all other contracts. If the state 25 or 50 years thereafter should say to the taker: "We were very improvident in not providing that you should pay us something each year for this franchise; therefore, hereafter you shall pay us 8 per cent. annually on \$10,000,000 or \$20,000,000, or we will evict you from the franchise," it might find itself embarrassed by the provisions of the Constitution in thus undertaking to avoid the results of its own improvidence. A franchise, whatever its value may be, which has not expired nor lapsed, nor been in some way forfeited, is property in the hands of its holder. There is force in the argument that when the state says: "We will value this property at several millions of dollars when we tax you on it, but at nothing at all when we fix the rate you may charge for your product in order to receive an 8 per cent. return on your property," it is seeking to accomplish by indirect methods what it might not be able to accomplish directly. Moreover, it is contended that the act of 1905, under which the gas commission acted, is obnoxious to the Constitution for grounds not already discussed, apparent on the face of that act itself.

4. But in the case at bar these arguments seem wholly academic. Irrespective of any action of the gas commission, the Legislature has itself fixed the 80-cent rate, and there is nothing to indicate upon what it predicated such action. For aught that we know, it may have reached the conclusion that the commission was in error in not including the franchises at their taxable value in the estimate of complainant's property, and may, at the same time, have concluded that 7, or 6, or even 5 per cent. was a proper return to be received by the owner of such property. This brings us to the fundamental question presented by the pleadings: Is the rate fixed by the Legislature (80 cents) so low as to be unjust or confiscatory? As was indicated at the outset of this opinion, there can be no intelligent answer given to this question until the whole case is presented upon testimony taken, not *ex parte*, but according to the rules for taking testimony in equity causes. Therefore, until the court at final hearing may have the opportunity to pass upon such a record, although the existing order is continued, its terms will not be enlarged, so as to undertake to restrain the actions of individual consumers, who are not parties to this suit, and have not been served with process.

5. A few minor details remain to be disposed of:

(a) The city of New York is the largest consumer, an undoubtedly solvent consumer, and the only one made a party defendant. The rate it is to pay is not regulated by the action of the gas commission, nor by either of the two acts already considered. Chapter 736, p. 2091, of the Laws of 1905, provides that it shall pay only 75 cents per 1,000 cubic feet, and to that act there is raised an additional constitutional question not heretofore discussed. The representatives of the city and of the complainant have had no difficulty during two or three years of controversy in arranging a *modus vivendi*, whereby all rights of either side are reserved, and gas is furnished as required. It is not to be anticipated that there will be any difficulty about continuing such arrangement, but to facilitate it the order now to be entered may provide that payment by the city at the 75-cent rate, and acceptance thereof by complainant under protest, shall not operate as an accord, satisfaction, waiver, or estoppel, to the prejudice of either side in any litigation, pending or future. Such a clause may make it practicable for these contestants to eliminate some questions as to accruing interest.

(b) This court fully appreciates the importance of a prompt disposition of this cause, which not only presents questions of grave importance, but which, also, including the other causes heard at the same time, affects the interests of nearly half a million of households. There is no apparent reason why a final hearing on the merits should not be reached with reasonable expedition. In the event of demurrer or exceptions to any pleading being filed by either side, this court will hear and dispose of the same at any time during vacation, upon a week's notice. As soon as the cause is at issue, upon request of either side and upon four days' notice, the court will apportion the three months which the rules allow for taking the testimony. Promptness on the part of complainant, which evidently has large interests at stake, may fairly be assumed, but it may be insured by the insertion in the order of a clause providing that, in the event of any unreasonable delay, an-

plication may be made to suspend the injunction. Promptness on the part of the defendants is equally assured. They are public officers, who not only represent the state, but are also, in this test suit, the representatives of the great body of consumers, who will be insistent to secure a speedy determination of the questions at issue. It should be borne in mind that the controversies of fact presented are not new. The entire field has been fought over before the gas commission and elsewhere. Each side knows just what evidence it requires to support its contentions, and knows, too, where that evidence is to be found. The great bulk of the proof is already prepared, probably already in type. Charters, contracts, reports, exhaustive tabulations of receipts, disbursements, percentages, calculations, etc., are immediately accessible, and will, no doubt, with proper reservation of exceptions as to their materiality, be stipulated in by consent of counsel. When the cause is placed upon the calendar, its great public importance will insure its being given a preference, and it seems reasonable to expect that it can be finally submitted on the merits not later than November of this year.

(c) The Supreme Court in Chicago, *M. & St. P. R. R. v. Tompkins*, 176 U. S. 167, 20 Sup. Ct. 336, 44 L. Ed. 417, has indicated the practice to be followed in cases of this kind. The testimony should not be taken before an examiner, but before some competent master, who is to make all needed computations, and find fully the facts. Such a disposition will, at the proper time, be made of this cause.

(d) The order continuing the injunction should contain a clause providing that, in the event of complainant failing to succeed finally in the litigation, the preparation of the papers required for refund and the distribution of the amounts due to the respective consumers, including such interest as the condition of the fund after paying expenses of administration may warrant, shall be performed by the company; and, upon its being shown that refund has been made to any consumer by crediting the amount due him upon any current monthly bill or bills, or otherwise, such amount shall be returned to the company, week by week, or at such shorter intervals as the court may approve. It will also contain a further clause that all consumers who may change their address or may remove out of the borough should notify the clerk of the court or the gas company of such change of address, to the end that whatever refund they may be eventually found entitled to may be paid to them at their new address without their being put to the inconvenience of coming to the special master or to the company to collect it.

THE BOUND BROOK.

(District Court, D. Massachusetts. April 25, 1906.)

No. 1,723.

1. SEAMAN—VALIDITY OF CONTRACT FOR SERVICE—ADVANCE PAYMENT OF WAGES.

The advance payment of wages to a seaman, in violation of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079], does not render the contract for service made by the shipping articles void, under Rev. St. 4523 [U. S. Comp. St. 1901, p. 3075], where it is not shown that the unlawful payment entered into the contract as one of the things agreed on by the parties.

2. ADMIRALTY—JURISDICTION OF SUIT FOR SEAMAN'S WAGES—TREATY WITH GERMANY.

Under article 13 of the Treaty of December 11, 1871, between the German Empire and the United States (17 Stat. 928), which gives to the consular officers of each country exclusive power to take cognizance of and determine differences between the captains and crews of vessels of their own nation, and prohibits the courts of the other country from interfering therein, a court of admiralty of the United States is without jurisdiction of a suit against a German vessel to recover wages, brought by seamen who are not citizens of the United States, but who signed before a German consul in a port thereof and were discharged in another port after completing their term of service without objection; and such jurisdiction is not conferred merely by the fact that they were paid wages in advance, in violation of Act Dec. 21, 1898, c. 28, § 24, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079].

[Ed. Note.—Admiralty jurisdiction of suits between foreigners, see note to *Fairgrieve v. Marine Ins. Co.*, 37 C. C. A. 193.]

In Admiralty. On plea to jurisdiction.

John J. O'Connor, for libelants.

Theodore H. Tyndale, for claimant.

DODGE, District Judge. In this libel for wages the libelants allege that they signed articles on July 18, 1905, at New Orleans, where the steamer then was, for a trip to Jamaica and back to Boston as seamen and firemen on board her, at certain rates of wages; that they went on board on July 19th, have performed their duties during the trip, and that certain sums are now due them, payment of which has been refused.

The steamer, as below appears, is a German vessel. The libelants allege that they signed the articles before the German Consul at New Orleans. Her owner and claimant, a German subject, has filed a plea to the jurisdiction of the court which is based upon article 13 of the Convention of December 11, 1871, now in force, between the United States and the German Empire (17 Stat. 921, 928). The article referred to reserves to the Consuls of each Government respectively, "exclusive power to take cognizance of and determine differences of every kind, arising either at sea or in port, between the captains, officers and crews" of its vessels, "and specifically in reference to wages and the execution of mutual contracts," and provides that "in such differences neither any court or authority shall on any pretext interfere."

The German Consul at Boston has filed in court a protest, on behalf of the Imperial German Government, against the assumption by this court of jurisdiction in the case. The above provisions of the existing treaty between his government and the United States are therein submitted as the grounds of protest.

At the hearing upon the question of jurisdiction thus raised it was agreed by counsel for the respective parties that none of the libelants are citizens of the United States, that the steamer is a German vessel sailing under the German flag, and that her master is a German subject. These agreements render it unnecessary to consider the exceptions and motion to dismiss which have been filed by the claimant without waiving his plea to the jurisdiction. The only objections thereby raised are that the libel does not allege the nationality of the vessel, a fact which should have been alleged, nor that the libelants are United States citizens.

It was further agreed at the hearing that the libelants were informed, both before and after their libel was filed, that their claim for wages would be adjusted at the German Consulate; also that the master of the steamer lodged in the hands of the Consul funds sufficient to settle and adjust all claims properly due the libelants.

The libel as filed set forth a simple claim for unpaid wages earned on board the steamer, such as would be clearly excluded from the jurisdiction of the court by the treaty provisions above quoted. It alleged no facts whatever which could in any event warrant a ruling that those provisions do not apply.

The libelants were permitted at the hearing, however, to amend by inserting in their libel the additional allegations that the master refused to pay the wages claimed, "on the ground that he had previously paid advance money on account of each libelant at New Orleans, and that said sums should be deducted from their wages due them at the end of the voyage at the Port of Boston, contrary to the laws of the United States."

Is the case thus presented one of which the court may take jurisdiction, or is it one of which the German Consul has exclusive cognizance under the treaty? Inasmuch as the libelants are none of them citizens of the United States, and the vessel libeled is foreign, the court is not bound to take jurisdiction. It will use its discretion whether to exercise jurisdiction or not. Where, as in this case, the voyage is ended, jurisdiction is usually exercised in the absence of reasons to the contrary, and it may be exercised even against the protest of the Consul. Such a protest, however, is always an important circumstance for consideration. But if there are treaty stipulations with regard to the Consul's right to adjudge controversies arising between the master and crew, such stipulations are to be fairly and faithfully observed. *The Belgenland*, 114 U. S. 355, 364, 5 Sup. Ct. 860, 29 L. Ed. 152; *The Becherdass Ambaidass*, 1 Lowell, 569, 572, 573, Fed. Cas. No. 1,203; *The Pawashick*, 2 Lowell, 142, Fed. Cas. No. 10,851.

In *Tellefsen v. Fee*, 168 Mass. 188, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379, the effect of a treaty with Sweden and Norway,

containing provisions similar to those relied upon by the claimant, was considered by the court. It was held that under the treaty the courts of this country have no jurisdiction of an action for wages brought by a seaman against a master of a Norwegian vessel. "Such a treaty," it was said, "has almost uniformly been held to take away all right of action for wages in the courts of this country by a seaman coming within the scope of the treaty, whether the action be in rem or in personam." The decisions referred to by the court, viz., *The Elwine Kreplin*, 9 Blatchf. 438, Fed. Cas. No. 4,426; *The Salomoni* (D. C.) 29 Fed. 534; *The Burchard* (D. C.) 42 Fed. 608; *The Marie* (D. C.) 49 Fed. 286; *The Welhaven* (D. C.) 55 Fed. 80, are all of them decisions in admiralty. The *Burchard* deals with the same treaty and the same provisions as are here in question. In view of them it cannot be denied, nor is it attempted to deny in this case, that to such provisions must be allowed in general the effect given them by the Massachusetts decision which has been quoted. That the voyage for which wages are claimed has been ended is no reason for allowing any less effect to such provisions. The voyage had been ended in *Tellefsen v. Fee* and in the *Welhaven* above referred to.

The libellant's contention is that section 24 of Act Cong., Dec. 21, 1898, c. 28, 30 Stat. 763 [U. S. Comp. St. 1901, p. 3079], has been violated by the payment of advance wages to them at New Orleans; that the contract of shipment under which they served was therefore void, under Rev. St. § 4523 [U. S. Comp. St. 1901, p. 3075], because made contrary to the provisions of the act referred to; that they were therefore never legally members of the steamer's crew; and that, unless they did lawfully become members of the crew, the difference which has arisen in reference to their wages is not within the treaty provisions.

The decision in *Patterson v. The Eudora*, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002, establishes that section 24 of the act of 1898, which by its terms (clause f) is made applicable to foreign vessels as well as to vessels of the United States, does properly so apply; and, therefore, so far affects all contracts of shipment made in the United States, though for service on foreign vessels, that wages paid in advance at the time of the shipment may be recovered on completion of the voyage as if they had never been paid, although such payments are not due either by the terms of the contract or according to the law of the country to which the vessel belongs.

Section 24 of the act of 1898 applies therefore to the shipment of the libellants on this steamer at New Orleans, and it follows, from the express language of clause f, that, if advance wages were paid them at the time of their shipment, the master, owner, agent, or consignee who made the payment became liable to a penalty. It may also follow from the general application of the section to foreign vessels that the advance payments would be no defense to a claim in our courts for full wages, as provided in clause a, where our courts are free to take jurisdiction. But the entire application of the section to foreign vessels is by clause f expressly made subject to the proviso that treaties in force do not conflict. In *Patterson v. The Eudora*, above referred

to, no question of a treaty arose, the vessel was British, and there is no treaty with Great Britain upon this subject. See *The Eudora* (D. C.) 110 Fed. 430. The case was therefore one of which the United States courts were free to take jurisdiction.

But a contract of shipment, to be void under Rev. St. section 4523, must have been made contrary to the provisions of some act of Congress, and it has nowhere been provided in any act that a contract of shipment is to be regarded as unlawfully made, merely because there has been an advance payment of wages to be earned under it. Illegal though such a payment is, it can hardly be said to have the necessary effect of avoiding a contract of shipment which has once been lawfully made. And unless the unlawful payment is shown to have entered into the contract as one of the things agreed on by the parties, either expressly or by implication, as would be the case if it were paid or promised as part of the consideration, it is difficult to see how the making of the contract can be said to have been affected by it.

In *The Troop* (D. C.) 117 Fed. 557, affirmed on appeal as *Kenney v. Blake*, 125 Fed. 672, 60 C. C. A. 362, the agreement for an advance and its payment appeared by the articles signed. See *Kenney v. Blake*, 125 Fed. 673, 60 C. C. A. 362. In *The Alnwick* (D. C.) 132 Fed. 117, see page 119, and in *The Neck* (D. C.) 138 Fed. 144, the advance payments appear to have been made at the time the articles were signed. In all these cases it was held that the contract of shipment was void by reason of the advance payment. I find no other decisions which have so held. *Patterson v. The Eudora*, above discussed, does not so hold, nor does it necessarily so imply, although the facts in the case were not only that the advance payment was made at the time of shipment, but also that the contract provided for wages at the rate of one shilling for 45 days service, and \$20 per month thereafter. This same provision in a contract of shipment was held in *The Kestor* (D. C.) 110 Fed. 432, to be a mere cover for an unlawful prepayment of \$20, as no doubt it was; yet, while the provision referred to was held in that case to be void and full wages at \$20 per month were decreed without deduction of the advance payment, it was not suggested that the contract was wholly void because of the void provision contained in it or because of the unlawful payment under it. In *Commonwealth v. Bartlett*, 190 Mass. 148, 76 N. E. 607, one among several instances of void shipments referred to by the court is thus described, "or if wages are advanced to a seaman contrary to the act of Congress." No question of such a shipment, however, was involved in the facts before the court, or in its decision, and the only authority cited upon the point is *Kenney v. Blake*, which has been considered above.

To admit, however, that the contracts of shipment in *The Troop*, *The Alnwick*, and *The Neck* were rightly held void, is not to admit that the same conclusion is required in the present case. It is not distinctly alleged in this libel that advance wages were in fact paid the libelants at New Orleans; but assuming that such an allegation is intended, and that advance payments were so made, there is still nothing to show that the payments in any way entered into the terms of the agreement

or had any immediate connection with the making of the contract. If there were such payments at New Orleans, they were before the steamer left that port. Nothing further is stated regarding the time at which, or the circumstances under which, they were made.

The Troop, The Alnwick, and The Neck, moreover, all involved the question of the right of a seaman who had received advance wages to leave the vessel before the term of service for which he had shipped was completed. No such question is raised in this case. These libelants have performed all the service on board the steamer which they agreed to perform by the contract now claimed to have been void. They never sought to escape its obligations, nor, so far as appears, did they ever attempt to repudiate it in any way until after it had been fully performed on their part without objection. The contract indeed is set up in the libel as the foundation of their claim. The only difference between them and the master, which the libel discloses, is as to the amounts due them under it. I do not think that they can now be heard to claim, for the purposes of the argument, that it was void.

I find nothing in the case presented, therefore, to warrant the conclusion that the contract made by the libelants at New Orleans was or ever became wholly void by our law. But, even if the contrary were sufficiently shown, since the libelants have, at any rate, rendered services on board throughout the voyage and have rendered them voluntarily and without compulsion so far as appears, I think they must still be considered members of the steamer's crew within the meaning of the treaty. They may have been free, so far as our laws are concerned, to claim wages at a rate higher than the contract rate (a claim which they do not make), or they may have had the right, notwithstanding their contract, to refuse service and leave the vessel after having gone on board (a right which they have never asserted), and the penalties may have been incurred which are imposed by clause f of section 24, above referred to; but, having once completed the voyage as members of the steamer's crew, I think that a difference arising in reference to the amount of wages to be paid them at the end of the voyage is still a difference within the treaty provisions. When the "crew" of a vessel is referred to, those persons are naturally and primarily meant who are on board her aiding in her navigation, without reference to the nature of the arrangement under which they are on board. "It matters not whether the contract is verbal or in writing or for a long or short voyage or period." *The Marie* (D. C.) 49 Fed. 286, 287. As used in a treaty, the word must be given its natural and obvious meaning, in preference to a meaning derived by construction from the laws of one only of the contracting nations. In *Commonwealth v. Bartlett*, 190 Mass. 148, 76 N. E. 607, already referred to above, it was held that no person not under a binding engagement for a term of service to continue for some time in the future was a "member of the crew," within the meaning of Rev. Laws Mass. c. 66, § 2. It is made an offense by that statute to entice or persuade a member of the crew to leave the vessel before the expiration of his term of service, and the defendant was indicted for that offense. In determining the meaning of "member of the crew" for the purposes of that case, it

is obvious that a different rule of construction was required from that which is appropriate here.

Section 24 of the act of 1898 is subsequent to the treaty, and might, of course, had Congress so intended, have modified the treaty provisions. No such intent, however, can be presumed. It must be clear from the language of the act. When a treaty and a legislative act relate to the same subject, "the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either." *Whitney v. Robertson*, 124 U. S. 190, 194, 8 Sup. Ct. 456, 31 L. Ed. 386. "It will not be presumed that the legislative department of the government will lightly pass laws which are in conflict with the treaties of the country." *The Chinese Exclusion Case*, 130 U. S. 581, 600, 9 Sup. Ct. 623, 32 L. Ed. 1068. Clause f of section 24 expressly declares that the section is to apply to foreign vessels only so far as treaties in force do not conflict. The application of the section for which the libelants contend seems to me to involve a conflict with the treaty, and a conflict which does not appear to have been intended by Congress. The manifest purpose of the treaty is to secure to each nation the privilege of having its own laws govern questions of wages arising where its own vessels are concerned, in ports of the other nation. When, therefore, a provision is adopted into our own law of wages, and is declared by Congress applicable to foreign vessels provided that no treaty conflicts, the intention manifested is, in my opinion, not to make that provision applicable, where its application would require the assumption of jurisdiction by our courts in cases already excluded from their jurisdiction by a treaty, but to restrict its application, so far as vessels of that nation are concerned, to cases which are left by the treaty within the jurisdiction of our courts.

If the treaty obliges our courts not to take jurisdiction of differences in reference to wages where German vessels are concerned, it equally obliges the German courts not to interfere, in such cases, where vessels of the United States are concerned. The latter obligation is one upon which the United States insists. U. S. Consular Regulations 1896 (the latest edition), par. 88, p. 34; paragraphs 308, 309, pp. 118, 119. See *Tellefsen v. Fee*, above cited, 168 Mass. 188, 191, 192, 46 N. E. 562, 45 L. R. A. 481, 60 Am. St. Rep. 379. The same privilege is secured to the United States which it has conceded to the German Empire. Even, therefore, if it be assumed, although the case presented requires no such conclusion, that the determination of these claims for wages by the German Consul will result in a deduction of advance payments forbidden by our law in the settlement, the court is none the less forbidden by the treaty to interfere. A German court might with equal right interfere in a similar case occurring in a German port where a vessel of the United States was concerned, in order to enforce such a deduction, lest the United States Consul acting under our law might decline to make it in a settlement before him. A fair and faithful observance of the treaty stipulations would plainly forbid such interference by a German court, and equally forbids this court to take jurisdiction of the present case.

In *The Troop* and in *The Alnwick*, above referred to, there was no treaty to be considered. *The Neck* (D. C.) 138 Fed. 144, also above referred to, deals with the treaty now under consideration, and is the only case which affords any authority for the contention that its provisions, or similar provisions in any treaty, are not to control upon the question of jurisdiction, if section 24 has been violated by the payment of advance wages. The libelant in that case was a citizen of the United States, a fact which in the opinion of the court gave him a right to invoke the jurisdiction of the courts of the United States of which no treaty could deprive him. These libelants can claim no such right. Other differences between the facts of that case and the facts here have been already referred to. If the decision is nevertheless in conflict, in any manner, with the conclusion here reached, I must, with due respect for its authority, decline to follow it.

The libel is to be dismissed, with costs.

AMES REALTY CO. v. BIG INDIAN MINING CO. et al.

(Circuit Court, D. Montana. June 11, 1906.)

No. 668.

1. COURTS—ENFORCEMENT OF REMEDY GIVEN BY STATE STATUTES—SUITS RELATING TO WATER RIGHTS.

Civ. Code, Mont. § 1891, which provides that in actions for the protection of water rights the plaintiff may make any or all persons who have diverted water from the same stream or source parties, and the court may in one judgment settle the relative priorities and rights of all parties to the action, establishes a procedure substantially consistent with the ordinary modes of proceeding in chancery, and the rights thereby given may be enforced by a federal court of equity having jurisdiction of the suit by reason of diversity of citizenship.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 972.]

2. SAME—JURISDICTION OF FEDERAL COURT—CROSS-BILLS.

In a suit in a federal court of equity to establish and protect rights in the waters of a stream against other separate appropriators of water from the same stream, all of whom are citizens of different states from complainant, the court may entertain cross-bills by any or all of the several defendants setting up priority of right as against complainant or their codefendants, since they relate to the subject of the original suit, which is the water of the stream, and, being ancillary to the original suit, the court has jurisdiction to determine the issues raised thereby without regard to the citizenship of the parties thereto.

In Equity. On questions of jurisdiction.

McConnell & McConnell, for complainant.

M. S. Gunn, for defendants.

HUNT, District Judge. Complainant, a corporation, resident and citizen of Missouri, brings this action to obtain an adjudication of the rights of itself and the defendants to the use of the waters of Prickly Pear creek and its branches and tributaries within the state of Montana, and for injunction against defendants, restraining them from diverting any of the waters of said creek and its tributaries until the prior

rights of complainant are first satisfied. There are about 90 defendants, some of whom are residents and citizens of Montana, while many are residents and citizens of other states. Complainant owns 1,926 acres of agricultural lands, which require irrigation. It alleges that in 1865 and 1866 its predecessors in interest tapped the waters of Prickly Pear creek by means of certain ditches, and carried the waters of said creek upon the said lands, and irrigated the same, and made appropriations of such waters to the extent of 404 inches, and said quantity of said waters has been used upon said lands ever since such appropriations, and is necessary now to the enjoyment of the lands of this complainant. Complainant alleges that the defendants, and each and every of them, claim some right to the use of the waters of said Prickly Pear creek or its tributaries, all of which said tributaries empty into the Prickly Pear creek above the points where complainant diverts its water, and that the waters of the tributaries are necessary in order to swell the waters of the main Prickly Pear creek, so that complainant and other prior appropriators to defendants may satisfy their prior rights. It is alleged that defendants are appropriating large quantities of the waters of Prickly Pear creek and its tributaries, and threaten to continue to do so, and thereby to exhaust the waters, so that complainant will be deprived of the use of water for its lands, and greatly damaged thereby. Complainant sets forth that all the rights claimed by the defendants, or any of them, are subsequent to the rights of complainant, and that, unless defendants are restrained from diverting and turning away the waters of Prickly Pear creek and its tributaries by means of ditches, complainant will be unable to cultivate its lands. It is set forth that, by reason of the diverse interests of each of the defendants, it is necessary that all and every of the claimants of the waters of Prickly Pear Creek and its tributaries be made and joined as defendants, in order to avoid a multiplicity of suits.

A number of the defendants have filed cross-bills, wherein each cross-complainant sets forth the substance of complainant's bill, pleads title to certain lands in the Prickly Pear valley, and that the lands described in the cross-complaint are agricultural lands, and have been irrigated with the waters of Prickly Pear creek by means of ditches carrying certain quantities of the waters of said creek, appropriated prior to the alleged dates of appropriation of the complainant. Cross-complainants allege that the lands they own are patented, and that they and their predecessors in interest have had open, notorious, continuous, uninterrupted, and adverse use, possession, and enjoyment of specified numbers of inches of waters of Prickly Pear creek, as against the complainant and other cross-complainants who are codefendants mentioned in the complainant's bill, and all other persons. They allege that the complainant, and their codefendants mentioned in complainant's bill, claim some right, title, or interest, by virtue of appropriations, to the use of the waters of the said Prickly Pear creek and its tributaries, and are using the same; but they aver that the rights of the complainant and their codefendants are subordinate and subservient to the rights of cross-complainants, and that it is necessary that an adjudication be had of the amounts of water to which the

cross-complainants and the complainant and the defendants named are entitled, and that the cross-complainant's rights to the use of the waters of the creek, or of the tributaries of the creek, from which they allege they are using waters, be quieted by decree of the court. They ask for an injunction, restraining the complainant and all other parties to the suit, and each and every of them, from in any manner interfering with the rights of the cross-complainant filing the bill, to the end that such cross-complainant may have the use of the waters of the tributary creek or main creek, according to his rights, as may be set forth in the particular cross-complaint.

No testimony has as yet been taken in the case. Counsel for several of the defendants, who have merely answered, present a question of jurisdiction by contending that there is no jurisdiction in this court to adjudicate the claims of cross-complainants where there is no diversity of citizenship, and no jurisdiction to enter a decree determining the relative rights of all the parties to the suit in and to the waters of the stream from which complainant claims to have made an appropriation. Counsel for answering defendants and for complainant have presented their views to the court, asking that a ruling should be had before testimony may be taken, to the end that the evidence may be confined to issues properly triable in this court.

The learned counsel for complainant argues that section 1891 of the Civil Code of Montana authorizes this court in one judgment to settle the relative priorities and rights of all the parties to the action, and that it lawfully has made parties to the action all persons who have diverted water from the Prickly Pear creek. His contention is that the subject for litigation tendered to the defendants by the bill of complaint is the stream of water known as Prickly Pear creek and its tributaries; that while the plaintiff only claims 404 inches of water, or rather the right to the use of 404 inches of the waters of the stream described, it is not a separate or separable part of the waters of such stream; that it is a usufruct right as against each and every one of the defendants; and that complainant's right to use the waters claimed by it depends upon the relative priorities of the parties. Placing stress upon the point that the amount claimed by the complainant may be controverted, he invokes broad principles of equity, which he says will not permit all the defendants to be sued simply to litigate the right of the complainant to waters as against each one of the defendants singly, but will uphold a jurisdiction to make a complete determination of the entire controversy among the users of the waters of the stream by allowing each defendant by cross-bill to set up his own right, and thus adjust all the claims in controversy in one suit. This argument needs find its foundation in the general application of the practice expressly recognized by the Codes of the state relating to actions to protect water rights to the equity practice of the federal courts. Section 1891 of the Civil Code of Montana is as follows:

"In any action hereafter commenced for the protection of rights acquired to water under the laws of this state, the plaintiff may make any or all persons who have diverted water from the same stream or source parties to such action, and the court may in one judgment settle the relative priorities and rights of all the parties to such action. When damages are claimed for the

wrongful diversion of water in any such action, the same may be assessed and apportioned by the jury in their verdicts, and judgment thereon may be entered for or against one or more of several plaintiffs, or for or against one or more of several defendants, and may determine the ultimate rights of the parties between themselves. In any action concerning joint water rights or joint rights in water ditches, unless partition of the same is asked by parties to the action, the court shall hear and determine such controversy as if the same were several as well as joint."

A cross-bill is often filed to obtain affirmative relief for the defendant in the original suit, to obtain a discovery in aid of the defense in that suit, to enable the defendant to interpose a more complete defense than that which he could interpose by answer, or to obtain full relief to all parties, and a complete determination of all controversies which arise out of the matters charged in the original bill. The Court of Appeals of the Eighth Circuit held in *Springfield Milling Co. v. Barnard & Leas Mfg. Co.*, 81 Fed. 263, 26 C. C. A. 389, that if a cross-bill "fairly tends to accomplish either of these purposes," it is generally a sufficient ground for its interposition. Section 399, Story on Equity Pleading, says a cross-bill is to be treated as a mere auxiliary suit, or as a dependency upon the original suit. In *Cross v. De Valle*, 1 Wall. 1, 17 L. Ed. 515, the Supreme Court of the United States quote this language of Judge Story, and, proceeding, say:

"It may be brought by a defendant against the plaintiff in the same suit, or against other defendants, or against both, but it must be touching the matters in question in the bill," etc.

In *Remer v. McKay* (C. C.) 38 Fed. 164, Judge Blodgett analyzed a pleading by answering the question whether the cross-bill was "germane to the subject-matter of the original bill." And in *Morgan's Co. v. Texas Central Railway*, 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, the Supreme Court again quote Mr. Justice Story as follows:

"A cross bill," says Mr. Justice Story (Eq. Plead. § 389), 'ex vi terminorum, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought either (1) to obtain a necessary discovery of facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties touching the matters of the original bill.' And, as illustrative of cross-bills for relief, he says (section 392): 'It also frequently happens, and particularly if any question arises between two defendants to a bill, that the court cannot make a complete decree without a cross-bill or cross-bills, to bring every matter in dispute completely before the court, to be litigated by the proper parties and upon the proper proofs.'"

Chief Justice Fuller writes of jurisdiction over the subject-matter, and says that "the subject-matter" of the cross-bill must be the same as that embraced in the original bill, and if it is the court will grant relief.

In *Badger G. M. & M. Co. v. Stockton G. & C. M. Co.* (C. C.) 139 Fed. 838, Judge Gilbert for the court of appeals sustains the doctrine that where facts are alleged in a cross-bill not alleged in the original bill, "but which are directly connected with the subject-matter of the original suit, and prays affirmative relief directly connected with and arising out of the matters of the original suit, and germane to the

same, the court will order the cause to be retained for final hearing and decree upon the cross-bill." What, then, are matters directly connected with the subject-matter of the original suit? In proceeding to a brief analysis, let us not confuse the question by misunderstanding the object of the action. The complainant herein, the Ames Realty Company, prays for a decree fixing its rights to the use of 404 inches of the waters of Prickly Pear creek, and for injunction restraining all defendants who claim rights from diverting water until complainant's prior rights are satisfied. The object of this action is, therefore, what the Ames Realty Company endeavors to obtain—a decree that it is entitled to the prior use of 404 inches of water, and an order of court which will prevent all defendants from interfering with it in the enjoyment of such prior right of use. Plainly, therefore, the object of the action is the remedy asked, and which may be finally awarded. It is something ahead—a future result—which is sought. This object, however, is something apart from the subject-matter of the suit, and, as said, the subject-matter being the point which we are here inquiring into, let us proceed further. Substantial accord is to be found among the books in the discussion of what is meant by the subject-matter of the action. It is scarcely necessary to state that clearly it is not the cause of action here, for the cause of action springs out of the primary lawful rights of the Ames Realty Company to the use of 404 inches of the waters of Prickly Pear creek, the duty of the defendants not to interfere with such right, and the breach thereof by the improper diversion of water by the defendants in the modes described in complainant's bill. These elements constitute the cause of action, and from them the Ames Realty Company's right of action has arisen. Speaking exactly, the subject-matter involved is the right to use the physical thing—the flowing water—susceptible of use for wetting the lands belonging to the Ames Realty Company and other owners. "Subject-matter of the action," writes Pomeroy on Code Remedies, § 369, "rather describes the physical facts, the things real or personal, the money, lands, chattels, and the like in relation to which the suit is prosecuted." I am not losing thought of the distinction between the right to use the physical thing and the thing itself—the incorporeal from the corporeal. There is, of course, no exclusive ownership of the water itself. A right to use for beneficial purposes is the right involved. Nevertheless, the right of use of the physical thing becomes, in these water right cases, so identified with the water, that in ascertaining by strict analysis what is the subject-matter of the action, we find that the water itself is that in relation to which complainant prosecutes its suit, and so the water really becomes the subject of the action, in so far as there is a thing physical or real involved in the suit. Now these cross-complainants severally allege that they own rights in and to the waters of the Prickly Pear anterior to those alleged in the bill of complainant; moreover, they say that complainant and their co-defendants are violating these rights by diverting the waters of the creek, and they demand relief by injunction.

For the purposes of this discussion, judicial knowledge may be taken of the fact that Prickly Pear creek is not a very large stream, and that

in midsummer its waters diminish greatly; indeed, it is but a statement which counsel would surely accept as of common knowledge that never does the Prickly Pear creek carry enough water to enable all the farms throughout the valley to receive during the irrigating season the full benefit of the water rights claimed by valid but ineffectual appropriations. Despite the most careful husbanding of the waters, much land suffers from drouth, and the many appropriators along the creek and its tributaries are obliged to protect their rights with the utmost vigilance, lest their crops languish for moisture. Such circumstances well illustrate the somewhat peculiar nature of the right of use of water from a stream of limited flow. Of course, there is no way of singling out certain specific water as belonging to any one appropriator. For instance, the use of a small quantity (404 inches) is all complainant in this case alleges it is entitled to. Such a quantity is doubtless considerably less than the whole stream. There is no ownership in kind, at least before the water complainant claims has passed into its own ditches, and even then it is but an ownership sub modo. Nevertheless, priority of appropriation is what the law jealously protects; it is of a species of property which has become immensely valuable as the western country has developed in its agricultural resources. By juridical law principles have been enunciated which protect the better right to the use of the waters of a creek by permitting a complainant who has such right to invoke protection of it against the acts of others, whether jointly or severally done. And the protection that is afforded should be as broad as the demand calls for, consonant always with those fundamental truths, which, under systems of administering justice, are recognized as the foundation of equitable jurisdiction. The quantity of water which a single one of these defendants may be diverting from Prickly Pear creek or its tributaries might not interfere at all with the Ames Company's use. But the result of the several diversions alleged against defendants might be shown to deprive complainant wholly of the enjoyment of any use. All users are therefore properly brought in to defend. By like reasoning, when they have come into court, these alleged diverters may ask relief against complainant, whose rights they say are subsequent to theirs.

But a still different condition may exist. One of the defendants may show that he is prior in right to complainant, and it may appear water is left in the creek sufficient to satisfy complainant's, as well as his own, right. As against him, complainant must fail. Another defendant may be proved to be subsequent in right to complainant, and is therefore defeated by complainant; but, though defeated by complainant in so far as his right is fixed in point of time, still, as the quantity of water which he claims a right to use is very limited, he might also enjoy his right without interfering with complainant in any injurious way, provided he can try and maintain his rights as against a codefendant, who has been defeated by complainant, but whose rights are subsequent to his (cross-complainant's), and who diverts so much water that he, the first cross-complainant, cannot use that to which he is justly entitled, though, as between him and original complainant, he might enjoy his right were it not for the extent to which his codefend-

ant is diverting. We may test this in this way: let us say that Prickly Pear creek carries 600 inches of water. The Ames Realty Company alleges it is entitled to 400 inches by appropriation taken out, let us say, one mile below the head of the stream; its appropriation dating January 1, 1864. An upper proprietor, who is a defendant, and whom we call B., claims a right to the use of 25 inches of water, which he says is his by appropriation dated January 1, 1865, or one year later than the complainant's. His ditch taps the creek half a mile above the point of diversion of the complainant. Another proprietor, whom we may call C., claims 200 inches, which were appropriated January 1, 1866. C. taps the creek above A. and above B. Subtracting 200 inches that C. takes out, there would still be enough water flowing to satisfy the original complainant claiming 400 inches. B., though, could get no water, notwithstanding his rights are superior to those of C., and notwithstanding the fact that he could enjoy his right without injury to the original complainant; enjoyment being denied because C. is diverting so much water that he (B.) is deprived of the use of that to which he is justly entitled, and which he would enjoy were it not for the extent to which his codefendant, C., is diverting the water. Will not a court of equity take jurisdiction with respect to this property right as ancillary to its jurisdiction over the case between complainant and first defendant, and, having jurisdiction of the whole proceeding, will it not proceed to do justice between all the parties? Reflection leads me to answer the questions in the affirmative. It is true that if complainant can secure protection of its own right, junior appropriators might be left to fight out their relative rights among themselves; but, as conditions frequently exist in litigation over usufruct of water, where it is practically impossible to make a just decree between complainant and one defendant without ascertaining rights of defendants as against one another, the court will permit cross-complaints to stand, to the end that a multiplicity of suits may be avoided, so that tedious, expensive, and unnecessary litigation may be saved.

In *Union Mill & Mining Co. v. Dangberg* (C. C.) 81 Fed. 73, complainant there brought suit in equity to obtain a decree against respondents for the alleged wrongful diversion of the waters of the Carson river in Nevada. He made about 125 persons respondents, alleging that they were farmers living above a certain mill, and that they used the waters of the Carson river for irrigation and other purposes. One of the contentions of the respondents was that, inasmuch as they did not claim the water of the river jointly, or by any common right, they could not be jointly sued, and that, therefore, complainant could not obtain the relief it sought. It was admitted that the respondents did not jointly or in common divert or use the water, and that they alleged that they claimed individual, distinct, and separate rights, independent of each other. Judge Hawley was of the opinion that the proofs and pleadings distinctly showed that the result of respondents' acts were such as to make their individual diversion of the water injurious to complainant's rights. He held that the claims of the respondents were of the same character, and were adverse to the complainant, and that they were, therefore, all properly united as respondents, because they

all diverted water from the Carson river, and claimed the right to divert it, as against the complainant. He said:

"These conflicting rights, whatever they may be, can be determined by one suit. Complainant might not be able to maintain its suit against them singly, for it may be that no one of the respondents acting individually has deprived complainant of all the water to which it is entitled. Complainant is only entitled, if at all, to a certain amount of the water of the river, and it is by the action of all the respondents that it has been deprived of the water to which it claims to be entitled. Each respondent claims the right to divert a given quantity of water. The aggregate thus claimed so reduces the volume of the water in the river as to deprive complainant of the amount to which it is entitled. To this extent, even if there is no such unity or concert of action or common design in the use of the water to injure complainant, there is certainly such a result in the use of the water by the respondents as authorizes complainant to maintain this suit, upon the ground that the action of all the respondents has produced and brought about the injury of which it complains. Every one who contributes to such injury is properly made a party respondent."

The analogy found between the reasoning of the case just quoted from and that at bar consists in the recognition of the rule that conflicting claims to the right to divert waters from a common source may be determined in one suit, and, although each respondent may claim a right to divert a given quantity of water, the aggregate thus claimed may so reduce the volume of the water in the stream as not only to deprive complainant of the amount to which it may be entitled, but may also so affect the volume of the water as to deprive one as against the other of the respondents of the amount to which he may be entitled. Pleadings, by way of cross-bills, setting forth such facts, would seem to touch the matters in question in the original bill in a way to authorize the court to proceed under the usual rules of pleading and practice in equity. *Mitford's & Tyler's Pleading and Practice in Equity*, page 178. But if, under the old chancery practice, no affirmative relief could be given to these defendants under their cross-bills, still the courts of the United States will not deny jurisdiction to proceed under the statute of the state already quoted, unless the equitable remedy afforded by the state statute impinges upon the rights of the litigants to a trial by jury at common law. No statute of the state can control modes of procedure in equity cases in the federal courts, nor deprive them of their separate jurisdiction in equity. *Cummings v. National Bank*, 101 U. S. 153, 25 L. Ed. 903. But the federal courts will enforce a new right or new remedy furnished by the laws of a state, as the nature of the new right or remedy requires. *Reynolds v. First Nat. Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733.

One of the most interesting discussions sustaining the doctrine that, while alterations in the jurisdiction of state courts cannot affect the jurisdiction of the Circuit Courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the federal courts as well as by the courts of the state, is to be found in the case of *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52. That was a suit in equity to quiet title of plaintiff to certain real estate in Nebraska as against the claim of the defendant to an adverse estate in the premises. It was

instituted under a statute of the state of Nebraska permitting suit to be brought by any person, whether in actual possession or not, claiming title to real estate against any person who claims an adverse estate or interest therein, for the purpose of determining such estate or interest and for quieting title to such real estate. With the learning which characterizes all the opinions of that truly great jurist, Justice Field speaks of the growth of statutes permitting recovery of the possession of real estate, granting relief in equity where formerly no relief could have been had. He proceeds to demonstrate that the statute of Nebraska is certainly for the interests of the state, and declares that it is for the interests of the community that conflicting claims to property situated as was the particular property in that case should be settled so that it might be subject to use and improvement. "To meet cases of this character," he says, "statutes like the one of Nebraska have been passed by several states, and they accomplish a most useful purpose; and there is no good reason why the right to relief against an admitted obstruction to the cultivation, use, and improvement of lands thus situated in the states should not be enforced by the federal courts when the controversy to which it may give rise is between citizens of different states." He reviews the earlier decisions of the Supreme Court, particularly *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *The Broderick Will Case*, 21 Wall. 520, 22 L. Ed. 599; and quotes from *Pomeroy's Equity Jurisprudence*, § 1398.

The Legislature of the state of Montana has a right to say that in an action for the protection of water rights a plaintiff may make all persons who have diverted water from the same stream parties to such action, and that the courts of the state may in one judgment settle relative priorities and rights of all the parties to such action; and, having so provided, are not the federal courts by conforming to the state practice but applying their mode of proceeding to the enforcement of a remedy substantially consistent with the ordinary modes of proceeding in chancery? Propriety and convenience are greatly promoted by pursuing the practice of the courts of the state, and if there be nothing in the character of the equities recognized by the state statute or the remedies prescribed which interfere with what legitimately pertains to the chancery practice, the federal courts will deal with controversies instituted under a state statute, so as to give effect to state legislation and state policy. *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123. It is manifestly a good thing for the agricultural interests of the state that water rights be adjudicated. The settlement upon, and cultivation of, lands in Montana depend largely upon the water rights available for irrigation purposes. As the population of the state has increased, the values of water rights have become greater. To avoid tedious and expensive litigation, involving the usufruct of the water of a stream whence many settlers may claim rights, the statute cited was passed, and I believe bench and bar will agree that its use has been fully demonstrated. Under its procedure the courts have been enabled to hear and determine very many important water right suits, and to make final decrees fixing the rights of parties to the use of the waters of various streams in Montana. System and quiet enjoyment are thus

had, and property rights are being settled to the satisfaction of those concerned. Now, why may not this right to bring all parties in and administer full relief be administered by the Circuit Courts of the United States as well as by the courts of the state?

In the case of *Broderick's Will*, 88 U. S. 503, 22 L. Ed. 599, Justice Bradley said:

"Whilst it is true that alterations in the jurisdiction of the state courts cannot affect the equitable jurisdiction of the Circuit Courts of the United States so long as the equitable rights themselves remain, yet an enlargement of equitable rights may be administered by the Circuit Courts, as well as by courts of the state. And this is probably a case in which an enlargement of equitable rights is effected, although presented in the form of a remedial proceeding. Indeed, much of equitable jurisdiction consists of better and more effective remedies for attaining the rights of parties."

In *Greely v. Lowe*, 155 U. S. 58, 75, 15 Sup. Ct. 24, 39 L. Ed. 69, Justice Brown wrote:

"This court has held in a multitude of cases that where the laws of a particular state gave a remedy in equity, as, for instance, a bill by a party in or out of possession to quiet title to lands, such remedy would be enforced in the federal courts if it did not infringe upon the constitutional rights of the parties to a trial by jury. *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733; *Chapman v. Brewer*, 114 U. S. 158, 171, 5 Sup. Ct. 799, 29 L. Ed. 83; *Cummings v. National Bank*, 101 U. S. 153, 157, 25 L. Ed. 903; *United States v. Landram*, 118 U. S. 81, 6 Sup. Ct. 954, 30 L. Ed. 58; *More v. Steinbach*, 127 U. S. 70, 8 Sup. Ct. 1067, 32 L. Ed. 51. This suggestion is the more important in view of a statute of Florida which authorizes a court of equity in partition cases 'to ascertain and adjudicate the rights and interests of the parties,' which has apparently been held to authorize the court, in its discretion, to settle the question of title as incidental to the main controversy, or retain the bill, and refer it to a court of law. *Street v. Benner*, 20 Fla. 700; *Keil v. West*, 21 Fla. 508."

In *Grether v. Wright*, 75 Fed. 742, 23 C. C. A. 498, after a careful review of the decisions of the Supreme Court, Judge Taft said:

"We think this review of the cases justifies the conclusion that the main purpose of section 723 Rev. St. [U. S. Comp. St. 1901, p. 583] was to emphasize the necessity for preserving to litigants in courts of the United States the right to trial by jury secured by the seventh amendment in suits at common law, and that, where a state statute grants to litigants in its courts an equitable remedy which does not impinge on their right to a trial by jury at common law, courts of the United States, sitting in the state as courts of equity, may grant the same statutory relief as that afforded in the state tribunals. In such cases, where the right of jury trial is not interfered with, the equitable remedy afforded by the statute of the state is usually so much more complete than the old remedies that the language of section 723 interposes no obstacle to equitable jurisdiction in the federal courts."

In *Southern Pine Co. v. Hall*, 105 Fed. 84, 44 C. C. A. 363, Judge Shelby, speaking for the Court of Appeals of the Fifth Circuit, said:

"An examination of the cases will show that the jurisdiction in equity in the United States courts to enforce statutes enlarging equitable remedies depends on the question whether or not the enforcement of the statute deprives a party of the constitutional right of trial by jury. Section 723 of the Revised Statutes of the United States, and the law as administered without regard to this statute, forbid equity to take jurisdiction where there is a plain and adequate remedy at law. If the record in this case showed that the de-

fendant was in actual possession of the lands, so that an action of ejectment could have been brought against her for the lands, then it would appear that there was an adequate remedy at law, and jurisdiction in equity would not exist in the United States courts, although the statute conferred such jurisdiction on the Mississippi state courts. *Whitehead v. Shattuck*, 138 U. S. 146, 147, 11 Sup. Ct. 276, 34 L. Ed. 873. The result of the decision of the Supreme Court is that a state statute which enlarges equitable rights will be enforced and administered in the United States courts in all cases where its enforcement and administration do not conflict with the right of the parties to a jury trial. *Clark v. Smith*, 13 Pet. 195, 10 L. Ed. 123; *In re Broderick's Will*, 21 Wall. 503, 22 L. Ed. 599; *Hipp v. Rabin*, 19 How. 271, 15 L. Ed. 633; *Thompson v. Railroad Co.*, 6 Wall. 134, 18 L. Ed. 765; *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Grand Chute v. Winegar*, 15 Wall. 373, 21 L. Ed. 174; *Buzard v. Houston*, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451. See, also, *Harding v. Guice*, 25 C. C. A. 352, 80 Fed. 162; *Green v. Turner* (C. C.) 98 Fed. 756. To review and quote from these cases would serve no useful purpose. That work has already been done by Judge Taft, speaking for the United States Circuit Court of Appeals for the Sixth Circuit, in *Grether v. Wright*, 23 C. C. A. 498, 75 Fed. 742."

Reference was made by me during the argument to a recent ruling I had made in the case of the United States against the Conrad Investment Company. The point there decided, however, has little relevancy to the questions here involved. That was a bill in equity filed by the United States against the Conrad Investment Company to restrain it from maintaining a dam, which it had erected upon the lands of the United States, and by means of which it was preventing the Indians upon one of the reservations of the United States from enjoying the use of waters, all of which were claimed by the United States as necessary for the irrigation of lands within the reservation, and belonging to the complainant. The defendant moved the court to order the complainant to make certain persons, strangers to the original suit, parties defendant. The defendant made no sufficient showing that its rights would be affected by making such persons defendants, but argued that they should be brought in, in order that there might be a complete adjudication of the alleged rights, not only as between the original parties, but between the United States and other persons who were settlers claiming right of use of waters of the stream which had been dammed by the defendant company. It was reasonably clear that the persons defendant asked to have made parties were not necessary or proper. The matter in litigation between the United States and the Conrad Investment Company did not seem to be one which in any way necessarily concerned persons other than the original parties; hence, relying upon the doctrine of *Union Mill Mining Co. v. Dangberg* (C. C.) 81 Fed. 87, I held the complainant had a right to bring only such parties before the court as interfered with its rights. The principle of the case is that, where no relief is sought against persons who are not connected in interest with the subject-matter of the suit, they should not be made parties to the litigation. The rule, however, that a complainant cannot be compelled to amend his bill and bring in new parties, who are not indispensable or necessary or even proper parties to the action, as disclosed by the bill of complaint, rests upon reasons very different from those which underlie the practice which allows parties, who are before the court by action of complainant, and

who are already within its jurisdiction, and who have an interest in the subject of the litigation, to assert rights, as against complainant and one another, provided the subject-matter concerning which affirmative relief is sought is directly connected with that involved in the principal action, and is germane thereto. In the one case complainant only asks relief against those whom he makes parties defendant, while in the other he is asking relief against those whom he has chosen to make parties, and they, in turn, when brought into court, ask affirmative relief against complainant and all parties to the suit who may be interfering with their alleged rights.

Van Bibber v. Hilton et al., 84 Cal. 585, 24 Pac. 308, was an action to restrain defendants from diverting the waters of a stream which flowed through the lands of both parties. Defendants by cross-complaints asked affirmative relief against plaintiff. The court stated the question in this language:

"Did the defendants in what are called the first and second cross-complaints seek affirmative relief thereby, affecting the property to which the action relates? The action relates to the waters of the stream, the right to the use of which the plaintiff claimed as a riparian proprietor, and the defendants in that capacity and as prior appropriators. * * * The right to the same water, the same property right, was involved in the action as brought as in the cross-complaints; and therefore a cross-complaint was the proper pleading, as we think, in which to set up the facts and claim the affirmative relief. There were then causes of action stated in the cross-complaints proper to such pleadings," etc.

Ayres v. Carver, 17 How. 591, 15 L. Ed. 179, is relied upon by defendants' counsel. But I do not regard the doctrine of that case as directly applicable to a case like that now before us. The court there treated the claims of certain codefendants cross-complainants, who were citizens of the same state, as forming no portion of the issue of the original suit. Justice Nelson said.

"As it respects the cross-bill, it may be proper to observe that the matters sought to be brought into the controversy between the complainants in that and their codefendants do not seem to have any connection with the matters in controversy with the complainant in the original bill. Nor is it perceived that he has any interest or concern in that controversy. These two complainants in the cross-bill set up a title to the lands in dispute, which, they insist, is paramount to that of their codefendants, and seek to obtain a decree to that effect, and to have the possession delivered to them. This is a litigation exclusively between these parties, and with which the complainant in the original bill should not be embarrassed or the record incumbered. The same matter has been set up in their answer to the original bill, against the equitable title claimed by the complainant, presenting the only issue in which he is interested, and upon which the questions between them can be heard and determined."

The case turned upon the point that there was perceived no interest by complainant in the controversy between defendants. By implication, if there had been any perceptible interest, the cross-bill would have been sustained. But, as I have shown, in controversies over the right to use the waters of a stream, where complainant makes a number of persons parties, as he has a right to do, it becomes a very decided concern of his, and of codefendants as between themselves and him, as to how the rights of cross-complainants may be settled, inasmuch as

the relief afforded them by definitely establishing their rights of user may so affect the use of the waters of the stream that complainant will have no enjoyment of any portion of it at all; his claim being subordinated, perhaps, to rights decreed to other parties. It would needlessly extend the length of this opinion to cite further authorities upon the general doctrine enunciated by those to which I have referred. They are enough to demonstrate as a principle that this court, having jurisdiction of the suit by reason of diversity of citizenship, may administer the substantial right conferred by the statute of the state, and accord the remedy which may be prescribed thereby.

The several defendants, who have answered only, urge that, the jurisdiction of this court being limited to controversies between citizens of different states, and the jurisdiction in this case being based upon the diversity of citizenship between complainant and defendants, the court will not retain the cross-bills, which seeks to obtain a decree determining the relative rights of the parties to the waters of the stream out of which complainant claims its rights, if diversity of citizenship is lacking between cross-complainants and other codefendants. The weight of authority is against the contention.

In *First Nat. Bank of Salem v. Salem Capital Flour Mills Co.*, and others (C. C.) 31 Fed. 580, it was contended that a cross-bill could not be maintained on account of the citizenship of the parties thereto, because the cross-bill made a case between several parties, all of whom were British subjects. That was a suit in equity to enforce the lien of a mortgage. The action was brought by the First National Bank of Salem against the Salem Capital Flour Mills Company, Stuart, McDonald, and Kelly, to enforce the lien of a mortgage given to the bank by the flour mills company on certain property in Oregon. Plaintiff was a citizen of Oregon. The defendant company, Stuart, and McDonald were British subjects, and the defendant Kelly was a citizen of Rhode Island. Stuart held a mortgage on the same property, and there was included in Stuart's mortgage certain other property besides, not included in plaintiff's mortgage. The complaint alleged that the defendants McDonald and Kelly pretended to have an interest in the property by reason of certain judgments which had been obtained in the courts of the state of Oregon, and which were in litigation by suits which had been instituted in the state courts, but thereafter removed to the Circuit Court of the United States for the District of Oregon. The defendant Stuart filed a cross-bill against plaintiff and his codefendants in the original bill. He alleged that the City of Salem Company was an Oregon corporation, and had borrowed certain moneys from him, evidenced by promissory notes and mortgage, and that the mortgage covered the property included in the mortgage to the plaintiff, except a certain tract, which was intended to have been included therein, and which was mortgaged to the defendant by the Salem Capital Flour Mills Company, successor in interest of the City of Salem Company. In the cross-bill it further was alleged that the defendants Kelly and McDonald pretended to have an interest in the mortgaged property by reason of certain judgments in their favor, and that they (Kelly and McDonald) claimed that defendants' mortgages were void

for fraud. Kelly and McDonald demurred to the cross-bill because there was no jurisdiction of the persons and matters set forth. The objection was made that Stuart was not a necessary party to the suit, but only a proper one. Judge Deady said that it might be admitted that he was not a necessary party; yet plaintiff had a right to make him a party, and being properly made a party, he had the same right to file and maintain a cross-bill in the suit as he would if he were a necessary or indispensable party. Attempt was also made to show that the cross-bill could not be maintained on account of the citizenship of the parties thereto, because a controversy was stated between Stuart on the one hand and McDonald and the flour mills company on the other, all of whom were British subjects. The learned judge disposed of this in the following language:

"Now, nothing is better settled, both on reason and authority, than this. In suits not original, but ancillary to litigation already pending in a Circuit Court of the United States, the citizenship of the parties is wholly immaterial. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Freeman v. Howe*, 24 How. 460, 16 L. Ed. 749; *Cross v. De Valle*, 1 Wall. 14, 17 L. Ed. 515; *Railroad Co. v. Chamberlain*, 6 Wall. 748, 18 L. Ed. 859. In the last case the court reversed the decree of the Circuit Court dismissing the cross-bill on the final hearing, because the parties thereto were citizens of the same state; saying that the cross-bill 'was but ancillary to, and dependent upon, the original suit,' and, by a necessary implication, that the citizenship of the parties in this connection was immaterial. If the citizenship of the parties in the original suit is sufficient to give the court jurisdiction, it has jurisdiction of the cross-bill therein without reference to the citizenship of the parties thereto. A cross-bill is a proper and recognized means of making a defense or asserting the right of a defendant in a suit in equity. It would be intolerable if a party sued in a national court was thereby deprived of this right, unless the parties to the cross-bill were such as to give the court jurisdiction in an original suit. In short, the cross-bill and the original suit are but one cause, and jurisdiction of the latter includes the former. *Field v. Schieffelin*, 7 Johns. Ch. (N. Y.) 252; *Story*, Eq. Pl. § 399."

It would appear as if a different rule had been followed by Judge Speer in *Vannerson v. Leverett* (C. C.) 31 Fed. 376, decided about the same time that Judge Deady expressed the opinion just quoted from. *Vannerson v. Leverett* was a controversy wherein a creditors' bill had been filed against the defendants, Vannerson and Leverett. Vannerson filed a cross-bill against his codefendant, Leverett, seeking relief in a certain indebtedness which existed between themselves. Leverett filed a plea to the jurisdiction of the United States courts, and averred that both he and Vannerson were citizens of Georgia. To this plea Vannerson demurred upon several grounds; one being that the bill filed by the creditors was a creditors' bill, and that the jurisdiction of the court did not depend upon the citizenship of the parties. The original bill in that case was dismissed, but Judge Speer did not regard that as material, but placed his decision upon the ground that, if Vannerson and Leverett were both citizens of Georgia, the one could have no relief in the United States court against the other, in a cross-bill filed to an original bill against them both, which he could not have obtained by original bill in the United States court. Emphasis was laid upon the fact that Vannerson had no standing in court as a suitor by original bill, and prayed no relief against the creditors. It was

held, too, that the cross-bill had no relation to the subject-matter of the suit by the creditors, nor was the cross-bill in any sense a reply to the allegations of the original bill.

There is no difficulty in reconciling the opinion of Judge Speer with that of Judge Deady, as it is clear that in the Salem Bank Case Stuart did have an interest in the subject of the controversy, and the cross-bill was ancillary to the original suit, while in the Vannerson Case the accounts which may have existed between the defendants themselves did not relate to the subject-matter of the suit by the creditors against the two defendants. Desty in his work on Federal Procedure, vol. 1, page 400, approves of Judge Deady's opinion, and deduces the following rule:

"An original bill and a cross-bill thereto constitute but one cause, and when a circuit court has jurisdiction of the former, by reason of the citizenship of the parties thereto, it has jurisdiction of the latter without reference to such citizenship." *Jesup v. Illinois Cent. R. Co.* (C. C.) 43 Fed. 483, 496; *Foster's Federal Practice*, § 18, p. 65; *Park v. New York, L. E. & W. R. Co. et al.* (C. C.) 70 Fed. 641.

In *Brooks v. Laurent*, 98 Fed. 647, 39 C. C. A. 201, the Court of Appeals for the Fifth Circuit passed upon the question directly involved. A cross-bill was there filed, praying for a decree enforcing the specific performance of the contract or lease, which was the subject-matter of the original bill. It was decided that the jurisdiction invoked by the cross-bill was not original, but ancillary; and, being merely ancillary to the original suit, the court said it might be maintained, "although the court would not have had jurisdiction of the cross-bill as an original action." The court cited *Railroad Co. v. Chamberlain*, 6 Wall. 648, 18 L. Ed. 859; *Osborne & Co. v. Barge* (C. C.) 30 Fed. 805; *First Nat. Bank of Salem v. Salem Capital Flour Mills Co.* (C. C.) 31 Fed. 580; *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749.

In *Osborne & Co. v. Barge*, supra, demurrers to the cross-bill in equity were filed. Judge Shiras considered the demurrers to the cross-bill upon the ground of lack of jurisdiction, and said:

"As already stated, the jurisdiction of the cause of action presented by the original bill and of the parties thereto cannot be and is not questioned. Having acquired full and complete jurisdiction of the original cause and the parties thereto, the court cannot be deprived thereof because another party obtains leave to intervene for the assertion of a right to the property which is the subject of the proceeding. If it be necessary for the protection of the rights of a third party that he be heard in the cause pending, he may be permitted to intervene, even though the court would not have, by reason of his being a citizen of the same state with complainant, jurisdiction over an original proceeding between the same parties. *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145; *Phelps v. Oaks*, 117 U. S. 236, 6 Sup. Ct. 714, 29 L. Ed. 888.

In *Lilienthal v. McCormick*, 117 Fed. 89, 54 C. C. A. 475, the Bank of Woodburn, in Oregon, was made a defendant by the complainants, and brought into the suit in the United States court, where it asked affirmative relief, by filing a cross-bill for the foreclosure of certain liens, thus attempting to litigate the question whether the complainants had any lien against certain property. The Court of Appeals for this, the Ninth Circuit, held that the bank was properly before the

court, and that the federal court was the proper one to deal with the subject-matter of the litigation. Judge Hawley, speaking for the court, said:

"It had jurisdiction to determine the controversy between complainants and the Bank of Woodburn as to the priority of their respective liens upon the property. In this case, the Bank of Woodburn was made a party defendant in order that its rights might be heard and determined. If it had not been made a party, it would have had the right to intervene. The citizenship of the Bank of Woodburn and of Wong Gee, who was not a party to the original bill, did not deprive the court of its jurisdiction." *Compton v. Jesup*, 15 C. C. A. 397, 68 Fed. 263, 279, and authorities there cited; *Schenck v. Peay*, Fed. Cas. No. 12,450.

The rule is that consolidations, cross-bills, and interventions do not oust the jurisdiction of the court in the main suit, whatever the citizenship of the parties thus brought in may be. *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124, 128; *Morgan's L. & T. R. & S. S. Co. v. Texas Cent. R. Co.*, 137 U. S. 171, 201, 11 Sup. Ct. 61, 34 L. Ed. 625; *Park v. Railroad Co. (C. C.)* 70 Fed. 641. The cases of *Covert v. Waldron et al. (C. C.)* 33 Fed. 311, and *Cilley v. Patten (C. C.)* 62 Fed. 498, are cited by defendants. *Covert v. Waldron* was not a case where cross-complaints were filed by persons interested in the subject-matter of the suit, who asked for affirmative relief. In *Cilley v. Patten et al.* the court decided that the parties complainant and defendants were selected for the purpose of creating a cause cognizable by the federal courts, and, as the court found no real controversy between citizens of different states, jurisdiction could not be had. The question considered does not bear upon the present case.

In conclusion, I hold that the cross-bills are proper, and that the elastic forms and modes of proceeding in equity will enable the court to do complete justice, even though the case be complicated and the parties numerous. There is no impingement upon the right to trial by jury. Jurisdiction in equity is complete as between complainant and defendants, and does not fail as between cross-complainants and complainant or others already parties to the suit, even though a diversity of citizenship may be lacking between codefendants.

The objections to the jurisdiction are denied.

IN RE COFFIN.

(District Court, D. Connecticut. May 10, 1906.)

No. 1,179.

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—ESTOPPEL TO ASSERT EQUITABLE TITLE.

A bankrupt had been a stockholder in a corporation which owned western lands, and with the other stockholders had advanced money to the corporation to pay its debts, to secure which a mortgage was taken on its lands. The mortgage was foreclosed by the trustee therein, who bought in the lands as such trustee. Subsequently, at request of the stockholders, he conveyed the lands without consideration to the bankrupt individually, and the latter, in order to settle any question as to

his title and to facilitate sales, instituted a suit in equity, to which the stockholders became voluntary parties, in which it was decreed that he was the absolute owner of the lands in fee simple, the title was quieted in him, his heirs and grantees, and all the defendants were enjoined from questioning the same. From time to time thereafter he sold portions of the lands, and mingled the proceeds with his other funds, but kept an account of the same, and when sufficient accumulated distributed the amounts so received among the stockholders of the corporation. At the time of his adjudication as a bankrupt he still held certain of the lands, and also had in his possession proceeds of others sold, which he had put into the form of a draft payable to him as trustee. *Held*, that the stockholders of the corporation were estopped by the decree to which they had consented from asserting any equity or trust, which would prevent the property from passing to the bankrupt's trustee, under Bankr. Act July 1, 1898, c. 541, § 70 (5), 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451], as property which he could have transferred, and which might have been levied upon and sold under judicial process against him.

In Bankruptcy. On petition for review of order of referee.

Clarence E. Bacon and John M. Ragan, for petitioner.

Hobart Hotchkiss and William H. Ely, for trustee.

Howard Taylor, for Russell Murray & Co., intervening creditors.

PLATT, District Judge. A careful study of the situation which this case has taken during its later presentations to the referee discloses no sound reason for passing upon the main contention, which is separated into diametrically opposing views—one taken by the claimants and the other by the trustee. The referee, however, perhaps wisely, and certainly courageously, assumed the burden, the matter has been fully and fairly discussed before him and before the court, and there is no disposition to avoid an expression of opinion, which may shed some light upon what may happen when the chance for final solution arrives.

The essential facts can be briefly stated: In 1890 there existed in Nebraska a corporation known as the Nebraska Real Estate & Live Stock Association, which had many stockholders, widely scattered about the country, among whom appears the bankrupt, for himself and for his wife. Becoming embarrassed, it requested a loan from the stockholders, so that it might pay its debts. It agreed to repay the loan, with 8 per cent. interest, and to mortgage its property therefor. Each stockholder loaned the pro rata amount called for under his holding, and to secure them a mortgage was made to one A. L. Clarke as their trustee. In 1899, default having been made under the trust deed, the said Clarke, under the powers therein contained, obtained a foreclosure in the district court of Adams county, Neb., and the property was conveyed to him as trustee for the stockholders, who had made the advances to the corporation, as above described. Clarke went on acting as such trustee until November, 1900, when, at the written request of the stockholders, for whom he was acting, he conveyed the property to the bankrupt. The bankrupt paid no money to Clarke for such conveyance. The bankrupt then had upon the records the absolute title to all the real estate in Nebraska which had formerly belonged to said corporation. Early in 1902, it appearing that, although the legal title to said real estate was in the bankrupt, a pros-

pective purchaser, knowing the situation, feared the possible legal complications which might arise, Mr. Coffin brought suit in the district court for Adams county, Neb., against the corporation and its stockholders, all of whom submitted to the jurisdiction of the court. He had already obtained quitclaim deeds from all the stockholders for the purpose of quieting and confirming his title, without paying any moneys therefor, and these he recited in his petition, and they were made part of the decree, and placed on file in the clerk's office. The decree based on said petition is dated June 2, 1902. It shows full jurisdiction, and sets forth, more fully, perhaps, than I have done, the facts above recited, and, *inter alia*, contains this:

"* * * That plaintiff is now the absolute owner in fee of all the premises hereinafter described, having full power to sell and convey the same, and to take mortgages for securing any portion of the purchase money in his own name, and to release the same; that all the defendants hereto are forever barred and should be enjoined from ever calling in question plaintiff's right and title to do, or his * * * title to said premises, and the title to his grantees and the grantees of said A. L. Clarke, trustee. That the lands and premises to be affected by this decree are described as follows. * * *

After the description comes the decretal order, which is in part as follows:

"It is therefore ordered, adjudged, and decreed that the title to all said premises be forever quieted and confirmed in plaintiff and his heirs, his or their grantees, and the grantees of A. L. Clarke, trustee, free and clear of any outstanding interest, claim, or title; that defendants and all persons claiming or to claim through, by, or under them, or either of them, be and they are hereby forever barred and enjoined from in any manner questioning plaintiff's title to such of said lands as still stand in his name, or the title of his grantees or the grantees of A. L. Clarke, trustee, in lands by him heretofore conveyed."

After the decree the bankrupt disposed of several pieces of the real estate therein described, giving deeds therefor in his own name, and receiving in payment certain sums in cash and certain mortgages back to him personally upon the properties sold. Long prior to that time, and continuously until the adjudication, the bankrupt kept only one bank account, which was in the First National Bank of Middletown, and in his individual name. He mingled therein his own moneys and the moneys of his wife and all receipts from the sales of the Nebraska lands. As returns accumulated from the western property, he paid to the stockholders, who had advanced moneys to the Nebraska corporation, a considerable percentage on their advancements, with interest at 8 per cent., turning over to them, as convenience dictated, the mortgages given to him individually in part payment on the sales, and filling up the balance of each stockholder's share with his personal check. Such payments were accepted by the stockholders, who gave receipts therefor, as payments on account of their advances. In 1899 the corporation voted the bankrupt a salary of \$1,500 per annum. The bankrupt credited this salary monthly on the books up to August 1, 1901, and from August 1, 1901, to June 1, 1902, he credited himself with services at the rate of \$175 a month. Up to February, 1903, a large sum had accumulated in his personal bank account from sales

of the western lands. Some time during the year 1903 the bankrupt erased in pencil the credits to himself for salary and services, and made a memorandum of charges for having given warranty deeds to purchasers amounting to \$15,300. He had no claim against the stockholders of said corporation which warranted such a charge. Between June, 1903, and the adjudication Mr. Coffin loaned from said accumulated funds to the L. D. Brown & Son Company, of which he was president and treasurer, \$6,000, taking as collateral security certain silk goods, and received three notes of \$2,000 each, dated in June, September, and October, respectively, made payable to him as trustee. Said corporation has a receiver, and by him two of these notes were paid to said Coffin after adjudication, by a New York draft payable to him as trustee. This draft and the third note have gone into the possession of the trustee in bankruptcy under the referee's orders herein attacked. On November 14, 1903, Mr. Coffin drew out his entire deposit—about \$4,800—added thereto \$1,000 which he had in a drawer at the office of the assurance company, and \$1,915.86, which had come, like former remittances, in the shape of a personal draft from the western agent, and with such proceeds obtained a New York draft to himself as trustee for \$7,715.86, which has also, under said orders, been turned over to the trustee in bankruptcy. Since June 2, 1902, the bankrupt has done many things which indicate that he understood that he was acting in his management of the western property in the interest and for the benefit of the stockholders who had made the loans as described. Such a situation existing, Mr. Coffin was adjudicated on his own petition December 2, 1903, and a trustee was chosen by the creditors. Section 70 of the bankrupt act of July 1, 1898 (chapter 541, 30 Stat. 565 [U. S. Comp. St. 1901, p. 3451]), provides what property shall be vested by operation of law in the trustee, and specifies in subdivision 5:

"Property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon or sold under judicial process against him."

The property here in controversy is of two kinds: (1) Western real estate; (2) proceeds of sales of such estate, which have been treated as hereinbefore described. Strictly construed, the section referred to applies to both. The petitioner, however, wishes to avoid such construction by invoking the principle that a trustee in bankruptcy does not take as an innocent purchaser, and that the bankrupt's property shall be held by him subject to all valid liens, claims, and equities. He claims to have established by the facts in this case that a resulting trust existed prior to the adjudication between the bankrupt and the stockholders of the Nebraska corporation. His petition, after setting forth the facts upon which he relies and the orders of the referee, goes on to say that the beneficiaries, who are the stockholders in the Nebraska corporation, expect him to go on with the execution of his trust, and to distribute what he now has and what he may get, and therefore prays that the orders of the referee may be vacated, and that the trustee in bankruptcy forthwith proceed to

reinvest him with all his rights as a trustee for the stockholders of which said orders divested him.

In the course of the hearing before the court the matter has assumed a new shape. Very little is heard now about Mr. Coffin, and much about the so-called "beneficiaries," and the demand now is, not that the trustee in bankruptcy shall turn the property over to Mr. Coffin, but, admitting his possession of the property under the referee's orders to be legal, that he shall proceed to convert it into cash, and to distribute it among the stockholders of the Nebraska corporation, in accordance with the alleged trust formerly existing between them and the bankrupt, to the exclusion of the general creditors. No such demand appears upon the record, and if such action were proper, it could only be taken after a complete reorganization of the pleadings. On the proofs before the referee, which furnish the only basis for the court's action, it is difficult to understand the line of reasoning which is supposed to lead to such a conclusion.

Passing the question of whether a trustee in bankruptcy should depart from his usual duties so far as would be necessary to enable him to execute such a trust, we are met at the outset with the question as to whether, at the time of adjudication, a trust of any kind, express or resulting, existed between the bankrupt and the stockholders in the Nebraska corporation. It was the possibility that a trust relation existed which influenced the stockholders to quitclaim their rights to Mr. Coffin, and to emphasize such action by consenting to a judgment, and to again cement it by permitting themselves to be forever enjoined from attacking the title, either while in the hands of Coffin, or his heirs or his grantees. It is not conceivable that the stockholders would have come into this condition if in June, 1902, there had been a suspicion that within a couple of years Mr. Coffin would have been forced into his present position. They gave faith and credit to him as a man of high character, and in this they were absolutely right; but they did more than that. Beyond his integrity, which is unquestioned and unquestionable, they relied upon his business ability and financial soundness. From no other point of view can we imagine them as consenting to a situation which gave other creditors an opportunity to satisfy their debts out of the western holdings. If Mr. Coffin had not been adjudicated a bankrupt, and no general creditor had attempted to satisfy his debt out of those holdings, and the stockholders had desired to make a change in the situation, we are not now concerned as to what the outcome might have been, or as to what course the stockholders ought to have pursued. A casual glance would lead one to think that it might have been necessary to go to the district court of Adams county, Neb., and there seek to be relieved from the yoke which they had permitted that court to place about their necks; but we will not pursue that thought. Since they have estopped themselves by deed and judgment from attacking Coffin's title when he should make a transfer, how can they hope to avoid a transfer made by operation of law from Coffin to his trustee in bankruptcy? He was adjudicated on his own petition, and therefore his voluntary act set in motion the machinery of the law, which of its

inherent force produced the transfer of title from him to his trustee. Such transfer, it is true, carries with it equities which had attached prior to adjudication, but it cannot carry an equity which the beneficiaries had of their own volition already relinquished.

Counsel for the beneficiaries admit that the trustee in bankruptcy is as well off, at least, as a sheriff would have been who might have held an execution based upon a creditor's judgment against Coffin prior to bankruptcy. The beneficiaries have placed themselves in such a position that they could not have assailed such an execution. The Congress has not made a law under which the property of A. can be taken to pay B.'s debt. The law says that a man's entire property shall be applied to the liquidation of his debts, and in the case before us the stockholders have no right to say that the title to the western real estate is not solely, entirely, and completely in the said Coffin. The truth is that the stockholders had such implicit confidence in Mr. Coffin that they both signed and confessed away all their rights, so that immediately after the decree they could not have compelled him to do the right thing had he been otherwise disposed. They voluntarily cut the cord which attached their equities to the property.

There is nothing else to discuss, except the claim made by the stockholders that Mr. Coffin recognized his trust relationship with them after the decree of June 2, 1902. The testimony shows that after June 2, 1902, Mr. Coffin did exactly what good conscience would lead any man to do. The property was absolutely his, and whenever he obtained any proceeds therefrom, after mingling them with his other funds—an indiscretion which perhaps ought to be pardoned—he kept strict account, and applied an equal amount for the purpose to which it was understood that such proceeds were to be applied. The beneficiaries understood this, and knew exactly what he was doing. This testimony seems to have been entirely irrelevant to the issues at hand. Mr. Coffin could not, if he would, have restored or recreated a trust relationship which had been put at rest by the decree. He and the stockholders acted under the decree and in obedience to it. Mr. Coffin's later actions would have been enough to give them power to compel him to act in their interest, if it can be imagined that he would have refused. Now the trustee in bankruptcy has the property. His position is not precisely the one which Mr. Coffin occupied prior to the adjudication. He represents general creditors, and the counsel have made an apt illustration when they suggest the attitude of a sheriff pressing an execution. Counsel say that it was not the intention of Mr. Coffin and the stockholders that the legal and equitable titles should merge in Mr. Coffin under the Adams county court decree, but rather that Mr. Coffin should hold both legal and equitable titles in trust for the stockholders. This amounts to saying that the proceedings in the district court of Adams county were intended as a subterfuge to mislead and misguide prospective purchasers of the western lands. That was not the intention of the parties. The acts of Mr. Coffin after the decree undoubtedly put the stockholders in a position where they could, if there had been time, have established such relation; but in that event the western property would have again

become clouded, so that a new decree or other device extinguishing the trust relationship would have been a necessity.

In closing it may be well to repeat that this decision simply confirms the orders of the referee, which it now seems that the petitioner who sought this review accepts.

The opinion has been prolonged for the purpose of indicating the attitude which the court will be apt to take whenever in its judgment the time shall be ripe therefor.

In re MOORE.

(District Court, S. D. Georgia, S. W. D. June 27, 1906.)

BANKRUPTCY—PROPERTY PASSING TO TRUSTEE—DEED GIVEN AS SECURITY.

An instrument given as security for a loan, and purporting to be a deed conveying real estate, but which was not accompanied by a bond for reconveyance, as required by Civ. Code Ga. 1895, § 2771 et seq., to constitute a statutory security deed, nor by a transfer of possession of the property, and which contains a power of sale, a recital that it is given for the purpose of securing a debt, and other contradictory provisions, constitutes a common-law mortgage, which does not pass the title, and is enforceable in the courts of the United States as a lien only; and where the property remained in the possession of the debtor until his bankruptcy, and was surrendered to his trustee, it is subject to sale as a part of the assets of his estate.

In Bankruptcy. On petition for review of referee's decision.
The following is the opinion of the referee:

Clarence H. Leavy, the trustee in bankruptcy, applied to this court for leave to sell all of the assets of said estate. The application was regularly heard, and at the hearing one B. P. Jones, scheduled as a creditor of said bankrupt, appeared by his counsel, and filed his objections to the sale of that part of the property set out in his objections, and alleged that the same is not the property of the bankrupt, but that objector claims title thereto under a certain deed executed by the bankrupt to him on the 5th day of April, 1904, copy of the deed being attached to his objections and made a part thereof. Objector asserts that the said deed was executed and delivered for the purpose of securing the payment of a certain note of even date with the deed for the sum of \$9,540, and that by the terms of the deed the title to the property described therein passed into him. He further alleges that the property claimed does not exceed in value the sum of \$3,500, and that it is burdensome and without value to the trustee for the benefit of the general creditors. To these objections counsel representing the trustee has demurred, alleging that the instrument claimed to be a deed conveying the title to him is not a deed, but simply a mortgage, and furthermore, that if the instrument is held to be a deed, it is void for usury, etc. Considerable testimony has been heard on these objections, and as to the value of the property claimed by Jones. The evidence satisfactorily establishes the fact that the property claimed is worth a sum substantially in excess of the amount due him on account of the loan secured by the instrument in question. The court therefore concludes that the property is not burdensome in character, and that the trustee of said estate has an interest therein for the benefit of the general creditors of the estate.

The more difficult question to determine, however, is: Is the instrument offered in evidence in behalf of the objector a mortgage or a deed? These facts are undisputed: The paper was given to secure a present loan, and was made as security for debt. The conveyance was not drafted in accordance with, or intended to operate as provided by, Civ. Code Ga. 1895, § 2771

et seq.; no bond to reconvey being given, and no reference made in the instrument to the Code section supra. The possession of the property remained in the grantor, and upon the filing of the petition in involuntary bankruptcy by the creditors of the bankrupt the property was seized by the marshal, and passed to the trustee of the estate as a part of the assets of the bankrupt. The wording of the paper is somewhat contradictory, the word "mortgage" being used in the fifth paragraph thereof in this connection, "which is made a part of this mortgage," and in the seventh paragraph this language is used: "This conveyance is intended to pass the title of the property herein described into the said party of the second part, and for the purpose of securing the prompt payment of the following described note, to wit." There is a power of sale embraced in the instrument, which provides that upon the failure of the grantor to promptly pay the note to secure which the deed was given, that the grantee should have the right to sell the property at public outcry, after due advertisement, and to make the purchaser or purchasers of the property good and sufficient title in fee simple to the same, thereby divesting out of Moore (the bankrupt) all right and equity which he may have had in said property, and vesting the same in the purchasers. The right and equity which the instrument declares shall be vested in the purchaser or purchasers is the "fee-simple title to the same." Under the peculiar law of the state of Georgia, a debtor may, by a deed to secure debt, transfer the legal title to his creditor as security for a debt; the creditor making, contemporaneously with the execution of the deed, a bond to reconvey the property upon the payment of the indebtedness. In such a case, where the deed purported upon its face to have been made for the purpose of securing a debt, and reciting that it was executed under the provisions of the Code sections relating to deeds to secure debt, although it did not fall strictly within the provisions of said sections, because no bond to reconvey was given, it has been held that the instrument passed title to the grantee. *Williamson v. Orient Ins. Co.*, 100 Ga. 791, 28 S. E. 914. But it was admitted by the learned counsel for the objectors that the instrument in question cannot be classified as a deed to secure debt under the provisions of the Georgia law. Thereupon arises the pertinent inquiry, What is the paper? It is not an absolute deed, because there was no transfer of possession. It is not a security deed under the Georgia law, it is admitted. It therefore must be a common-law mortgage. "If the instrument made by W. T. Alexander be equivalent to a common-law mortgage, nevertheless, in the United States court it can be enforced in equity only." In that view it would be the creation of a trust estate, with a trust resulting to the mortgagor on the discharge of the debt. This appears to be substantially the effect of the state statutes quoted above. It is true that the statute declares that the instrument provided for "shall be held by the courts of this state to be an absolute conveyance, with right reserved by the vendor to have said property reconveyed to him upon the payment of the debt or debts intended to be secured." Code 1882, § 1969. A mortgage at common law is nothing more. *Conrad v. Insurance Co.*, 1 Pet. 442, 7 L. Ed. 189. The statute declares that the instrument is "not a mortgage," but this evidently means a mortgage by the law of Georgia, which does not convey title, and is merely a security for debt. Code 1882, § 1954. Whatever the instrument may be termed by the state statute, or howsoever it may be enforced under the blended practice of the state, a court of the United States cannot fail to perceive in it the creation of a trust for creditor and debtor, the enforcement of which is within the exclusive jurisdiction of equity" (*Alexander v. Mortgage Co.* [C. C.] 47 Fed. 135); and the United States courts have repeatedly held the security deed, termed by the Georgia law "an absolute conveyance of title," a mere mortgage. "The promissory note, the deed, and the bond to reconvey evidence one transaction, must be construed together, and expressly show that the conveyance of the land was to secure the payment of the debt evidenced by the note. It is too plain to admit of argument that the transaction was a borrowing of money and giving a lien on land to secure the loan. This is a mortgage." *Ray v. Tatum*, 72 Fed. 112, 18 C. C. A. 406.

It is urged for the defendant with great earnestness that the instrument is called a "deed"; that it "grants, bargains, aliens, conveys, and confirms;" that

It gives an absolute right to sell; that it confers absolute seisin upon Nussbaum; and that the statute and repeated decisions of the supreme appellate court of the state leave it no longer open to dispute that under such a conveyance the title absolutely passes. In support of this proposition, among many others, the following cases are cited: *Roland v. Coleman*, 76 Ga. 652; *Biggers v. Bird*, 55 Ga. 650; *Carswell v. Hartridge*, 55 Ga. 412; *Johnson v. Trust Co.*, 55 Ga. 691; *Behn v. Phillips*, 18 Ga. 466. In reply to the contention of the defendant's counsel, the plaintiffs make the broad assertion that, if the deed or other instrument to alienate or change the title is given to secure a debt, with the right existing, either by operation of law or by express reservation, to redeem the property pledged, it is neither an alienation, nor, in the absence of an express stipulation identifying the conveyance and forbidding it, such a change of the title as will avoid the insurance. In the maintenance of this proposition great reliance is placed upon the decision of the Supreme Court of Georgia in *Insurance Co. v. Feagin*, 62 Ga. 515. In that case the policy made the insurance void in case of "any sale, transfer, or change of title in the property without the company's consent indorsed on the policy." It was pleaded there that the insured had no title at the time of the insurance. They had simply an interest under a bond for titles. The property had been previously transferred to one Ogden as trustee, to secure a debt due to a trust association, and the trustee had in the same conveyance bound himself to reconvey to the assured on the payment of the debt. In that case, also, there was the same language of conveyance as in the deed before the court. There, as here, possession was left in the grantor, the assured. There, as here, the grantee had the power upon default to take possession of the property and to bargain and sell at public or private sale, to execute titles, and to give possession to the purchaser to apply the proceeds—first, to the payment of the note; and, second, to account for any balance to the parties insured. There is this difference: In that case there was an indorsement on the policy that the loss, if any, is made payable to the trust association, viz., the debtor intended to be secured; and this was done with the consent of the insurance company. The jury found for the plaintiff, and a motion for new trial was made upon the following ground, among others: "Because the court charged that the deed to Ogden, trustee, was only a lien, and did not without more invalidate the policy; that it did not amount to a sale, there being no change of possession or step towards that end." *Nussbaum v. Northern Ins. Co.* (C. C.) 37 Fed. 527, 1 L. R. A. 704. "This is an attempt on the part of the creditors of William Miller to administer his estate in bankruptcy. It appears that an important part of the estate is about to be sold by the Thomasville Loan & Improvement Company by virtue of a deed made by the debtor, in which, under the law of Georgia, he conveyed title to that company. This, nevertheless, in equitable contemplation, is security only for debt." *In re Miller* (D. C.) 118 Fed. 360. And in the case of *New England Mortgage Security Co. v. Gay*, 145 U. S. 123, 12 Sup. Ct. 815, 36 L. Ed. 646, the highest court in the land seems to have characterized this peculiar instrument "a mortgage." If a security deed declared by the state statute to be an absolute conveyance is held in the courts of the United States to be merely a mortgage, with how much stronger reason can it be argued that a conveyance not in accordance with such a statute, but on its face merely a security for the payment of a debt, and containing conflicting characterizations, a power of sale, and a provision for the passing of the fee-simple title out of the grantor, is merely a mortgage. It matters not what the parties themselves call the instrument, the court will determine from the context of the paper what in law it really is. *Brantley v. Wood*, 97 Ga. 755, 25 S. E. 499.

The transaction between the parties to the conveyance was the borrowing and lending of money, and the taking of the paper in question as security for the debt. The grantor remained in possession of the property, and a part of the personality therein conveyed was sold by him in the usual course of trade, and other parts have passed out of the possession of the grantor and of his successors in estate. The transaction must therefore be held to constitute a mortgage.

In marshaling the assets of a bankrupt estate the court is confronted with numerous contests for the right of priority. In this case, as against this particular property, there are claims for taxes in favor of the state of Georgia and the county wherein the property is located, claims of laborers who have performed services and have rights against this property, and various and sundry other claimants seeking establishment of their right against the same. The property is manifestly fast deteriorating in value, and there is a vast amount of expense attending the keeping of the same. At best, the objector can only hope to be paid the balance due him on account of his loan—balance, I say, because \$2,500 has already been realized from the sale of a part of the property claimed by this objector—and so it occurs to me that it would be far more expedient and for the benefit of all parties concerned that the property belonging to the estate in general, which is very small, and this property in particular, should be sold at public outcry at the earliest opportunity after due advertisement; the property of the general estate being sold separate and apart from the property claimed by the objector, and the proceeds held separately to await the determination of this contest, and that hereafter the rank and dignity of the objector's claim may be fixed and established against the proceeds of the sale as easily as against the property itself.

An order will therefore be entered granting the prayer of the trustee for the sale of the assets of the estate, in accordance with the foregoing opinion.

D. W. Krauss, for the trustee.

A. T. Woodward, C. L. Smith, and J. M. Wilkinson, for B. P. Jones.

SPEER, District Judge. In this case, after due consideration, the court adopts as its own the singularly clear, satisfactory, and attractive opinion of Max Isaac, Esq., referee in bankruptcy, and directs that order of affirmance be entered.

WELLS & RICHARDSON CO. v. ABRAHAM et al.

(Circuit Court, E. D. New York. April 20, 1906.)

1. INJUNCTION—CONTRACTS—INDUCING BREACH.

Complainant manufactured a proprietary medicine, which it sold under a trade-mark and only to wholesale dealers under contracts which bound them to sell, only at a certain price, and only to retail dealers who also had contracts with complainant fixing the price at which the medicine should be sold to consumers. *Held*, that such contracts were legal, and that complainant was entitled to an injunction restraining defendants, who, not having entered into any contract with complainant, were therefore not entitled to buy and sell the medicine, from inducing any purchaser who had made such a contract to violate the same by selling to defendants, or from knowingly purchasing from any such person in violation of his contract, and also from selling the medicine to consumers after the cartons and labels containing the directions for its use had been removed from the bottles.

2. SAME—EVIDENCE OF INTENTION.

The fact that defendants, who were shown to be selling large quantities of the medicine to consumers at less than the prices fixed by complainant, before doing so removed from the bottles all cartons and labels containing numbers which would enable complainant to trace the original purchaser, in the absence of evidence showing to the contrary, was sufficient to authorize a finding that defendants knowingly participated in the breaches of the contracts between the sellers and complainant.

In Equity. On motion for preliminary injunction.

Steuart & Steuart (Frank F. Reed and Edward S. Rogers, of counsel), for complainant.

Paul Grout (Edmond E. Wise, of counsel), for defendants.

THOMAS, District Judge. The complainant owns a secret process for making a medicinal product known as "Paine's Celery Compound," or "Celery Compound," for many years, extensively sold under a registered trade-mark showing a head of celery. The article is placed in bottles bearing the word "Paine's" on one side, and the words "Celery Compound" on the opposite side, while on the cork is a label showing the trade-mark and carrying the words "Paine's Celery Compound." On a third side of the bottle is a label showing a larger picture of the trade-mark, whereon is printed in large letters, "Celery Compound," while below are the words "Paine's Celery Compound. A True Nerve Tonic, an Active Alterative, a Reliable Laxative, and Diuretic. It Restores Strength, Renews Vitality, Purifies the Blood, Regulates the Kidneys, Liver and Bowels. Price \$1.00. Prepared by Wells, Richardson & Co., Sole Proprietors, Burlington, Vt." On the fourth side appears, in English and German, the following:

"Directions for using Paine's Celery Compound. The dose should be graduated to suit the patient, enough being taken to act upon the bowels and keep them regular, but lessening the dose if it acts too strongly: for adults, from a teaspoonful to a tablespoonful in a little water four times a day, before eating and at bed time; lessen the dose for children according to age. In bad cases of Neuralgia and Rheumatism double the above dose for the first two days, and in severe and obstinate cases, or in any disease complicated with Scrofula, add one-eighth ounce of Iodide of Potassium to each bottle, then use the medicine faithfully. Prepared by Wells, Richardson & Co., Sole Proprietors, Burlington, Vt."

On each of the two labels last described are stamped numbers, whereby the persons to whom the complainant delivered the bottle may be traced. Around the bottle is wrapped a pamphlet, showing the picture, and noting the history, of "Prof. Edward E. Phelps, M. D., L. L. D., the Eminent Discoverer of Paine's Celery Compound," followed by a disquisition on the nervous system, the relation of the nerves to the stomach, liver, kidneys, and heart, a great number of pictures of, and communications from persons, who relate their experiences in the use of the medicine, and much other matter intended to illustrate the curative qualities of the medicine. The bottle and pamphlet are packed in a carton, one side of which shows, in a variety of colors, the matter appearing on the third above-described side of the bottle. Another side states that the compound is "A Reliable Medicine" for certain diseases enumerated, and gives the directions for its use as stated on the bottle. The same substantially is repeated in German on another side, while the fourth side announces for what the compound is a remedy. In each carton is an envelope containing samples of "Wills' English Pills," and recommending their use in certain cases supplementary to the compound.

The defendants, under the name of Abraham & Straus, are among the great merchants in New York, and sell at a cut price the com-

pound, in the original bottles, stripped of carton, pamphlet and all else, including labels, save the small circular label on the cork above described. The defendants do this in defiance of complainant's forbiddance that they sell the goods at all, unless they comply with the "direct contract system," instituted by the complainant. Under such system the complainant sells its product only to wholesale or jobbing druggists who will agree with the complainant that they will only sell at stated prices, and discounts to such dealers as have executed contracts with complainant agreeing not to sell for consumption except at the prices fixed by the complainant, and that they will not sell at all to dealers who have not similar contracts with the complainant. This system opens the field to all dealers who will agree to observe the fixed prices, and limit sales for the purpose of reselling to those who have agreed to such terms. The defendants knew of this system. They rejected its opportunities. They, by themselves, their agents, or other persons, induced or co-operated with some vendee bound by such contract to sell them the product, and to save their vendor the penalties of a breach of the contract the defendants stripped the packages to the bare glass, save the miniature label on the cork, and in this naked form have and are marketing the compound. The defendants remove the cartons and labels because they carry stamped thereon serial numbers, whereby the bottle may be traced from the complainant to the retailer or wholesaler. This preserves the secrecy of their operations. The result is that the defendants have and sell the product made by complainant, because they surreptitiously obtain it from persons who have agreed not to sell it to them.

The defendants urge that the evidence does not show that they purchased it from a person interdicted by the contract from selling it. When a bottle of medicine is despoiled of its very prescription, the statement of the diseases for which it may be used, and this for the obvious purpose of shielding a contract breaker, the evidence of connivance and participation in the breach of the contract is sufficient. The doubt that Judge Lacombe entertained in *Bobbs-Merrill Co. v. Straus*, decided August 14, 1904, does not exist in the case at bar.¹

But has the complainant a remedy in this suit? The contracts with the complainant's vendees are legal. Resort need not be had to the voluminous briefs submitted, for the defendants in their brief say:

"The validity of these contracts as between the parties is nowhere attacked. On the contrary, the whole argument proceeded on the theory that, though as between the parties thereto such contracts could probably be enforced, third parties who did not assent thereto, and who were under no contractual obligation to the complainant, could not in the absence of proof of fraud or conspiracy be compelled to observe such contracts, in the case of articles made under secret processes, any more than if such articles were not made under

¹In the memorandum filed by Judge Lacombe in the case of *Bobbs-Merrill Co. v. Straus*, he says that where the record does not show whether defendants bought from a jobber, thus obtaining a reduced price or from a person who had already paid the full retail price, the court ought not to undertake on preliminary motion to render a decision which possibly could not be reviewed by the appellate court.—Editor.

secret processes, and that the patent cases which granted such remedy had no application to the case at bar."

The concession as to the legality of the contract accords with the decision in *Park & Sons Co. v. National Wholesale Druggists' Association*, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839.

But the defendants contend that the defendants cannot be enjoined from purchasing the goods, or selling them after purchase. That proposition in connection with the facts appearing amounts to this: That the complainant's vendees are legally bounden by contract not to sell to the defendants, but that the defendants may, so long as they use neither force nor fraud, intentionally co-operate with them to do an illegal act—that is, break the contract—and be immune. The briefs abound in decisions, but no precedent should be required. A. is intentionally doing B. a legal injury. C. intentionally induces A. to do the injury. He solicits that it be done. He pays money to the doer of it to tempt him to do the act; that is, A. and C. unite, connive, agree to procure A. to break his contract, so that C. may get complainant's goods, which the latter has committed to A. upon the trust that they shall not be delivered to C., and others similarly situated. In such an instance the law should have sufficient inherent integrity to enable it to lay fast hold of A. and C., and stop both such deliberate breach of obligations and the advantages that the persons implicated in it are gaining. The law permits the complainant to use the direct contract system to maintain the price of its medicine, so that it shall not be the subject of capricious sales at varying prices. The complainant is under no obligation to sell to the defendants. The defendants have no right, equitable or legal, to insist upon sales to them. The complainant sells to others only upon their solemn stipulation that they will not sell to persons situated as are the defendants. The defendants induce them to break such contract, and take part with them in breaking it, and get the goods, not by rightful purchase, because their vendors have no right to transfer the title to defendants, but by procuring these vendors to deliver to the defendants the goods, knowing that they have agreed with the complainant, upon its parting with title to its vendees, that the latter would not give title to these defendants. Remember that it is conceded that the contract is good and legal between the parties. If so, the defendants have attempted to take title from a person who has no right to transfer the legal title to any person of the class to which the defendants belong. Hence the defendants get goods by procuring the avoidance of another's obligation that he will not give it to them. Whatever may be said argumentatively, no sane conscience can justify one man inducing another to betray a legal obligation. The point of wrong should not be missed. It is not primarily in selling a product which the makers have limited to be sold by others, of which the defendant is not one. The very vital wrong is that the defendants have obtained and are obtaining the goods by inducing others, not entitled to sell to them, to make sale to them, whereby the defendants

come into possession by doing the complainant a legal injury, a wrong, that makes such possession wrongful. A contract prohibiting alienation to a particular class is held to be lawful. It is admitted to be lawful. How, then, can the restriction upon alienation become unlawful in a court of equity, and how can a third person be heard to declare it unlawful, when an attempt is made to enjoin one from inducing a party to it to violate it? Is it valid at law and void in equity? If it is valid, it is property, and a court should be authorized to protect it, as any other property may be protected that is menaced by a wrongdoer. The law of the land accords with good morals. In *Heath v. American Book Co.* (C. C.) 97 Fed. 533, the defendant knowingly induced the schoolbook board of counties to purchase books from him, and discard those of the plaintiff, which they by contract were obligated to take. The defendant was held liable for damages. No fraud or misrepresentation was alleged. The learned judge followed *Lumley v. Gye*, 2 El. & Bl. 216, in which a singer was maliciously induced by defendant to break her contract with another, and the defendant was held liable for damages. In *Angle v. Chicago, etc., R.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55, the plaintiff was prevented from completing a contract by the defendant bribing its officers and inducing by false allegations the Legislature to withdraw a grant of land, and a bill in equity to reach the property held by the defendant and adjudged applicable to the payment of plaintiff's damages was sustained. The opinion states that "it has been repeatedly held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer," and in support of this instances *Green v. Button*, 2 Cr. Mees. & R. 707; *Lumley v. Gye*, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. D. 333, 337; *Walker v. Cronin*, 107 Mass. 555; *Jones v. Stanly*, 76 N. C. 355, 356; *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780, and thereupon the opinion proceeds:

"Under these authorities, if the Omaha company had by its wrongful conduct simply induced the portage company to break its contract with Angle, it would have been liable to him for the damage sustained thereby. A fortiori, when it not only induces a breach of the contract by the portage company, but also disables it from performance."

In *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289, it is said:

"But in view of the series of decisions by this court from *Walker v. Cronin*, 107 Mass. 555, through *Morasse v. Brochu*, 151 Mass. 567, 25 N. E. 74, 8 L. R. A. 524, 21 Am. St. Rep. 474; *Tasker v. Stanley*, 153 Mass. 148, 26 N. E. 417, 10 L. R. A. 468; *Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Hartnett v. Plumbers' Supply Association*, 169 Mass. 229, 47 N. E. 1002, 38 L. R. A. 194, and *Weston v. Barnicoat*, 175 Mass. 454, 56 N. E. 619, 49 L. R. A. 612, to *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330, we cannot admit a doubt that maliciously and without justifiable cause to induce a third person to end his employment of the plaintiff, whether the inducement be false slanders or successful persuasion, is an actionable tort."

See, also, *Doremus v. Hennessy*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203.

In *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839, it appears that the defendant and one Bickford, persons separately engaged in the retail drug business, agreed that Bickford should buy of the plaintiff a proprietary medicine manufactured by him under a contract, wherein he agreed not to sell it at retail at less than a specified price, and that subsequent purchasers should obtain and sell it only under such agreement. Bickford made the purchase and turned it over to the defendant, who advertised and sold it at less than the specified price. The opinion, after stating this history, continued:

"All this was in pursuance of a conspiracy between the defendant and Bickford that Bickford should make this contract and break it, to the injury of the plaintiff, for the benefit of the defendant. A conspiracy to deprive one of the benefit of a contract with another is unlawful. *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555; *Vezelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. The defendant's arrangement with Bickford that he should break the contract was a wrong upon the plaintiff, intended for the defendant's advantage. The scheme was fraudulent. The purpose of the defendant was to induce the plaintiff to part with his property at a comparatively low price to a person who was, in fact, a retail druggist, and who represented by his words and conduct that he wanted the medicine to sell at retail, and who agreed not to sell it at less than the regular retail price, when, in fact, he was obtaining it under an arrangement to turn it over to the defendant at the wholesale price, to be sold by him at retail at less than the regular price. The defendant was a party to this scheme of fraud, and presumably was the author of it. He should be held liable for the wrong. *Exchange Telegraph Co. v. Central News* (1897) 2 Ch. 48; *Dodge Co. v. Construction Information Co.*, 183 Mass. 62, 66 N. E. 204, 60 L. R. A. 810, 97 Am. St. Rep. 412. In this respect the case is very different from *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631. See, also, *Taddy et al. v. Sterious et al.* (1903) 1 Ch. 354. The suit is one which calls for relief in equity. The damages are of a kind that cannot be accurately computed or easily estimated. The remedy at law is not complete and adequate, and an injunction with damages for the injury already suffered gives the only proper relief."

In *American Law Book Co. v. Edward Thompson Co.* (Sup.) 84 N. Y. Supp. 225, Justice Bischoff states the facts and his conclusions as follows:

"By preliminary injunction in an action for injunctive relief the plaintiff seeks to restrain the defendant from making agreements with subscribers to the plaintiff's encyclopedia, whereby the defendant undertakes to indemnify these subscribers against claims for damages for their breach of contract in declining to receive and pay for the plaintiff's books, and from conducting and defraying the expenses of the defense to any action brought against the subscriber by the plaintiff. The complaint alleges that these agreements have been systematically offered by the defendant to the plaintiff's subscribers for the purpose of causing them to subscribe to the defendant's encyclopedia, and to repudiate their subscriptions for the work published by the plaintiff; and the allegations further disclose the making of intentional misrepresentations by the defendant to these subscribers as to the relative merits of the encyclopedias for the purpose of inducing the breach of contract. The defendant admits the making of the agreements in question, but asserts that the plaintiff has no remedy in equity upon the allegations of the complaint; the contention being that the plaintiff has his remedy at law for each contract broken, that the party to that contract has the right to break it and pay damages, and that what the party can do another person may ask him to do without re-

straint by injunction. It is also argued that the cases in which an injunction has been granted to prevent the solicitation of a breach of contract are found to have involved only contracts for personal services, and that there is no precedent for such an injunction as the plaintiff seeks. If there be no exact precedent for this injunction, none is needed. The complaint avers, and the affidavits support the averment, that the defendant is engaged in an attempt to obtain business which the plaintiff has secured, having no regard to fairness of competition, but with resort to trick and device. Whether the subscribers are in each instance actually led by the defendant's misrepresentations to break the particular contracts is not important, and is not an essential averment of the complaint. Intentional false statements, made with a view to obstruct the plaintiff's business and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition. The fraudulent intent, followed to fruition in the actual inducement to persons dealing with the plaintiff to break their contracts for the intended benefit of the defendant, and to the intended injury of the plaintiff, is the basis of the defendant's wrong; a wrong which our system of remedial justice recognizes as the subject of relief."

In *Dr. Miles Medical Co. v. Goldthwaite* (C. C.) 133 Fed. 794, the defendant was restrained from interfering with contracts, similar to those now under consideration, by inducing their violation by the parties thereto, and from selling the medicine as complainant's in other than the original packages and at the contract price. In *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606, and two other cases (U. S. Cir. Ct. N. D. of Ill.), Judge Kohlsaat made a similar holding, as did Judge Cochran in *Hartman v. Park* (U. S. Cir. Ct., E. D. of Ky.) 145 Fed. 358.

The case at bar must be carefully distinguished from cases where the purchase is from one who has a right to sell to the purchaser. Such was *Keeler v. Standard Folding Bed Co.*, 157 U. S. 660, 15 Sup. Ct. 738, 39 L. Ed. 848. Cases must also be differentiated where the facts do not even show a contract. Such was *Bobbs-Merrill Co. v. Straus* (C. C.) 139 Fed. 155. In *Garst v. Hall & Lyon Co.*, 179 Mass. 588, 61 N. E. 219, 55 L. R. A. 631, it is said:

"It is not averred that the defendant ever made any contract or agreement with the plaintiff, or had any dealings with him. No fraudulent act or conduct of the defendant in obtaining the medicine is set out, although the word 'fraudulently' is used in characterizing his acts. This word adds nothing to the averments of fact in the bill. The statement of the alleged fraud is too general to be the foundation of a decree. *Nichols v. Rogers*, 139 Mass. 146, 29 N. E. 377; *Nye v. Storer*, 168 Mass. 53, 46 N. E. 402. The averments of the bill in this particular would be entirely satisfied by showing a purchase of the medicine by the defendant from a person who bought it of the plaintiff's vendee, or from one who bought it of a purchaser from the vendee. The agreed statement of facts shows that the defendant obtained it in this way: The defendant did not buy the medicine of the firm of wholesalers who received it from the plaintiff, and who agreed to sell it subject to the above conditions, but bought it of a person who bought either from this firm, or from a purchaser from this firm."

If the defendants in the case at bar stood in a like innocent condition, why have they not proved the same under their oaths and shown that they purchased in good faith and from a person, who so far as they had notice, could sell without breach of a contract not to sell to them. As already stated, the effort to hide the history of their purchase is sufficient evidence of their unlawful participation

in the breach of the contract. But the fact of selling the goods thus obtained is not the only legal injury by the defendants to the complainant. They tear the very prescription from the bottles, so that the consumer may not know how to use the medicine, whether he is using it advantageously or injuriously, and the defendants by removing all enumeration of the diseases for which the medicine may be used, deprive the purchaser of the complainant's advice and representations in such regard. This seems to be a ruthless proceeding, both as regards the consumer and the complainant. The defendants urge that the medicine has an element—alcohol—that is dangerous for certain diseases enumerated by the complainant. Plainly, then, the medicine should be administered with care. But the defendants send broadcast the remedy without limitation as to dose or disease. This is a palpable menace to the patient, and to the complainant's business, and should be enjoined. *Dr. Miles Medical Co. v. Goldthwaite* (C. C.) 133 Fed. 794; *Hartman v. Park* (U. S. Cir. Ct., E. D. of Ky.) 145 Fed. 358. But the defendants, vigorously engaged in selling the medicine, urge that it is dangerous for certain diseases for which the complainant advertises it, and that the complainant, thus inequitable, should not be heard against the defendants, who are using their ample opportunities to market this very medicine, so alleged by themselves to be dangerous. This is a strange attempt at defense. The claim that Dr. Phelps' participation in the discovery of the product is not as asserted in the complainant's literature does not prevent defendants from taking advantage of any fame such alleged connection of Dr. Phelps has produced for the remedy. However, it is not perceived that the representations regarding his relation to it are necessarily false. The other affirmative defenses raised by the defendants to shield themselves are not approved. *Dr. Miles Medical Co. v. Platt*, 142 Fed. 606, and other cases (U. S. Cir. Ct., N. D. of Ill.).

The complainant is entitled to an order (1) restraining the defendants, their agents and servants, and all persons acting in concert or connivance with them from purchasing, directly or indirectly, the compound from any person who has entered into the contract above stated with the complainant, or from any person who has not entered into such contract, where defendants have notice or knowledge of such relation or absence of contractual relation to the complainant, and restraining the defendants, their agents and servants, and all persons acting in concert and connivance with them from selling such compound now or hereafter obtained from any such person or persons; (2) in any case where the defendants may become authorized to sell the compound, restraining them from doing so, unless the package containing it bears all the directions for using Paine's Celery Compound, and the precise representations as to the purposes and diseases for which it may be taken, as shown both on the label and the carton containing the bottle.

The details of the terms and scope of the injunction will be determined more precisely upon the settlement of the order herein. At the time of settling the order, ruling on the exceptions to the answer herein will be made.

HILLSIDE CHEMICAL CO. v. MUNSON & CO.

(Circuit Court, D. Connecticut. July 5, 1906.)

No. 1,062.

TRADE-MARKS—SUIT FOR CONTRIBUTORY INFRINGEMENT—WAIVER OF CLAIM AGAINST PRINCIPAL INFRINGER.

Complainant brought a suit for infringement of a trade-mark, which was settled by stipulation, and a decree entered establishing complainant's exclusive right to the trade-mark from that date; but it was stipulated that neither the defendant therein nor its customers should be held liable for past infringements. *Held* that, having thus waived all claim against the principal infringer, a court of equity would not thereafter entertain a suit by complainant for contributory infringement against one who had made and furnished to such infringer the cartons used by it containing the infringing trade-mark.

In Equity. Suit for infringement of trade-mark.

Henry M. Earle, for complainant.

John K. Beach, for defendant.

PLATT, District Judge. The essential facts in this case can be briefly stated. Plaintiff makes and sells a medical preparation known as "Terraline," distinguished by name, label, and manner of putting up. Defendant is charged in the bill with selling counterfeit packages or cartons containing the trade-mark and other devices and designs of the plaintiff to others, thereby enabling them to palm off upon the public a similar preparation, in fraud of plaintiff's rights and in deception of the public. The defendant makes paper boxes, and if it has done any wrong at all, it has done it by selling the cartons to others, and thus enabling them to infringe. This is what it did: In January, 1889, R. K. Helphenstine and James E. McKahan entered into business at Washington, D. C., under the name of the Terraline Company, and on their letter-heads Helphenstine appears as president and McKahan as secretary. Defendant's predecessor furnished boxes or cartons for the Terraline to that company, and after 1891, while connected with the National Folding Box & Paper Company, continued the sales. In January, 1898, an order was sent to the defendant corporation from that company for 100,000 boxes. These were made, and 25,000 of them were delivered to the Terraline Company, the balance remaining in the hands of the defendant. The Terraline Company about that time became financially embarrassed, and made no payments on the order. May 5, 1898, said Helphenstine assigned his one-half interest in the Terraline Company and in the registered trade-mark, "Terraline," to his partner, James E. McKahan, which assignment was duly recorded in the Patent Office May 9, 1898. The business was then reorganized under the name of the Hillside Chemical Company, a West Virginia corporation, with its principal place of business at Newburgh, N. Y. (the complainant), which acquired whatever rights McKahan had under the assignment. Helphenstine organized the Glyza Chemical Company, which was continued at the old Washington stand of the defunct Terraline Company. In July, 1898, the complainant wrote to the

defendant about cartons. Defendant furnished new ones, and also disposed of a large part of the stock on hand of the Terraline Company cartons. In October, 1898, and in the spring of 1899, defendant sold the balance of the old stock of Terraline cartons to said Glyza Chemical Company and has never sold any to any other parties. Complainant brought suit in the Supreme Court of the District of Columbia against said Glyza Chemical Company for infringement of its trade rights in Terraline. A restraining order was obtained against the Glyza Company, but was later discharged, and an application for preliminary injunction was twice denied, and the litigation at last terminated in a so-called "stipulation and decree," filed March 21, 1901, which sets forth, *inter alia*, "that the said cause shall not be further proceeded with" unless defendants should do something wrong thereafter, and "that no claim of any kind shall be made against the customers of the defendants, or any of them, because of the purchase from them, or any of them, of any Terraline prior to the date of this stipulation," and that a decree shall be entered adjudging that "from and after this date" the complainant, the said Hillside Chemical Company is entitled to the exclusive use of the trade-mark "Terraline," which decree was on that day accordingly entered. A sample exhibit of the boxes complained of carries on its front these words, "Prepared only by the Terraline Company, Washington, D. C." The balance of the old stock sold to complainant by defendant had the same inscription on its front, but carried on its back the statement that it was put out by complainants as successors to the Terraline Company.

The proofs satisfy me that the defendant was careless, and perhaps indifferent, in its dealings with the complainant and the Glyza Company in 1898 and 1899. If the litigation with the Glyza Company had resulted in a complete victory for the complainant, it would hardly do for defendant to say, "You people were fighting about your respective rights. I could stand neutral, and furnish you both with ammunition to carry on the business end of your warfare." It was defendant's duty to examine into the matter more closely.

The stipulation and decree in the Washington suit, however, puts a different face upon the matter. Defendant has sold the alleged infringing cartons to no party except the Glyza Company. Its wrong, then, consists in having furnished in 1898 and 1899 the sinews of war to the great infringer. On March 21, 1901, the present complainant forgave the principal wrongdoer all its sins up to date, and promised not to follow up those whom it had made co-sinners by placing in their hands the offending bottles and boxes. It would be highly inequitable now to pursue one who had helped the principal sinner in its wrongdoing. Technically, and following the very letter of the stipulation and decree, it is possible to argue that this is not a case in which one of two joint feasons has been released, but when we study the matter in the spirit which always animates a court of equity we find that the result arrived at is the same.

This situation is so strongly marked that it seems superfluous to discuss whether or not the complainant's hands are clean.

Let the bill be dismissed, with costs.

HATCH v. CURTIN.

(Circuit Court, D. Massachusetts. April 23, 1906.)

No. 305.

1. COURTS—JURISDICTION OF CIRCUIT COURT—REVIEW OF PROCEEDINGS OF DISTRICT COURT IN BANKRUPTCY.

A Circuit Court of the United States is without jurisdiction of a suit which seeks to review a judgment of a District Court in bankruptcy, to recover money in the hands of a trustee in bankruptcy and to enjoin him from paying the same out in dividends in obedience to the order of the District Court even though it is alleged that such judgment was rendered *coram non jndice*.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 C. C. A. 9.]

2. SAME—SUIT AGAINST TRUSTEE.

The jurisdiction of a Circuit Court of a suit by an adverse claimant of property against a trustee in bankruptcy is expressly excluded by Bankr. Act July 1, 1898, c. 541, § 23a, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], where it would not have had jurisdiction if the suit had been against the bankrupt.

In Equity.

Harold Williams, for complainant.

Robert K. Dickerman, for defendant.

LOWELL, Circuit Judge. This is a bill in equity brought by the trustee under the will of Luther P. Tucker against the trustee in bankruptcy of Frederick M. and Tracy H. Tucker, a partnership under the name of F. M. Tucker & Co.

The bill sets out a provision in the will of Luther P. Tucker, which directs the bankrupts, as his executors, to hold in trust a part of his estate, paying the income thereof to Marion E. Tucker, granddaughter of Luther, with other provisions to take effect at her death. It alleges that the bankrupts acted as Luther's executors, but were never appointed trustees under his will; that they set aside, held, and dealt with certain specific property which was in their hands as executors, and assumed to hold the same as trustees for Marion; that they wrongfully appropriated a part of the trust property by lending certain specific stocks and bonds to Frederick; that, to secure this loan, Frederick assigned his seat in the stock exchange to both the bankrupts as trustees for Marion; that Tracy, as trustee, demanded from Frederick a return of the securities lent as aforesaid; that Frederick said he was unable to return them or pay therefor; that the bankrupts thereupon took the stock exchange seat in payment of the loan, whereby the stock exchange seat became the property of the bankrupts as trustees for Marion; that thereafter Frederick and Tracy were adjudicated bankrupts, and the defendant was appointed their trustee in bankruptcy; that the defendant filed a petition before the referee for leave to sell the stock exchange seat; that the bankrupts objected to the sale; that the referee ordered the seat to be sold, although, as the bill alleges, the stock exchange seat was not in the possession of the trustee, but in the possession of the bankrupts holding as trustee for

Marion; that the District Court affirmed the judgment of the referee, and the seat was sold; that the bankrupts, assuming to act as trustees for Marion, but without authority to act on her behalf, thereafter filed a petition before the referee, asking for an accounting to determine the rights of Marion in the stock exchange seat; that, upon this petition, the referee decided that neither Marion, nor Frederick and Tracy as trustees, had any right in the seat, which judgment was affirmed by the District Court; that Marion was not represented at any of the proceedings aforesaid; that thereafter the Supreme Court of Massachusetts appointed the complainant trustee for Marion under the will of Luther; that the complainant, as such trustee, filed a petition in the District Court for leave to intervene in order to contest the jurisdiction of the District Court as to the petition for an accounting; that his petition to intervene was denied; that the referee ordered a dividend upon the bankrupt estate; that the complainant believes that there are not funds in the defendant's hands outside the proceeds of the stock exchange seat sufficient to pay the dividend; that the defendant now holds the proceeds of the stock exchange seat intending to use them for the payment of the dividend; wherefore the bill prays that the defendant may account to the complainant for the proceeds of the seat, and that he may be enjoined from paying out any of the proceeds in dividends, or from seeking any order declaring a dividend payable out of the said proceeds. The defendant has moved to dismiss the bill for want of jurisdiction.

In effect, the bill seeks to review a judgment of the District Court, alleging that it was rendered *coram non judice*. The review sought is to be effectuated by taking property from an officer of that court, a trustee in bankruptcy, and by enjoining him from obeying the order of that court issued in due form.

If the District Court exceeds its jurisdiction in bankruptcy, its action may be controlled by the Supreme Court on appeal, or by the Circuit Court of Appeals through its authority "to revise in matter of law the proceedings of the several inferior courts of bankruptcy within their [its] jurisdiction." The Circuit Court is without jurisdiction to review the proceedings of other federal courts like those of bankruptcy and admiralty, even if these proceedings are alleged to be *coram non judice*. No such jurisdiction is given to this court by statute, and jurisdiction is expressly excluded in a case like this by clause "a" of section 23 of the bankrupt act, which reads as follows:

"The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants." Act July 1, 1898, c. 541, 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431].

For the history of this section, see *In re Hammond* (D. C.) 98 Fed. 845, 848. The complainant could not have sued the bankrupt in this court to recover the stock exchange seat or its proceeds. Furthermore, even a state court, which has general jurisdiction of suits to recover property, cannot take property from the possession of a

court of bankruptcy. *White v. Schloerb*, 178 U. S. 542, 20 Sup. Ct. 1007, 44 L. Ed. 1183; *In re Spitzer*, 130 Fed. 879, 66 C. C. A. 35; *Treat v. Wooden* (C. C.) 138 Fed. 934.

As this court is without jurisdiction, the bill will be dismissed, without costs.

UNITED STATES v. HART.

(District Court, N. D. Illinois, E. D.)

No. 3,676.

ARMY AND NAVY—OFFENSES—PLEDGING CLOTHING AND ACCOUTERMENTS OF SOLDIERS.

The seventeenth article of war (Act July 27, 1892, c. 272, § 1, 27 Stat. 277 [U. S. Comp. St. 1901, p. 947]), provides that any soldier who sells, or through neglect loses or spoils, his horse, arms, clothing, or accouterments shall be punished as a court-martial shall adjudge. Rev. St. § 3748 [U. S. Comp. St. 1901, p. 2527], declares that clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away, and that no person not a soldier or duly authorized officer of the United States who has possession of any such clothes, etc., shall have any right, title, or interest therein, but the same may be seized and taken wherever found. *Held*, that clothing issued to soldiers while in the military service remained the property of the United States, within section 5438 [U. S. Comp. St. 1901, p. 3674], providing that every person who knowingly purchases or receives in pledge from any soldier any clothes, equipment, or other public property, which the person selling or pledging the same has no right to sell, shall be imprisoned, etc.

C. B. Morrison, U. S. Atty.

Thomas E. Milchrist, for defendant.

BETHEA, District Judge. This is an indictment for violation of the provisions of section 5438, Rev. St. [U. S. Comp. St. 1901, p. 3674]. The part of the section under which the indictment is drawn is as follows:

"* * * Every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, every person so offending in any of the matters set forth in this section shall be imprisoned at hard labor for not less than one nor more than five years, or fined not less than one thousand nor more than five thousand dollars."

It appears that Edward Hart, the defendant, on a number of different occasions at his place of business in Highwood, Ill., purchased and received in pledge from soldiers employed in the military service of the United States at Ft. Sheridan certain articles of clothing, consisting of fur caps, fur gauntlets, capes, and coats, which articles had been previously issued to them as soldiers by the United States. On motion to take from the jury, the question arose as to whether certain articles of clothing, namely, caps, gloves, shoes, and coats, which had been issued to soldiers in the service of the United States, and by them sold

and pledged to the defendant, are public property, under section 5438 of the Revised Statutes. Clothing is issued to soldiers by the United States for use by them in the capacity of soldiers. The government determines the character, quality, and quantity of clothing to be issued to the soldiers, and when the clothing is issued, although it is charged against the soldiers on their clothing account, they receive but a qualified interest therein. The seventeenth article of war (Act July 27, 1892, c. 272, § 1, 27 Stat. 277 [U. S. Comp. St. 1901, p. 947]) provides that any soldier who sells, or through neglect loses or spoils, his horse, arms, clothing, or accouterments shall be punished as a court-martial may adjudge. Section 3748 of the Revised Statutes [U. S. Comp. St. 1901, p. 2527] provides that clothes, arms, military outfits, and accouterments furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away, and that no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accouterments, so furnished, shall have any right, title, or interest therein, but the same may be seized and taken wherever found. These sections of the Revised Statutes indicate that the title to clothing issued to soldiers remains in the United States; therefore, I hold that in this case the articles of clothing which were issued to the soldiers at Ft. Sheridan while they were employed in the military service of the United States were public property, under section 5438. Motion to take from the jury overruled.

Jury instructed to return verdict of guilty.

BRINCKERHOFF v. HOLLAND TRUST CO. et al.

(Circuit Court, S. D. New York. April 18, 1906.)

EQUITY—PARTIES—INTERVENTION.

Where a petitioner for leave to intervene alleges rights in the subject-matter of the suit which make him a proper party, and his intervention will not prejudice the rights of other parties, but rather tend to facilitate the final determination of the rights of all of the parties, his petition will be granted, and the court will not undertake on such preliminary application to decide questions of right which may be doubtful.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 275–279.]

On Petition for Leave to Intervene.

Geo. H. Yeomans and Arthur H. Masten, for the motion.

L. Lafin Kellogg and Duncan & Duncan, opposed.

COXE, Circuit Judge. The petitioner, R. B. Roosevelt moves to intervene in this action and asks permission to file his petition as a cross-bill. Upon the argument, and in the briefs subsequently submitted, the discussion has taken an exceedingly wide range including many of the questions which must be determined at the trial of the suit. It is unnecessary to decide these questions upon this motion and it might be prejudicial to the rights of the parties to do so. The

petitioner asks simply that he may be permitted to submit his contentions to the court and I do not see how the interests of the other parties will be jeopardized by allowing him to do so. That he is a necessary party is not apparent but that he is a proper party is sufficiently clear. With the petitioner on the record all the interested parties are before the court and a decree can be entered determinative of the entire controversy. It is for the interest of all concerned that the questions still in dispute between the parties shall be decided in the pending suit: to commence a new suit will only protract litigation and increase expense.

It is undoubtedly true as a general proposition that there can be no contribution between joint tort feasons, but this is a question which should be determined on pleadings and proofs and not upon a motion of this character. The petitioner asks to be subrogated to the rights of the complainant: this also is a question which should not be decided in limine, but is for the trial court to determine. So far as this motion is concerned, the question is a simple one. If the petitioner has any rights in the premises they should be determined in the pending litigation and I am of the opinion that the court should not decide at this stage that he has no such rights.

The motion is granted.

NEW YORK HERALD CO. v. STAR CO.*

(Circuit Court, S. D. New York. March 26, 1906.)

TRADE-MARKS AND TRADE-NAMES—TITLE OF PUBLICATION.

Complainant *held* entitled to protection in the trade-mark "Buster Brown" as the title of a comic section of a newspaper it being shown that it was the first to use the title, and that it was so used exclusively by complainant and its licensees for such length of time as to give it a proprietary right therein.

In Equity. On motion for preliminary injunction.

W. A. Megrath, for complainant,
Herbert Knight, for defendant.

LACOMBE, Circuit Judge. This is a suit solely to restrain infringement of a trade-mark; no question as to copyright or as to unfair competition is presented. The trade-mark which complainant claims to own is the words "Buster Brown" as a title or heading for a comic section of a newspaper. No claim is made as to any particular style of illustration, only to these words used in this connection.

It is not disputed, it could not be seriously disputed under the authorities, that the title of a publication may become a trade-mark. Who was the first person to invent the name or to suggest its use in some other connection is not material, the question is "who first used it as the title of a comic section of a newspaper?" That the complainant was the first so to use it is most clearly and positively shown by the affidavits. The suggestion that neither complainant nor defendant uses it as the title of a comic section; that the real titles of the pages referred to are respectively "New York Herald Comic Section" and "Comic Section of the New York American and Journal"

*Affirmed by Circuit Court of Appeals. 146 Fed. 1023.

is unpersuasive. A comic section may consist of a single page as well as of four pages; it may be a subsection of a larger section also comic, but it is none the less a "section." Both papers, the Herald for several years, and the defendant recently, have published each a page in their Sunday editions containing comic pictures and entitled "Buster Brown." Whether or not the original draughtsman of the so-called "Buster Brown" pictures was in the employ of the Herald is immaterial; concededly it bought them from him, paid for them, published them (whether with or without retouching, coloring, etc., is immaterial) and headed the page on which they were published with the words "Buster Brown." Nor is there anything in the suggestion that plaintiff has abandoned the trade-mark because for a few Sundays it printed the pictures, and their title on the fourth page instead of the first page of the colored comic section.

It appears that certain other newspapers have used the words as a title for comic sections in their Sunday editions, but in every instance this was with the consent of complainant and upon paying it for the privilege. What proceedings have been taken or are now pending touching registration of the trade-mark are not important; complainant has shown title to the trade-mark, irrespective of the statute. Injunction pendente lite may issue restraining the use of the trade-mark, either in the newspaper or in advertising matter, which may indicate or imply that defendant is about to publish a "Buster Brown" comic section. This relief extends only to the words "Buster Brown"; Mr. Outcalt, or any one else whom the defendant may choose to employ, is entirely free to design, draw, color, and publish comic pictures of the same kind as those to which plaintiff has prefixed that title, provided only that they do not so closely imitate pictures already published and copyrighted as to be an infringement thereof.

OUTCALT et al. v. NEW YORK HERALD.

(Circuit Court, S. D. New York. March 26, 1906.)

TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—IMITATION OF PICTURES.

An artist has no such common-law right in pictures drawn by him and sold to another, who published and copyrighted the same, as to render it unfair competition in trade for the latter to afterward publish other pictures depicting different scenes merely because they contain characters in imitation of those in the earlier ones.

[Ed. Note.—Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376.]

In Equity. On motion for preliminary injunction. Complainant seeks pendente lite to enjoin defendant from further manufacturing and selling comic sections of newspapers, containing pictures in imitation of those produced by complainant and employing in connection therewith a title ("Buster Brown") associated with said pictures.

Herbert Knight, for the motion.
W. A. Megrath, opposed.

LACOMBE, Circuit Judge. So far as the use of the title "Buster Brown" is concerned the controversy is disposed of by the opinion filed to-day in the countersuit of N. Y. Herald v. Star Company, 146 Fed. 204. The pictures which complainant for several years drew and sold to the Herald were by it colored, copyrighted and published. There is no contention that any subsequent picture is such an imitation of an earlier one as to constitute piracy; if it were the defendant in this suit as owner of the copyright would be the person entitled to complain. The contention of complainant is that it is unfair competition in trade for any one else to draw and offer for sale any other pictures in which, although the scenes and incidents are different, some of the characters are imitations of those which appeared in the earlier pictures which complainant sold to defendant. In other words that deponent, although he never copyrighted them and did not acquire any right to the title in connection with newspaper publication, has, nevertheless, some common-law title to individual figures therein displayed, which he can maintain to the exclusion of others, who depict them in other scenes and situations. It is sufficient to say that no authority is cited supporting this proposition, which seems entirely novel and does not commend itself as sound.

The motion is denied.

CANADIAN PAC. RY. CO. v. WENHAM.

(Circuit Court, S. D. New York. February 21, 1906.)

COURTS—JURISDICTION OF FEDERAL COURT—MOTION TO QUASH SERVICE.

A motion to set aside the service in a federal court, on the ground that defendant is not an inhabitant of the district where the question of intention appears to be involved, will not be determined alone on the ex parte affidavit of defendant, nor will it be passed for determination of the question on plea or answer where defendant is under arrest; but the issue will be referred to a master, to take such testimony thereon as may be offered by either party, subject to the right of cross-examination.

On Motion to Set Aside Service of Summons.

See 146 Fed. 207.

John J. Lordan, for the motion.

Chas. A. Hess, opposed.

LACOMBE, Circuit Judge. The memoranda of authorities filed by both sides are not particularly helpful. The word used in the clause of the statute is not "domiciled," nor "citizen," nor "resident," but "inhabitant." It would seem that the act of 1887 has been in force so long that there must be some decisions construing that word when applied to an individual not a corporation. If it be the equivalent of "domiciled," the intent of the party is a highly important element. But it would be unfair to the complainant to accept as conclusive the sworn ex parte statement of defendant as to his intent, untested by the cross-examination to which he would be subjected if the question were being determined under a plea to the jurisdiction. This court has frequently, where proved facts seemed inconsistent with such a statement, declined

to determine the question on ex parte affidavits, leaving it to be decided under plea, or upon issue raised by the answer. Such a course in this case would be grossly unfair to defendant, who is held upon order of arrest under bail so high that it may be difficult for him to procure it. It is therefore referred to John A. Shields, one of the masters of this court, who is selected because his office is in the same building as that of the marshal, to take testimony and report the same to the court. The marshal may produce the defendant, if he desire to be examined on this question, and he may in that event, after making such statement as he may be advised, be cross-examined thereon. Of course the cross-examination must be directed solely to the facts bearing upon his alleged "inhabitaney" of this district. Either side may produce such other witnesses as counsel may choose, who will be examined and cross-examined. Either side may also file any additional affidavits, in case it may be found inconvenient to produce the witness, but in weighing such ex parte statements the court will give proper consideration to the circumstances that the affiants have not been tested by cross-examination. The taking of testimony must be expeditious, and when complete the court will then be sufficiently advised to make a decision, as it would were the questions presented on a plea. By that time counsel will no doubt be able to submit the cases bearing on the particular clause of the statute.

CANADIAN PAC. RY. CO. v. WENHAM.

(Circuit Court, S. D. New York. March 21, 1906.)

1. DOMICILE, CHANGE OF.—INTENT.

Though the question whether a person, who has removed himself from one district to another, has thereby become an inhabitant or resident of the district where he is living and doing business when served with process is to be determined principally by his intent, his own declaration as to his intent, especially when made after he has become appreciative of the consequences of a change of domicile are not controlling.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, §§ 9-11, 15, 22.]

2. SAME.

When defendant left Chicago a suit against him was being tried, the result of which he must have understood would be adverse, and which was of such a character that execution under the judgment would run against his person and result in his imprisonment. He came to New York; entered into business, took a lease of an office for a year and a half, and of apartments for nine months. Though he left his wife and child in Chicago, he had for several years, whenever absent from Chicago, traveled with his mistress. Since the entry of the Illinois decree against him he had been in Chicago but a single day, a Sunday. *Held*, that defendant had become a resident of the New York district, and could be sued therein.

[Ed. Note.—For cases in point, see vol. 17, Cent. Dig. Domicile, §§ 9-11, 15, 22.]

Action upon a judgment in favor of plaintiff against defendant in United States Circuit Court, Northern District of Illinois, for moneys fraudulently converted. Motion to set aside service of the summons

and to dismiss this action, brought by an alien, on the ground that defendant is not an inhabitant of this district.

See 146 Fed. 206.

John J. Lordan, for the motion.

Charles A. Hess and Jerome Sayles Hess, opposed.

LACOMBE, Circuit Judge. Undoubtedly the question whether a person, who has removed himself from one district to another, has thereby become an inhabitant or resident of the district where he is living and doing business when served with process is to be determined principally by his intent. His own declaration as to his intent, however, especially when made after he has become appreciative of the consequences of a change of domicile, are not controlling. In the case at bar, in view of the defendant's admissions as to his past conduct, his declarations as to anything have little probative value. His intentions are to be deduced from his acts and from a consideration of the circumstances under which he acted.

When he left Chicago and came to New York a suit against him was being tried, the result of which he must have understood would be adverse, and which was of such a character that execution under the judgment would run against his person and result in his imprisonment. He came here, entered into business, took a lease of an office for a year and a half, and of apartments for nine months. He left his wife and child in Chicago, but that circumstance, usually important, is not especially persuasive because it appears that for several years, whenever absent from Chicago, he has traveled in this country and abroad with his mistress, introducing her as his wife, socially as well as to the hotels or tradespeople, from whom they have obtained lodging and food. No doubt, when he came he intended and hoped (and still does so) to return to Chicago. But as was said in *Pacific Mutual Life Co. v. Tompkins*, 101 Fed. 539, 41 C. C. A. 488, "the consummation of that hope and intent depended upon circumstances beyond his control; the happening of some fortunate event giving him opportunity to return." He appreciates the situation. Since the entry of the Illinois decree against him in December last he has been in Chicago but a single day, January 7th, a Sunday, when he was immune from arrest under civil process. Unless he may be fortunate enough to effect some compromise, he has no intention of residing in that city for many years to come, certainly not while he is liable to arrest in satisfaction of the judgment. His acts show that until that time comes, if it ever come, he has elected out of the territorial limits of the United States this particular district in which to live and conduct his business; and it would seem that within the meaning of the act of 1887 he has become an inhabitant of this district.

The motion is denied.

BURK v. JOHNSON et al.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1906.)

No. 2,308.

1. CANCELLATION OF INSTRUMENTS—FRAUD—MUTUAL MISTAKE.

Where a bill to rescind a contract assigning territory for the promotion of burial associations under copyrighted by-laws was based on alleged false and fraudulent representations by defendant, the bill could not be sustained by proof of mutual mistake.

[Ed. Note.—For cases in point, see vol. 8, Cent. Dig. Cancellation of Instruments, § 96.]

2. SAME—EVIDENCE.

In a suit to rescind a contract assigning rights within certain territory under a copyright of articles of association and by-laws for the organizations of mutual burial associations and to cancel notes and mortgage given therefor, evidence *held* insufficient to sustain a finding that defendant represented that the copyright conferred on any purchaser the exclusive right to organize and operate under the plan disclosed, and that no organization using any of the features of such copyrighted plan would or could be operated without obtaining from defendant the right to do so, and that persons so operating were not subject to insurance laws of the several states.

3. COPYRIGHTS—EFFECT—RIGHTS OBTAINED.

The copyright of a pamphlet containing articles of association and by-laws of a mutual burial association did not protect the system, considered merely as a system, so as to confer on the person owning the copyright or his transferees the exclusive right to organize associations under the plan described.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 37.]

4. CONTRACTS—RESCISSION—MISREPRESENTATIONS—QUESTION OF LAW.

Where defendant assigned the right to organize mutual burial associations according to a copyrighted plan throughout several states to complainants for the full term of the copyright, together with all defendant's right, title, and interest thereto within the states named, secured to defendant by such copyright, any opinions expressed by defendant concerning what his rights were under such copyright, in the absence of a misunderstanding of the facts or bad faith, constituted a mere matter of mistake of law, which was insufficient to authorize a cancellation of the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 427, 1166.]

5. SAME.

Where complainants purchased from defendant, who was an ignorant man, the right to use defendant's copyrighted plan for the establishment of mutual burial associations in several states on defendant's alleged misrepresentations concerning his rights under his copyright, and that the plan was not subject to supervision by state insurance departments, and when the matter remained in escrow for two months before the transaction was completed, and complainants had ample time to ascertain their rights under the contract, if they failed to do so, they were not thereafter entitled to demand a rescission because of such misrepresentations.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 425, 1160-1164.]

6. SAME—RATIFICATION.

Where complainants, having purchased an assignment of the right to organize and operate mutual burial associations under a copyrighted plan in June, 1902, discovered the falsity of certain alleged representations of the seller concerning complainants' rights under the contract within a month after the contract was made, but continued, notwithstanding, to operate under the contract, and made no demand for rescission until suit was brought to cancel the contract more than a year thereafter, the fraud, if any existed, was waived.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 446, 1181, 1183.]

7. DEEDS—BLANKS—COMPLETION.

Where the name of the grantee in a deed executed, acknowledged, and deposited in escrow was left blank at the request of the vendee, the fact that he thereafter filled the blank with his own name and recorded the deed did not invalidate it.

[Ed. Note.—For cases in point, see vol. 16, Cent. Dig. Deeds, § 64.]

8. SAME—PAROL AUTHORITY.

Under Gen. St. Kan. 1901, § 1195, providing that a deed to real estate situated in that state need not be under seal, parol authority, express or implied, was sufficient to authorize a vendee to fill his own name in a blank left for that purpose in a deed to land located in that state.

Appeal from the Circuit Court of the United States for the District of Kansas.

This was a suit in equity brought by the appellees against the appellant, Burk, for the rescission of a contract and cancellation of certain instruments made in its execution. Burk was the owner of a copyright on a pamphlet known as "Articles of Association and By-Laws of Harrison Mutual Burial Association." The object of an association formed by the adoption of such articles and by-laws was to provide a plan, by mutual and periodical assessments of members, whereby funeral expenses of each should be secured. The bill charges that Burk induced complainants, W. A. Johnson and Beach, who were copartners under the name of Johnson, Beach & Co., to purchase from him the right to use the copyright throughout certain specified states by false and fraudulent representations made by him, to the effect that the copyright conferred upon any purchaser the exclusive right to organize and operate under the plan disclosed by it; that no organization using any of the features of the copyrighted plan would or could be operated without obtaining from him the right to do so; that persons organizing and operating under his copyrighted articles would not be under the supervision of insurance commissioners of any of the states constituting the territory about which he was negotiating with complainants; and that he would protect them in the exclusive and unembarrassed use of the copyrighted plan in that territory; and further charges that, led on by such false representations, and relying upon their truth, complainants took an assignment from Burk in the following words:

"To All Whom it May Concern: Whereas, I, A. F. Burk, of Harrison, Ohio, did obtain a copyright from the United States for the Harrison Mutual Burial Association, and the certificate of said copyright was dated December 18th, 1899, now this deed witnesseth that for a valuable consideration, viz., ten thousand dollars to me in hand paid, the receipt whereof is hereby acknowledged, I have assigned, sold, and set over, and by these presents do assign, sell, and set over, unto Johnson, Beach & Co., of Wichita, Kan., all the right, title, and interest for and within the following states: Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon, and California, in the said Harrison Mutual Burial Association, as secured to me by said copyright, the same to be held and enjoyed by the said Johnson, Beach & Co. for his own sole use and behoof, and for the sole use and behoof of his legal representatives, to the full end of the term for which said copyright was issued, for and within the limits of the above-described

territory only, as fully and entirely as the same would have been held and enjoyed by me had this assignment and sale not been made.

"In testimony whereof, I have hereunto set my hand and affixed my seal this fourth day of June, 1902.

"[Signed]

A. F. Burk. [Seal.]"

The bill further charges that, in consideration of the assignment, complainants executed and delivered to Burk their five promissory notes, maturing from time to time during the following year, and also a deed conveying to him title to a valuable lot of ground in Wichita, Kan.; that Burk had no right to convey to complainants, and did not convey to them, any exclusive use of the copyrighted plan; that other associations operating on a similar plan were at the time in operation; and that the operation under the plan was not free from the supervision of the insurance commissioners in the territory acquired by complainants. After issue joined and hearing had a decree was rendered in the Circuit Court canceling the notes and deed, and forever enjoining and restraining Burk from asserting any claim thereunder. From that decree he appeals.

Dudley P. Wayne and Sherman T. McPherson, for appellant.

W. E. Stanley and Earl Blake (R. R. Vermilion, Earle W. Evans, and W. A. Ayres, on the brief), for appellees.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The gravamen of the bill is the alleged false and fraudulent representations of defendant, and the decree must be sustained, if at all, upon proof of the specific and definite fraud alleged in the bill. "The rule that the court will only grant such relief as the plaintiff is entitled to upon the case made by the bill is most strictly enforced in those cases where plaintiff relies upon fraud. Accordingly, it has been laid down that where the plaintiff has rested his case in the bill upon imputations of direct personal misrepresentation and fraud, he cannot be permitted to support it upon any other ground." Daniel's Ch. Pl. & Pr. vol. 1, *page 380; *Eyre v. Potter*, 15 How. 41, 56, 14 L. Ed. 592; *Putnam v. Day*, 22 Wall. 60, 66, 22 L. Ed. 764; *Hendryx v. Perkins*, 52 C. C. A. 435, 114 Fed. 801. Attention is called to the foregoing rule because of a claim that the decree below might be supported on proof of a mutual mistake. We do not wish to be understood as intimating that the proof shows such a mistake, but the rule is alluded to for the purpose of sharply defining the issue before us. The questions arising on this appeal will be stated as the opinion progresses.

Did defendant make the false and fraudulent representations as averred, with the actual fraudulent intent and purpose charged in the bill? The proof discloses that complainants had observed the success of one Gill, who had acquired an assignment of defendant's copyright for use in Wichita county, Kan., where he had organized an association of over 8,000 members, had heard of the Burk plan and its advantages through Gill and one Larimer, who was Burk's agent for disposing of territory in the state of Kansas, and had become exceedingly anxious to acquire territorial rights themselves. From April 12 to June 1, 1902, urgent letters were written by Johnson to Burk, advising the latter that he and his associate had concluded to make a

deal with him, and, as they wanted to secure large territory, urged Burk to come to Wichita. Burk at this time was much occupied in handling his copyright and organizing associations under it. He had, before negotiating with Johnson, made between 8,000 and 9,000 sales or territory throughout the United States, and had made them all by assigning his copyright for use within the territory sold, substantially as done by him in this case. Burk finally, on June 4th, was persuaded to go to Wichita to meet Johnson. The parties differ concerning the negotiations which followed. Burk says he expected to have to explain his proposition, and, as he began to do so, Johnson told him he had seen Gill and Larimer, and knew the whole thing, and all he wanted to know was the price and conditions on which he could get the desired territory; that they quickly agreed upon the territory, and the price of \$9,000; \$2,000 to be paid in notes of complainants, maturing from time to time within the following year, and the balance (\$7,000) to be paid by conveying a house and lot in Wichita owned by Johnson. The assignment of the copyright, which was made in the form Burk had always employed, and which was written or filled in by Beach, the notes and the deed were all executed and left in escrow with the president of the Fourth National Bank, to be exchanged when Johnson should have paid a note of about \$1,000, secured by mortgage on the lot. Subsequently, deliveries of these notes, assignment, and deed were all made according to the terms of the escrow.

Johnson, the main witness for complainants, testifies as follows:

"That upon learning that Burk was at the hotel, we went up to his room, and said to Burk: 'Now I have got just a few questions to ask you. I am very busy. What have you got, and how can you protect us in this proposition?'"

That the following colloquy then occurred between him and Burk. The latter said:

"I have got my plan so thoroughly covered with copyrights that I have absolute protection, and can protect you absolutely against all comers and goers. * * * I can absolutely protect you from any one collecting money in a burial association by assessment.' I told him if he had some proposition to offer us that would give the men we sold to absolute protection, so that no one else could infringe or start a plan similar to it, that we could deal; otherwise it would not be any use to say a word. * * * He said: 'I have had that idea copyrighted, and I am protected for seventeen years from the date I am copyrighted.'"

Johnson testifies that these conversations were both before and after the execution of the assignment; that Burk had with him his certificate of copyright, and in course of the negotiation exhibited the same to complainants, and also exhibited the constitution and by-laws copyrighted, and made a good many explanations concerning them.

Mr. Beach, the other complainant, gives his account of the negotiations as follows:

"I said * * * that there were two propositions that I wanted to thoroughly understand. One was, was it strictly a legitimate proposition? And the other was, was he able to protect us by copyright in the proposition?"

He testifies that Burk answered in the affirmative, and further stated that the plan did not conflict with the insurance laws of any of the states. Burk flatly denies the testimony of both Johnson and Beach.

From this kind of testimony, in the light of many other incontrovertible facts, we are unable to find that Burk made the representations ascribed to him by complainants in any such sense as is claimed by them, or in any sense that afforded complainants any ground for reliance upon them in the deal they were engaged in making.

Complainants, after the transaction was closed and after they had entered upon the business contemplated by it, wrote some letters which are in evidence. In those letters they referred to the existence of similar associations which they found they had to compete with, and referred to the fact that they were required to conform to the insurance laws of the state of Minnesota before commencing business there. If the representations claimed to have been made by Burk had been made, and if complainants had been induced by them to make the negotiation in question, nothing would have been more natural than an immediate and vigorous protest upon first ascertaining that the representations were untrue; but, as will be later seen, there were no such protests. Moreover, complainants seem, according to their own testimony, to have been fully advised as to the nature and character of the business from conversations with Larimer and Gill, who had been successfully operating the same kind of a business in the state of Kansas, and particularly in the county of Wichita. They seem, from the correspondence anterior to Burk's going to Wichita, to have made up their minds to go into the business provided they could get territory from Burk. Their anxiety to secure this territory was great and Burk's disposition indifferent. All these things harmonize better with Burk's theory than with complainants'. We have no doubt that Burk, like many successful business men, exaggerated the merit of the general scheme of his business. He had organized many associations under his copyrighted articles, and had made a great success of them. He would naturally boast of his success. Whatever may have been his representations, we hesitate to believe, from all the facts and circumstances attending this case, that he deliberately, fraudulently, and deceitfully undertook to assure complainants that his copyright, for the partial assignment of which he was then negotiating, would secure to them the exclusive use of the plan of operation suggested by it. His copyright conferred upon him no such exclusive right. *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841; *Griggs v. Perrin* (C. C.) 49 Fed. 15. This he and complainants were both presumed to know, and any representation to the contrary or reliance upon it would be unreasonable and improbable.

But, in deference to the contrary contention, we are led to some other considerations. The representations relied on in the bill relate to the scope and effect of the copyright, or, rather, to what advantages or immunities the law conferred upon its owner. Bearing in mind that during the negotiations in question the parties had before them, free to the observation and inspection of all, the certificate of copyright

and the printed copy of the constitution and by-laws copyrighted, and bearing in mind, also, that Beach, one of the complainants, drafted the assignment for Burk to execute, and thus became critically familiar with the language employed and all its limitations, it seems that there was no opportunity for misunderstanding the facts, or no actual misrepresentation or suppression of any of them. Reference to the assignment in question discloses that Burk intended to convey and complainants to acquire the right to exploit the copyright throughout the states of Wisconsin, Minnesota, North Dakota, South Dakota, Montana, Idaho, Washington, Oregon, and California, and this right only. Language cannot be plainer than that employed by the parties to this contract. The assignor, after reciting that he, on a date mentioned, had secured a copyright for the Harrison Mutual Burial Association, says that he has assigned to Johnson, Beach & Co. "all right, title, and interest for and within" the states named "in the said Harrison Mutual Burial Association as secured to him by said copyright; the same to be held and enjoyed by the said Johnson, Beach & Co. * * * to the full end of the term for which said copyright was issued, * * * as fully and entirely as the same would have been held and enjoyed by him had this assignment and sale not been made." Such was their contract—a clear and explicit assignment of such rights, and only such rights, as were conferred by the copyright. Any opinions expressed concerning what those rights were are opinions concerning the law, and, in the absence of any misunderstanding of the facts or bad faith, do not afford the basis of an action for deceit or for rescission of the contract.

The Supreme Court of the United States in *Upton v. Tribilcock*, 91 U. S. 45, 50, 23 L. Ed. 203, says:

"That a misrepresentation or misunderstanding of the law will not vitiate a contract where there is no misunderstanding of the facts is well settled."

Then, adopting the language of *Fish v. Cleland*, 33 Ill. 243, the court says:

"A representation of what the law will or will not permit to be done is one on which the party to whom it is made has no right to rely; and if he does so it is his folly, and he cannot ask the law to relieve him from the consequences. The truth or falsehood of such a representation can be tested by ordinary vigilance and attention. It is an opinion in regard to the law, and is always understood as such."

—Citing *Starr v. Bennett*, 5 Hill (N. Y.) 303; *Lewis v. Jones*, 4 B. & C. 506; *Rashall v. Ford*, Law Rep. 2 Eq. 750. In the same case the learned justice uses the following language: "The rule that a mistake of law does not avail prevails in equity as well as at common law"—citing *Bank of U. S. v. Daniel*, 12 Pet. 32, 9 L. Ed. 989; *Hunt v. Rousmanier*, 1 Pet. 1, 7 L. Ed. 27; *Id.*, 8 Wheat. 174, 5 L. Ed. 589; *Mellish v. Robertson*, 25 Vt. 603. See, also, *Travelers' Ins. Co. v. Henderson*, 16 C. C. A. 390, 69 Fed. 762, and *Patent Title Co. v. Stratton* (C. C.) 89 Fed. 174.

We are aware that the rule just alluded to is not an inflexible one; it has been departed from in exceptional cases.

In *Griswold v. Hazard*, 141 U. S. 260, 284, 11 Sup. Ct. 972, 999,

35 L. Ed. 678, these exceptions are considered. After affirming the general rule just adverted to, the court says:

"Yet the rule that an admitted or clearly established misapprehension of the law does create a basis for the interference of courts of equity, resting on discretion and to be exercised only in the most unquestionable and flagrant cases, is certainly more in consonance with the best considered and best reasoned cases upon this point, both English and American."

In the light of what has already been said concerning the facts of this case, we cannot place it among the exceptions. The *Griswold Case* was based, in part, at least, upon an alleged mutual mistake of the parties. In that respect, also, it affords no parallelism to the case before us.

Another well-recognized rule precludes recovery by complainants in this case. It was not reasonable prudence on their part to act upon the opinion of Burk concerning their legal rights under the assignment which they took. Burk, as disclosed by his letters and testimony, was an ignorant man. He was not a lawyer, and did not pretend to be versed in the law. He was interested adversely to complainants. There existed no occasion for immediate or hasty action. The papers involved in the transaction were left by Burk in Wichita for about two months in escrow before the transaction was closed by their interchange. Burk left Wichita immediately upon their execution and delivery in escrow. Complainants, who resided there, remained there. Ample time was afforded for consultation and information concerning their rights. No lawyers were consulted concerning them, and no other information apparently desired or secured.

In *Slaughter's Administrator v. Gerson*, 13 Wall. 379, 20 L. Ed. 627, the Supreme Court, by Mr. Justice Field, laid down the governing principles on this subject. He says:

"The misrepresentation which will vitiate a contract of sale, and prevent a court of equity from aiding its enforcement, must * * * relate to a matter respecting which the complaining party did not possess at hand the means of knowledge. * * * A court of equity will not undertake any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations. If, having eyes, he will not see matters directly before them where no concealment is made or attempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by overconfidence in the statements of another."

In *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931, the Supreme Court, speaking by Mr. Justice Brewer, after referring with approval to the *Slaughter Case*, quotes from *Atwood v. Small*, decided by the House of Lords, and reported in 6 Cl. & Finn. 232, 233, as follows:

"If a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he can not be heard to say he was deceived by the vendor's representations."

In *Clark v. Reeder*, 158 U. S. 505, 524, 15 Sup. Ct. 849, 39 L. Ed. 1070, referring to *Farnsworth v. Duffner*, the court says:

"In respect to such an action, it has been laid down by many authorities that, where means of knowledge respecting the matters falsely represented are equally open to purchaser and vendor, the former is charged with knowledge of all that by the use of such means he could have ascertained."

See, to the same effect, 2 Pom. Eq. Jur. § 892; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678, and *Upton v. Tribilcock*, supra, wherein it is said:

"Equity will not assist a man whose condition is attributable only to that want of diligence which may be fairly expected from a reasonable person."

The means of knowledge as to what Burk conveyed by the assignment of the copyright were as available to the complainants as to the defendant. It was a question of law pure and simple, and whether the plan of operation suggested by the copyright was one that subjected the operators to the provisions of the insurance laws of any state was also a question of law. Complainants had ample opportunity to submit these legal questions to competent counsel, and ample time within which to do it before their situation was at all changed. Their reliance upon what Burk said, under such circumstances, was not the act of a prudent person. It did not evince ordinary discretion or diligence, and does not justify their resort to a court of equity to right; the same to be held and enjoyed by the said Johnson, Beach relieve them against his alleged misrepresentations.

If the representations were material, and were made as charged in the bill, did not the complainants, on learning their falsity, elect to ratify the contract notwithstanding?

About August 1, 1902, both Johnson and Beach started into the new enterprise. They first went to Minneapolis, and were forthwith informed by attorneys that their business conducted under the articles and by-laws of the Harrison Mutual Burial Association would subject them to the provisions of the insurance laws of Minnesota. After becoming satisfied that such was the case, they proceeded to incorporate under the laws of Minnesota, and otherwise to conform thereto, so as to qualify them to prosecute business in that state. It also appears that they found two different companies or associations organized in Minneapolis for similar purposes as their own.

On September 19, 1902, complainants wrote Burk a letter, which, after some highly decorous observations against resorting to political influences to further their ends, reads as follows:

"Now don't conclude by this that we have given up the idea of succeeding with this meritorious business, for we have not. But we have got to add some of our own merit and money as well. We have found out by advising with the best legal talent that we will have to conform to the insurance laws of Minnesota to operate here. Now we inclose two p's. of so called Mutual Burial Ass'n, and copyrighted, too. What are they? People here say, why, if I can get this for \$200 what do I want of the Harrison. Will you kindly send us some of their literature, that we may be advised and know how to meet these unusual and unlooked for propositions."

It is to be observed from the foregoing letter that although complainants, soon after starting out in their venture, were advised of facts clearly showing that the representations which they claim to have

relied on were false, they fail, in the first letter communicating those facts to Burk, to allude to any deception practiced by him, or to any claim of right to cancellation or modification of their contract.

Later, on November 19th, in a letter written by Johnson for his firm to Burk, he states that they had been having "the hardest time of their lives in Minnesota. * * * We fought hard, but all of no avail. I have spent lots of time and money. I expect to do better out west." Still no complaint, but a determination to go on in the prosecution of their business. Beach was left in Minnesota to conduct the business there, and Johnson started westward. He subsequently went to all the principal places in his territory, Butte, Spokane, Seattle, Tacoma, Portland, and some other little towns. He says he had no trouble at Butte, but sold that territory to another. At Spokane he made satisfactory arrangements, and went on to Portland, where he received a letter informing him that a big undertaker at Spokane had organized an association identical with theirs called the Martha Washington, collecting money by assessment for burial purposes. He says he found the Martin brothers, from Illinois, had gone all over their territory, offering to sell it on about the same plan as Burk did. These are things which, on complainants' theory, should have moved Johnson to a most vigorous protest, and which, as will be later seen, demanded immediate action if rescission was contemplated. But such was not the case.

On November 29th, in a letter written from Tacoma, Johnson says to Burk:

"Please write me a good letter, stating how the H. M. B. Asso. is getting along at different places, and if there are any other associations that are doing anything. This will help me in trying to sell this territory. * * * "

On February 17, 1903, Johnson writes to Burk, informing him that he had just sold two towns for \$125, \$45 cash and \$80 on time. The correspondence shows no complaint until January 15, 1903, when Beach wrote Burk the following letter:

"Mr. W. A. Johnson writes me from Washington that there is a burial association organized at Spokane, Washington, practically the same plan as the Harrison. We request you to look after and ——— it up at once as per your agreement with us."

On February 8, 1903, Beach wrote Burk another letter as follows:

"There is an organization here in Minneapolis called the Friendly Aid Society. Its sole purpose is the burial of its dead, and its workings are practically the same as the Harrison. I inclose some of their literature. Now we demand that you attend to this at once."

These letters, instead of indicating an election to rescind by reason of any representations, plainly recognize the contract as made to be in force. They call upon Burk to perform what complainants say was one of its stipulations. This and other reliable testimony establish the following facts: Complainants secured the right to sell and use the copyrighted articles through an extended territory and with it the advantage of the prestige which a large number of prosperous associations organized under them afforded. After they had received positive information of the existence of conditions different

from those claimed to have been represented by Burk, they took no action to rescind the contract, but proceeded to exercise its privileges, speculate upon its possibilities, and receive and enjoy its fruits. Not a word of complaint concerning defendant's conduct was made for about six months, and then, instead of a notice of a rescission of the contract, a demand for its performance followed. Nothing different is disclosed by the record until the institution of this suit in September, 1903. It was then too late. They had already waived all objections which they could have made by reason of the fraud, and elected to proceed in the execution of their contract notwithstanding it.

In the leading case of *Grymes v. Sanders*, 93 U. S. 55, 23 L. Ed. 798, the Supreme Court lays down the following rule:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted."

In *McLean v. Clapp*, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804, the doctrine of the last-mentioned case is repeated and reinforced.

In *Scheffel v. Hays*, 7 C. C. A. 308, 58 Fed. 457, and in *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402, this court has spoken in no uncertain voice on these questions. In the latter case it made use of the following:

"If one who is induced to make a trade or sale by fraud would rescind it, he must immediately, upon his discovery of the fraud, announce his intention so to do, and return all the consideration he has received, to the end that the parties may be put in statu quo before subsequent transactions have made action impossible. Silence, delay, vacillation, acquiescence, or the retention and use of any of the fruits of the sale or trade that are capable of restoration for any considerable length of time after the discovery of the fraud constitute a complete and irrevocable ratification of the transaction."

See, to the same effect, *Pom. Eq. Jur.*, vol. 2, § 897, and *E. Bement & Sons v. La Dow* (C. C.) 66 Fed. 185, and cases cited.

Applying the doctrine of the foregoing cases, complainants must be held, under the facts disclosed by this record, to have elected to ratify the contract in question, even if it was procured by false and fraudulent representations.

It is urged in argument that the failure and inability of complainants to restore or offer to restore the consideration received by them or to place the defendant in statu quo is fatal to their right of relief. In the view we have taken of other and controlling issues, we deem it unnecessary to express our opinion as to the application of this principle. The deed executed, acknowledged, and deposited in escrow by Johnson and his wife was for the convenience and at the request of Burk executed in blank, the name of the grantee being omitted, with the agreement made at the time that Burk might thereafter direct what name should be inserted. Presumptively, as the consideration for the assignment of the copyright was payable to Burk, he had a right to fill in his own name. He subsequently did so, and caused the

deed, with the blank so filled, to be duly recorded in the proper recorder's office. Did this avoid the deed? We think not. It carried out the undoubted intention of the parties, and executed the contract as actually made. A deed to real estate situated in the state of Kansas need not be executed under the seal of the grantors (section 1195, Gen. St. 1901), and accordingly the deed in question was not so executed. In such circumstances, whatever may be the rule in cases where the deed must be a specialty, parol authority, express or implied, to fill in a grantee's name after execution by the grantors is sufficient, and when done the deed is good. *Mechem on Agency*, § 94, and cases cited; *Am. and Eng. Ency. of Law*, vol. 1, p. 955, and cases cited. Even if the conveyance is by law required to be under seal of the grantor, there is abundant authority and reason for holding that a blank left for the name of grantee may be filled in by the grantee after execution. *Drury v. Foster*, 2 Wall. 24, 33, 17 L. Ed. 780; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Thummel v. Holden*, 149 Mo. 677, 51 S. W. 404; *State of Minnesota v. Young*, 23 Minn. 551; *Lafferty v. Lafferty*, 42 W. Va. 783, 26 S. E. 262, and cases cited. In any view, the course of procedure adopted by the parties to this suit with reference to filling in the name of the grantee did not vitiate the deed.

We think the learned trial judge erred in the application of the law to the established facts of this case, and for that reason we are constrained to reverse the decree rendered, and direct the Circuit Court to enter a decree dismissing the bill; and it is so ordered.

BROWN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1906.)

No. 2,310.

1. POST OFFICE—USE OF MAIL—SCHEME TO DEFAUD—DESCRIPTION IN INDICTMENT.

In a prosecution for depositing a letter in the post office in execution of a scheme to defraud in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], defendant cannot be convicted unless the proof establishes the "scheme" substantially as alleged in the indictment.

[Ed. Note.—Nonmailable matter relating to frauds and counterfeiting, see note to *Timmons v. United States*, 30 C. C. A. 86.]

2. SAME—ISSUES AND PROOF.

Accused was indicted for depositing a letter in the post office in execution of a scheme to defraud. The scheme alleged consisted of the insertion of an advertisement in a newspaper containing the words "How to speculate on Board of Trade. Sent free by J. L. Brown & Co.," etc., to induce the public through correspondence conducted by mail to purchase through defendant under the name of "J. L. Brown & Co." commodities on some board of trade to enable defendant who did not intend to make such purchases to convert the money to his own use. The proof was that one Hardwick saw such advertisement and without correspondence sent defendant \$1,000 by wire, with instructions to buy options on pork. Defendant immediately returned a memorandum showing a sale made by him to Hardwick, and not a purchase made on a board of trade for him. Thereafter Hardwick deposited more money, and directed further pur-

chases of pork, which were made in the same manner. *Held*, that such facts were insufficient to establish the charge laid in the indictment.

In Error to the District Court of the United States for the Western District of Missouri.

W. F. Riggs, for plaintiff in error.

A. S. Van Valkenburgh (Leslie J. Lyons, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The plaintiff in error was indicted and convicted for depositing a letter in the Kansas City post office in execution of a scheme to defraud in violation of section 5480 of the Revised Statutes [U. S. Comp. St. 1901, p. 3696]. The scheme alleged in the indictment to have been devised by him is substantially this: that he would insert in a newspaper called the "Kansas City Packer," the following advertisement: "How to speculate on Board of Trade. Sent free by J. L. Brown & Co., Gibraltar Bldg., Kansas City, Mo. Grain, Stocks, and Provisions. Ref. Am. Nat'l. Bank," for the purpose of inducing the public through correspondence conducted by mail to purchase through him under the name of "J. L. Brown & Co." commodities on some board of trade, and for the purpose of enabling him so to do to send him money pretended by him to be necessary either in paying for the same or in making deposits of margins on futures bought by him for account of his customers on such boards, whereas it was not his intention to use such money for either of these purposes, but on the contrary, to convert the same to his own use. This is not a complicated scheme. It consists in the one alleged false pretension that defendant would make use of such money as might be entrusted with him in making purchases or sales of commodities, or futures in the same, on some board of trade for account of his customers. The purpose of requiring a description of the scheme to defraud in the indictment is to definitely and clearly inform the accused of the scheme charged against him so as to enable him to make his defense. *Brooks v. United States* (C. C. A.) 146 Fed. 223, decided at this term, and not yet officially reported; *Stewart v. United States*, 55 C. C. A. 641, 119 Fed. 89, 94; *United States v. Hess*, 124 U. S. 483, 486, 8 Sup. Ct. 571, 31 L. Ed. 516.

It follows that one must be convicted, if at all, on the scheme as alleged, and if the scheme as alleged is not substantially established by the proof he cannot be convicted. In the view we take of this case it is necessary to refer to the proof with some particularity. One Hardwick, a resident of Oklahoma, saw a copy of the Kansas City Packer, published January 4, 1904, containing the business card of J. L. Brown & Co., in the language already set out. Without any preliminary correspondence or other communication between him and Brown & Co., he transmitted by wire to the latter company, on February 7, 1902, \$1,000, as he says in his evidence, "to buy options on July pork." Brown & Co. received the money, and on the same day (February 7th), acknowledged its receipt and disposition in a letter written and sent to Hardwick in the following words:

"We have your telegram to buy 1,000 barrels Chgo. July Pork and on receipt of telegram from Bank, we executed your order for same as per inclosed contract. We thank you very much, etc."

The contract inclosed, so far as necessary for our present purpose, is in the following words:

"J. L. Brown & Co. Grain, Provisions and Stocks. Gibraltar Building. Kansas City, Mo., 2/7/02. E. F. Hardwick: You have this day bought from us at regular commission less than the prices named in the memo. One thousand (1,000) barrels of Chicago pork at \$16.05 per bbl. for delivery in July. Margins deposited with us \$1,000. Notice. All contracts made with us for the purchase or sale of grain, provisions or stocks made with us or through us are subject to the rules and regulations of the board of trade or stock exchange in the city where delivery is to be made. * * *

There was also an inclosure in this letter of a pamphlet entitled "How to speculate." In this, among other things unnecessary for our present purposes, the following clearly appears:

"In buying and selling grain and provisions upon a margin, our customers can take advantage of the different fluctuations of the market by buying or selling on every decline or advance."

Towards the latter part of February, Brown & Co. wired Hardwick, calling for more margins, whereupon, without complaint, \$500 were sent by telegraph to Brown & Co. On March 3d, Hardwick testifies that thinking "that pork would be a pretty good proposition," he sent Brown & Co. \$500 more, with directions "to buy 500 barrels more of pork." This telegram was answered by a letter, written and mailed by Brown & Co., March 4, 1902, in part as follows:

"Mr. E. F. Hardwick, Alva, Okl.—Dear Sir: On receipt of telegram from Exchange National Bank of your city, we executed an order for 500 barrels of Chicago July Pork at 15.52, as per contract inclosed. We thank you very much for the order, etc."

The contract inclosed bears the same date, March 4th, and reads as follows:

"E. H. Hardwick, You have this day bought from us at the regular commission less than the prices named in this memo. 500 Barrels Chicago Pork at \$15.52 per barrel for delivery in July."

The balance of the contract is the same as that bearing date February 7th, already partially copied.

The record discloses nothing more with reference to either of these deals until April 28th, when Hardwick came to Kansas City personally, met defendant Brown, and informed him that he had come to close the pork deals. Brown proceeded to act and informed him that he had closed it out at \$17.12. Hardwick insisted upon an immediate settlement, and told Brown that he had been over to the board of trade and had ascertained that a settlement was due immediately upon closing out the deal. The money was not paid as requested and the evidence discloses an effort on Brown's part to evade settlement with Hardwick and to conceal his bank credits, doubtless for the purpose of embarrassing Hardwick in any attempt to enforce payment. As a result much ill feeling seems to have been engendered between Hardwick and Brown. The evidence further discloses that it was cus-

tomary among the brokers in Kansas City at the time in question, upon receiving orders like those sent by Hardwick to Brown & Co., to either make the transaction themselves and obligate themselves to make the delivery required by the terms of the order, or go into open market and as agent for the customer, there make the transaction. In other words, that the custom was for brokers, upon receiving orders to buy or sell commodities for patrons, to act either as principal or broker in the transaction. There was not only no evidence of any other transactions in which customers of Brown & Co. made losses, but positive evidence that the Hardwick case was the only one of that kind. The government made no effort to show any other transactions with Brown & Co. which it claimed to be fraudulent. The defendant, on the other hand, undertook to make a showing of the course of his business for the last five years, but the government's objection to that showing prevented it. There is not only no evidence that Hardwick was dissatisfied with the terms of the sales to him by Brown & Co., as stated in the contracts accompanying the two letters of February 7th and March 3d; but there is affirmative evidence that Hardwick never communicated any dissatisfaction therewith to the defendant.

We fail to find in the proof so made any demonstration of the scheme to defraud as laid in the indictment. That scheme is that Brown would hold himself out and pretend to act as an agent for others in buying and selling commodities on the floor of the public exchanges. The card of J. L. Brown & Co., published in the Kansas City packer, is claimed by the government to be evidence of a fraudulent design. In fact, it is pleaded in the indictment as the initiation of the scheme to defraud. We fail to discover in the card any more evidence of a pretension on defendant's part to operate as a broker on the public exchanges than to conduct a bucket shop of his own. One man only, so far as the record shows, saw and acted upon it. That was Mr. Hardwick of Oklahoma. But he did not understand or treat it as a representation or assurance that Brown & Co., would act as his agents in buying commodities on Chicago or any other board of trade. On the contrary he treated it as the advertisement of a bucket shop, dealing in options. He knew from the general custom prevailing among Kansas City brokers, or in some other way, that Brown & Co., might make a bookkeeping transaction with him charging him with the market price of the pork on the date of the transaction, and later, on the date of the contemplated delivery, crediting him with the then market price and settling on the basis of differences so shown. This appears from what immediately followed forming a part of the transactions in question. Brown & Co., on receiving Hardwick's remittances acknowledged their receipt and informed him that they had executed his orders as "per contract inclosed." The contracts so inclosed informed Hardwick in plain and unambiguous terms that Brown & Co. had not negotiated a purchase for him on any board of trade, but had themselves sold him the pork desired. Hardwick received the letters and contracts relating to both deals in due course of mail, and by his repetition of an order, after being informed how Brown & Co. treated the first one and by his con-

tinued silence, must be presumed to have acquiesced in the firm's action. He consented to have the firm take the deals and seems never to have contemplated a trade on any public exchange.

From these prominent and undisputed facts taken in connection with the want of proof of any irregular or fraudulent practices by defendant with any other persons or in any other ways, we confidently reach the conclusion that the scheme to defraud as laid in the indictment was not proved. Up to April 28th Hardwick and Brown & Co. appear to have conducted their business harmoniously and satisfactorily. Hardwick seems to have been the initiator of each deal; to have determined on his own responsibility that "pork would be a pretty good proposition," and to have voluntarily sent money to defendant's firm for the purpose of buying July options in it. All of a sudden, with no preliminary correspondence or explanation, Hardwick, on that day, appeared in Kansas City, made himself known to defendant, and without making any complaint concerning the firm's treatment of his deals demanded an immediate closing and settlement of them. No apology is intended to or can be made for Brown's conduct from this time on. He began systematically and stealthily to conceal his money, put every possible obstacle in the way of Hardwick's securing payment of the balance due him, and personal feeling became bitter between them. The criminal court of the state was first resorted to by Hardwick and later this proceeding was instituted.

Section 5480 serves a wise and useful purpose, primarily and chiefly to prevent the mail service of the United States being used for fraudulent purposes, but incidentally, and in a subordinate way, to prevent the formation and execution of fraudulent schemes under the guise of plausible business methods. To permit any persons to resort to its salutary provisions for any ulterior purpose would tend to impair its legitimate usefulness.

The judgment must be reversed, and the cause remanded for a new trial.

BROOKS v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. April 24, 1906.)

No. 2,304.

1. POST OFFICE—USE OF MAILS—SCHEMES TO DEFRAUD—OFFENSES.

In order to make out the offense defined by Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], prohibiting the mailing of a letter in the execution or attempted execution of a scheme to defraud, there must not only be a scheme intended to defraud, but such scheme must contemplate as one of its essential parts the use of the United States post office establishment to effect its purpose, the gist of the offense being the mailing of the letter in furtherance of such scheme.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 55.

Use of mails for schemes to defraud, see note to *Timmons v. United States*, 30 C. C. A. 86.]

2. SAME—INDICTMENT.

An indictment for mailing a letter in execution or attempted execution of a scheme to defraud in violation of Rev. Stat. § 5480 [U. S. Comp. St. 1901, p. 3696], while required to allege the particulars of the scheme with sufficient certainty to show its existence, and character, need not do so

with the same particularity as to time, place, and circumstance as is required with reference to the mailing of the letter.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Post Office, § 72.]

3. SAME.

If the scheme is sufficiently outlined to show its design and adaptability to deceive, and to fairly acquaint the accused with what he is required to meet, it answers the requirement of the statute.

4. SAME.

Whether the pretensions made by the accused, which are averred to constitute the scheme to defraud, constitute an agreement, valid or otherwise, or consist of representations of fact, present or future, an expression of opinion or assurance of past, present, or future conditions, it may constitute a scheme to defraud, provided only it be designed and reasonably adapted to deceive.

5. SAME.

An indictment for mailing a letter in execution of a scheme to defraud, in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], alleged that the defendant with others by means of advertisements published in newspapers, and correspondence conducted by and through the United States mail service, pretended to be engaged under the name "National Securities Company" in a lucrative and honorable business as a broker, dealing in grain, provisions, and stocks, and pretended to be possessed of superior knowledge concerning the business, making loss improbable, and pretended to pay interest to depositors at the rate of 6 per cent. per month, and to permit withdrawals at the depositors' election, when in fact he had no such superior knowledge, did not intend for any great length of time to pay 6 per cent. per month, nor permit withdrawals at depositors' pleasure, but intended by such false pretensions to induce deposits, for the sole purpose of converting them to his own use. *Held*, that the indictment sufficiently alleged a scheme to defraud, within such section.

6. SAME—INSTRUCTIONS.

In a prosecution for mailing certain letters in execution of a scheme to defraud, in violation of Rev. St. § 5480 [U. S. Comp. St. 1901, p. 3696], the court properly charged that defendant could not be convicted for devising the scheme alone, but that the gravamen of the offense rested in the mailing of the letters alleged in the indictment, and that in order to convict the jury must find that defendant placed or caused the letters to be placed in the post office, as alleged.

7. CRIMINAL LAW—DECLARATIONS OF DEFENDANT.

Where in a prosecution for mailing certain letters in furtherance of a scheme to defraud, it was charged that the letters were mailed, one on December 10, 1902, one on January 13, 1903, and another on January 29, 1903, and there was no evidence that defendant's admissions to a post office inspector concerning his operation of the scheme were not made after the mailing of the letters in question, such admissions were not erroneously admitted as made prior to the mailing of the letters.

8. SAME—EVIDENCE—EXISTENCE OF THINGS—PRESUMPTION OF CONTINUED EXISTENCE.

That the defendant had charge of the mailing of letters and literature for a fraudulent securities company in November, 1902, was insufficient to justify a presumption that he continued indefinitely thereafter in the same employment, under the rule that from proof of the existence of a certain condition of things at one time the same condition, of things, if of a continuing nature, is presumed to continue until the contrary is shown.

9. POST OFFICE—SCHEME TO DEFRAUD—USE OF MAILS—MAILING LETTERS—EVIDENCE.

In a prosecution for the mailing of certain letters in furtherance of a scheme to defraud, evidence *held* sufficient to justify a finding that defendant mailed or caused the letters in question to be mailed.

10. SAME—EVIDENCE.

Accused did business under the name "National Securities Company." He advertised to invest deposits in grain, provisions, and securities, so as to yield his customers 6 per cent. per month, and to permit them to withdraw their deposits at their election. He sent out through the mail laudatory circulars, affidavits, and letters purporting to come from others, some of which were entitled "Do you know of something, anything better?" "Our company strong, well financed, capital full paid." "Our plan infallible, has never lost a dollar. An assured success." "Our management honest, conservative, intelligent, and experienced." "Our proposition very profitable, cannot be excelled. Our profits justify it." *Held*, that such documents in themselves constituted evidence of the existence of a scheme to defraud.

11. SAME.

Where, in a prosecution for mailing certain letters in furtherance of a scheme to defraud, defendant's participation in securing a certain false affidavit and laudatory letter appeared in the stock advertisements of the business in which defendant was engaged, such stock advertisements and copies of the affidavit and letter were admissible.

12. SAME.

In a prosecution for mailing certain letters in furtherance of a scheme to defraud, letters other than those counted on in an indictment, purporting to have been written by the company operated by defendant, to different persons throughout the country, and relating to transactions by the company with them, were admissible to show that the scheme contemplated the use of the mails, and as bearing on the intent with which the business was done, and the existence of a scheme to defraud.

In Error to the District Court of the United States for the Eastern District of Missouri.

Chester H. Krum, for plaintiff in error.

David P. Dyer, for the United States.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. Defendant was indicted, tried and convicted under the provisions of section 5480, Rev. St. [U. S. Comp. St. 1901, p. 3696], for having mailed a letter in the St. Louis post office in execution of a scheme or artifice to defraud, alleged to have been devised by him, and others, and which he intended to make effective by correspondence conducted by and through the postal establishment of the United States. The scheme as disclosed in the indictment is to the following effect: That the defendant, with others who were not put on trial with him, by means of advertisements published in newspapers and correspondence conducted by and through the United States mail service, would pretend to be engaged, under the name of National Securities Company, in a lucrative and honorable business as a broker, dealing in grain, provisions, and stocks, and would pretend to possess such superior knowledge concerning the business as would render loss improbable and would pretend to pay interest on all sums of money which any one might be induced to deposit with him at the rate of 6 per cent. per month, and permit withdrawal of any deposits at any time the depositors might desire, when in fact, he was not engaged in any lucrative or legitimate business, had no such superior knowledge, did not intend for any great length of time to pay 6 per cent. interest per month or permit withdrawals at the pleasure

of the depositors, but did intend by such false pretensions to induce the deposit of money with him for the sole purpose of converting the same, or a great part thereof, to his own use. The judgment of conviction is challenged by the defendant for three prominent reasons: Because the indictment states no offense; because there is no competent evidence showing that defendant mailed either of the letters set out in the three counts of the indictment; and because the trial court admitted irrelevant evidence consisting of certain letters emanating, or purporting to emanate, from defendant's place of business. The argument against the sufficiency of the indictment rests upon the alleged insufficiency of the averments to show a scheme or artifice to defraud.

It is argued that the pretension by defendant that he was engaged in an honorable and legitimate business, and that he had such superior knowledge of the business as to make loss improbable involves only a matter of opinion and does not create legal liability; that the pretension that defendant would pay interest on deposits at the rate of 6 per cent. per month and allow deposits to be withdrawn by depositors at their pleasure, were, in themselves, innocent, amounting only to terms and conditions of a mutual agreement, and that the denial of the reality of these pretensions adds nothing to the scheme because it was a denial of the existence of opinions, so far as they were concerned, and a qualified and evasive denial of the reality of the intention to pay the large rate of interest or to permit withdrawals by depositors when they desired. It is argued that the denials of defendant's intention to pay interest "for any great length of time" or to permit depositors "for any great length of time" to withdraw the deposits on demand afford no standard of certainty, and are of no legal significance; and that the alleged intent by means of the pretensions set forth, to secure the money of depositors and convert the greater portion thereof to his own use, states no criminal purpose because the deposit created only the relation of debtor and creditor between defendant and depositors; the money becoming the property of defendant upon the completion of the deposit. This argument is not persuasive; it dissects the averments, showing the separate elements of the scheme to defraud as if they were separately pleaded as the basis of actions at law for deceit or actions in assumpsit for the recovery of money deposited; but such is not the character of the proceeding before us.

Section 5480 denounces as a crime the mailing, among other things, of a letter in the execution or attempted execution of a scheme to defraud. This must not only be a scheme intended for the purpose of defrauding, but must contemplate as one of its essential parts, the use of the post office establishment of the United States in effecting its purpose. The gist of the offense is the mailing of the letter. Congress, under the constitutional grant of power to regulate post offices and post roads, might legislate to prevent the use of the postal establishment in carrying letters for fraudulent purposes; but could not legislate for the purpose of preventing or punishing general schemes to defraud. The existence of the scheme to defraud is a necessary

prerequisite or condition to the commission of the offense. But as the scheme may be the basis of many offenses under section 5480, dependent upon the number of letters written and mailed in its execution or attempted execution in whole or in part (*Brown v. United States* [C. C. A.] 143 Fed. 60; *Howard v. United States*, 21 C. C. A. 586, 75 Fed. 986, 34 L. R. A. 509; *In re Henry*, 123 U. S. 372, 8 Sup. Ct. 142, 31 L. Ed. 174), its averments cannot afford a reliable criterion to determine whether a former acquittal or conviction can be pleaded in bar to a subsequent prosecution for the same offense. For this reason, and because its execution does not constitute the gravamen of the offense, it need not necessarily be pleaded with all the certainty as to time, place and circumstance requisite in charging the writing and mailing the letters in execution of the scheme which does constitute the gravamen of the offense. *Sharp v. United States* (C. C. A.) 138 Fed. 878. Nevertheless, the particulars of the scheme are matters of substance, and must be set out with sufficient certainty to show its existence and character, and to fairly acquaint the accused with what he is required to meet. *United States v. Hess*, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516; *Stokes v. United States*, 157 U. S. 187, 15 Sup. Ct. 617, 39 L. Ed. 667; *Stewart v. United States*, 55 C. C. A. 641, 119 Fed. 89, 94; *Miller v. United States*, 133 Fed. 337, 66 C. C. A. 399.

Does the description of the scheme found in the indictment under consideration measure up to this requirement?

In *Durland v. United States*, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709, counsel for defendant argued much as is done in this case, that the statute only contemplates such cases as come within the definition of "false pretenses"; that the representation must be of some existing fact, and not a mere promise as to the future; that the fraudulent purpose must be something more than an intention not to carry out a contract, etc. The court, speaking by Mr. Justice Brewer, says:

"We cannot agree with counsel. The statute is broader than is claimed. * * * Some schemes may be promoted through mere representations and promises as to the future, yet are none the less schemes and artifices to defraud. * * * But beyond the letter of the statute is the evil sought to be remedied, which is always significant in determining the meaning. It is common knowledge that nothing is more alluring than the expectation of receiving large returns on small investments. * * * In the light of this the statute must be read, and so read, it includes everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose."

See, also, *United States v. Flemming* (D. C.) 18 Fed. 909.

The section in question read in the light of the foregoing exposition of its meaning, in our opinion, contemplates any scheme involving matters of enforceable or unenforceable contract, representation of facts, expression of opinions, or assurances of past, present or future conditions, provided only it was designed and reasonably adapted to deceive and defraud. The most successful schemes to defraud are those dressed in the garb of honesty and hedged about with all the appearances of legal and enforceable undertakings. If the intent and purpose is to deceive and defraud the unwary it matters not what form the project is made to take.

Tested by the foregoing, we think the scheme alleged to have been devised by the defendant comes fairly within the statute, and is sufficiently outlined to show its design and adaptability to deceive, to inform defendant of its character and enable him to take issue thereon and prepare to meet it. It appeals to one of the strongest of human passions—the love of speedy and large returns on small investments. It assures the public of such a superior knowledge and experience as usually guarantees success. It offers that most seductive privilege of investing money at the enormous rate of 6 per cent. interest, per month, only however, as long as the customer desires, with the assured right to withdraw the principal at any time. Patronizers of such schemes usually flatter themselves that they will be smart enough to foresee disaster in time to withdraw their money before the final collapse. The feature of the scheme which received the severest denunciation of defendant's learned counsel is that part of it disclosing defendant's intent not to pay the large rate of interest "for any great length of time" or permit such withdrawals "for any great length of time," but did intend by means of the representations "to induce" Stewart, and others mentioned in the indictment, to deposit money with him so that he might convert the greater part thereof to his own use. We think the feature of the scheme so denounced is its most attractive element, the one which would naturally give assurance of the greatest success. To start out with the payment, for a time, of interest as promised, and the practice of free withdrawals whenever a customer desired was very shrewd. It inspired confidence at the outset, and afterwards, when confidence was fully established, encouraged and doubtless secured large increase of deposits upon which the ultimate intent charged "to convert to his own use" could operate. The trial court did not err in overruling the demurrer to the indictment for defective or insufficient statement of a scheme to defraud.

The court properly charged the jury that defendant could not be convicted for devising the scheme alone; that the gravamen of the offense rests in the mailing of the letters set out in the three counts of the indictment, and that in order to convict they must find that the defendant placed or caused the letters to be placed in the St. Louis post office to be sent or carried to their respective addresses by mail. In response to this charge the jury found defendant guilty on each of the three counts of the indictment, thereby necessarily finding that he mailed, or caused to be mailed, the letters counted on in the indictment. Was there sufficient evidence to warrant this finding? It was of two kinds—first, in the shape of an admission made by defendant to the post office inspector in effect that he was the manager of the National Securities Company; that he practically owned and conducted its business and had charge of the publication of its advertising literature, the use of the mail and the handling of checks for money received. This testimony was objected to by defendant's counsel on the ground that the letters counted on in the indictment were charged to have been mailed, one on December 10, 1902; one on January 13, 1903, and one on January 29, 1903, and that defendant's declaration related only to his acts and doings in November, when the

declaration was claimed by defendant's counsel to have been made, and that it had no tendency to show that defendant continued doing the same things in December and January, when the letters were actually mailed. We think that objection does not give due consideration to all the evidence of the witness. There is certainly no definite statement that the declarations were made any more in November, 1902, than in February, March, or April, 1903. In fact, it appears that the witness had conversations with Brooks in each of the months mentioned, and we are not able to say from a careful scrutiny of the record, that the declarations under consideration were not made after the mailing of the letters in question. Therefore we cannot say that the court improperly permitted the same in evidence.

We cannot adopt the rule invoked by counsel for the government, that from the existence at one time of a certain condition of things the same state or condition of things is presumed to continue until the contrary is shown. That rule is limited in its application to the continuance of such conditions as are of a continuing nature. It is only things of that continuing nature that are presumed to continue. Wharton's Law of Evidence, vol. 2, § 1284. We certainly cannot say that the fact that Brooks had charge of the mailing of letters and literature for the securities company in November is in and of itself an employment of such a continuing nature as to justify us in holding that he continued indefinitely thereafter in the same employment. But the declarations of Brooks are not all the evidence bearing on his mailing, or causing to be mailed, the letters in question. Certain facts are either conceded or established by the proof. They are: (1) The defendant was the owner of the business of the securities company; (2) the letters on their face show that they relate to that business; (3) they were addressed to persons residing outside of St. Louis, and obviously intended to be carried by mail; (4) the letters were actually mailed in the St. Louis post office, as shown by the conceded fact that the envelopes bore the mailing stamp of that office; (5) the defendant had charge of the correspondence. From these facts the jury, under well-recognized rules of evidence, were entitled to draw all reasonable and fair inferences, and it was not an unwarranted exercise of their privilege in that regard to infer from such evidence alone that the defendant mailed, or caused the letters in question to be mailed.

Mr. Justice Brown, in *Stokes v. United States*, *supra*, in discussing this subject, says:

"The letters that were contained in these envelopes were proven to be in the hand writing of the defendants, or to have emanated from them. * * * and if these letters were written by the defendants and found their way into the mail, the jury would be authorized to infer that they were deposited in the mail by the defendants."

How much more is that true in this case. The defendant here not only had charge of the correspondence, but was the owner and manager of the business. The letters related to the business and were to be carried to distant parts by the postal establishment of the United States. They found their way into the post office at St. Louis, as charged in the indictment, and were received by the persons to whom

they were addressed. We think there was ample evidence to sustain the finding that the defendant mailed, or caused the letters in question to be mailed in the St. Louis post office, as charged in the indictment.

The government sought to prove the guilt of the defendant by introducing in evidence certain advertising matter circulated under the name of the National Securities Company. Some of these documents are entitled thus: "Do you know of something, anything better?" "Our company strong, well financed, capital full paid." "Our plan infallible, has never lost a dollar. An assured success." "Our management honest, conservative, intelligent, and experienced." "Our proposition very profitable, cannot be excelled. Our profits justify it."

The contents of these documents consist of extravagant laudation of the honesty, experience, and past success of the company; seductive promises and assurances to all who will patronize it; bewildering figures and statistics showing how rich one can get by investing with the securities company; profound moral, business, and philosophical reflections all skillfully adapted to prey upon the credulity and cupidity of people of little experience in the ways of the world. The documents contain what purports to be copies of letters written to the company from residents of divers towns and cities throughout the United States, gratefully acknowledging the receipt of some advertising matter or of dividends on former investments, and in many instances announcing the inclosure of drafts for further investment. They refer to affidavits, copies of which are said to be inclosed, and assure readers that the company's line of references is superior to that of any other brokerage house in the United States. These documents, in themselves, contain most convincing evidence of the existence of the fraudulent scheme charged in the indictment. Among the papers offered in evidence by the government, over the objection and exception of defendant, were printed copies of an affidavit of a man by the name of Baker, and a letter written by one Russell. Baker pretended to be an important business man of Sedalia, Mo., a large investor with the securities company; to have investigated the plan of the company and its responsibility and to cordially recommend investing with it. Russell pretended to be the cashier of a bank known as the "Century Banking Company" with an authorized capital of \$100,000, and as such cashier, to certify with pleasure that the securities company "has an open account with his bank, and that its deposits were good and its business satisfactory," and, in addition, he says that he was personally acquainted with the officers of the company, and believes they will faithfully carry out their contract. The proof shows that Baker's affidavit was largely misleading and deceptive, and that Russell's pretenses to being a cashier of an independent bank were absolutely false. The testimony of both Baker and Russell directly connects Brooks with the negotiation for and securing their services in the capacities referred to, and in the execution and use of the documents in question as advertising matter, and these documents appear in and form a part of the stock advertisements to which reference has been made. The proof, therefore, of defendant's participation in securing the affidavit and letter in question and their subsequent appearance

in the stock advertisements is sufficient, if no other grounds existed, to justify the admission in evidence of such stock advertisements, and particularly the copies of the affidavit and letter in question.

It is next assigned for error that the trial court erred in admitting in evidence over defendant's objection, certain letters other than those counted on in the indictment, purporting to have been written by the securities company to different persons throughout the country, and relating to transactions of the company with them. These letters were written about the time the offenses laid in the indictment were charged to have been committed. The issue was raised concerning the character of defendant's business and the intent with which it was conducted. It was alleged to have been carried on with the intent to defraud. The letters in question were admissible as bearing on the intent with which the business was done and the existence of the scheme to defraud as charged. *Castle v. Bullard*, 23 How. 187, 16 L. Ed. 424; *Lincoln v. Claffin*, 7 Wall. 132, 19 L. Ed. 106; *Butler v. Watkins*, 13 Wall. 456, 464, 20 L. Ed. 629; *New York Mutual Life Ins. Co. v. Armstrong*, 117 U. S. 591, 599, 6 Sup. Ct. 877, 29 L. Ed. 997; *United States v. Flemming* (D. C.) 18 Fed. 907. They were also admissible to show that the scheme as devised contemplated the use of the United States mail service in its execution. But it is urged that they were not sufficiently authenticated as emanating from the defendant to warrant their introduction. The trial seems to have progressed below on the theory that no question was made concerning the parentage of these letters, but apart from this there is a satisfactory reason for holding that they were properly received in evidence. Without treating them individually or separately, it may be safely stated that either some of the stock advertising matter prepared and circulated by the securities company accompanied them or that a certificate of indebtedness was subsequently issued by the securities company to the addressees of the letters for money deposited with it by them, as the result of the correspondence. In most if not all instances, both of these coincidences occurred. From these facts it appears that the securities company, owned, controlled, and managed by the defendant Brooks, either directly sent the letters in question or subsequently adopted them as its work. There was no error in receiving them in evidence.

Some criticism is made of the charge of the court to the jury and of the refusal by the court to give a certain requested instruction; but after carefully considering both, we fail to discern anything prejudicial to the defendant. The charge as a whole fairly presented the issues to the jury for its determination, and the requested instruction contained a proposition of law which was not warranted by the facts of the case.

The judgment must be affirmed.

CLEVELAND-CLIFFS IRON CO. v. EAST ITASCA MINING CO.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1906.)

No. 2,325.

1. MINES AND MINERALS—LEASES—ASSIGNMENT—CONTRACT—CONSTRUCTION.

A contract for the assignment of certain mining leases required plaintiff to pay defendant within 6 months from date 7 cents for each ton of ore averaging 56 per cent. of iron found as a result of exploration work conducted with reasonable diligence during a period of 6 months. The contract also required plaintiff to thoroughly explore the land, so as to fairly determine the character and extent of the deposit of iron ore therein. *Held*, that such clause only required the explorations to be reasonably and fairly conducted in the usual manner, so as to determine, with as much certainty as that kind of an exploration would permit, the character and extent of the ore deposit.

2. SAME.

A provision of the contract requiring plaintiff to furnish defendant a true report, showing the "substance encountered," should be construed only to require plaintiff to disclose the substance encountered by the kind of exploration and development adopted by the parties to test the same.

3. SAME.

A contract for the assignment of certain mining leases on iron land provided that plaintiff should pay defendant 7 cents per gross ton of 2,240 pounds for all iron ore discovered and shown to exist. The contract otherwise provided for customary explorations, which under the custom of the country were treated as showing the character of the earth for a distance of 100 feet on each side of the drill hole. *Held*, that the contract bound plaintiff to pay defendant 7 cents per gross ton for all iron ore discovered or shown to exist by the completed explorations reasonably and fairly made on the land within the time specified, and the contract did not contemplate the ascertainment of the actual quantity of ore existing within the premises.

4. PAYMENT—QUASI CONTRACT—MISTAKE OF FACT.

Where a contract for the assignment of leases on iron land provided for payment of 7 cents per gross ton for all iron ore discovered or shown to exist by the completed explorations reasonably and fairly made, based on a customary assumption that a drill hole would properly disclose the condition of the earth within a radius of 100 feet, etc., but, notwithstanding accurate calculations and computations, it turned out that such assumption was erroneous, or that any other assumed fact on which the exploration was based was false, plaintiff was not entitled to recover a portion of the consideration paid as the result of such computations, on the theory that the payment was made by a mistake of fact.

In Error to the Circuit Court of the United States for the District of Minnesota.

William P. Belden and Horace Andrews (H. J. Grannis and Hoyt, Dustin & Kelley, on the brief), for plaintiff in error.

Oscar Mitchell (J. L. Washburn and W. D. Bailey, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. The Cleveland-Cliffs Iron Company sued defendant in error, the East Itasca Mining Company, to recover \$92,-

000, alleged to have been paid the latter by mistake as excessive consideration for an assignment of two mining leases. The leases were assigned pursuant to a preliminary contract between the parties. Defendant claims that the contract creates a conclusive criterion for settling the price to be paid by plaintiff for the leases, and that the price as paid conformed accurately to the criterion created; that if there was any mistake, it was a mistake in judgment in agreeing upon the criterion. Plaintiff claims that the contract did not create a criterion, and if it did that there was such a mistake in its subsequent application or operation as entitles it to recover. The true interpretation of the contract must therefore be determined.

The defendant was the owner of several leasehold terms of 30 years in properties located on the Mesaba Range, in Itasca county, Minn., upon which it had been conducting explorations for iron ore. On July 8, 1902, plaintiff and defendant entered into a written contract for the assignment of the leaseholds to plaintiff. Those numbered 2 and 3 are the subjects of this litigation. One of the preliminary recitations of the contract is as follows:

"Whereas, the said Cleveland-Cliffs Company is desirous of acquiring the said properties for the purpose of exploring the same for iron ore, and for the purpose of acquiring mining leases thereon, if iron ore in desirable quantities and of suitable quality shall be found to exist therein."

This recitation affords a key to what follows. The first clause of the contract provides that it is made in "consideration of the payments to be made by said Cleveland-Cliffs Company to the said Itasca Company, as hereinafter specified." Then, after providing for the payment of certain royalties and costs of exploration work already done by defendant, the contract proceeds thus:

"And said Cleveland-Cliffs Company agrees to enter upon the said leased premises, and with the said five drills [referring to certain churn and diamond drills which had been used on the premises by defendant company] and competent crews to operate the same, and such other drills and crews as it may see fit to put thereon, proceed with the work of exploring said premises for iron ore; and shall thoroughly explore the lands covered by said leases numbered two (2) and three (3) within six months from this date, so as fairly to determine the character and extent of the deposit of iron ore therein; such exploration to be conducted to the mutual satisfaction of the parties hereto. And in case a difference arises as to whether such lands have been fully and fairly explored for the purposes above set forth, in that event such difference shall be determined by E. J. Longyear, of Hibbing, Minnesota, who is hereby agreed upon as a referee for such purpose, and whose determination in that regard shall be final and binding upon the parties. And if upon the determination of said Longyear it shall be that such lands have not been fully and fairly determined as to quantity and quality, then the said Cleveland-Cliffs Company shall at once continue such explorations, and complete the same as fast as practicable, using not less than four drills in the conduct of such work. The said Cleveland-Cliffs Company further agrees that upon the exploration being completed on or before six months from this date, it will pay to the said Itasca Company the sum of seven (7) cents per gross ton of 2,240 pounds, for all iron ore discovered and shown to exist on, in, or under said lands covered by said leases numbered two (2) and three (3), which will average 56 per cent. or better in iron, all ore to be figured in the calculation of such average that is so situated as to be practically mined from said premises, the mines being operated in the usual workmanlike and minerlike fashion. * * * The said Itasca Company, upon such payment being made

and simultaneously therewith, hereby agrees to execute and deliver to the said Cleveland-Cliffs Company, its successors or assigns, good and sufficient assignments of the said mining leases numbered two (2) and three (3), granting thereby to the said Cleveland-Cliffs Company all the right, interest, estate, and privileges therein granted by the lessor to the said Itasca Company; * * * that the said Cleveland-Cliffs Company shall, from time to time, and as near as may be on or about the 1st or 15th days of each month during the progress of such work of exploration and development, furnish to the said Itasca Company a true report thereof, showing the location of the various test-pits and drill holes, and the substance encountered therein, together with average samples of ore of each five (5) feet of ore, and shall also furnish a copy of the assays for the determination of iron and phosphorous on average samples of each five (5) feet of ore. * * * "

Unusual conditions apparently confronted the parties at the time this contract was made: (1) Plaintiff wanted the leaseholds for the ultimate purpose of mining iron ore. (2) The amount of iron ore was necessarily uncertain and doubtful, and would so remain until the whole territory should be thoroughly and exhaustively mined. (3) Plaintiff could not carry on mining operations proper until it secured the leaseholds. (4) It could not secure the leaseholds, until it made payment therefor in the manner prescribed by the contract. (5) The explorations were to be thorough, "so as fairly to determine the character and extent of the deposit of iron ore."

The evidence shows that the usual and customary manner of exploring by drill holes was to bore through the earth with a drill enclosed in surrounding casements, force water down the drill hole so as to return through the surrounding aperture made by the outer casement, bringing with it the substances produced by the operation of the drill, and depositing the same in a vessel of water, where by the process of settling the solid substances go to the bottom of the vessel, and, after the water is drawn off, become subject to examination and analysis. The evidence further shows that a uniform custom pervades the iron regions of the Mesaba Range to assume, for the purpose of exploring for iron ore, that what is actually found in any 5 feet of each drill hole pervades the ground laterally for a radius of 100 feet; that 13 cubic feet of ore make a ton; that the product brought up from the drill hole discloses the true quantity and quality of ore encountered by the drill; that these, and other assumptions not necessary to mention, are customarily indulged in estimating the value of ore-bearing lands; and that traders act upon them, and buy and sell according to their showing. Notwithstanding these customs and assumptions, either one of the latter may, in individual instances, obviously be erroneous. No mere exploration of the kind referred to can, in the nature of things, disclose with absolute certainty how much or what quality of ore exists in the bowels of the earth. Accordingly, contracts for buying and selling ore lands always deal with a doubtful and uncertain subject of sale, and if parties wish to purchase outright, and secure title in anticipation of exhaustive mining, they must proceed largely by approximation. Contracts are frequently made in the light of customary dealing and common usage, and when so made such custom and usage enter into and form part of the contract as fully as if they were incorporated in it. 1 Story on

Contracts, § 794; Robinson v. United States, 80 U. S. 363, 20 L. Ed. 653; Hostetter v. Park, 137 U. S. 30, 40, 11 Sup. Ct. 1, 34 L. Ed. 568; Albion Phosphate Min. Co. v. Wyllie, 23 C. C. A. 276, 77 Fed. 541.

An agreement must be interpreted so as to give effect to the intention of the parties. This is the great cardinal rule of construction of contracts. To that end the four corners of the instrument must be examined to ascertain the meaning of any of its stipulations, and each of them must be construed so as to give effect to all, if possible. The language employed must be construed in the light of the subject-matter and the circumstances surrounding the parties at the time the contract was made. 1 Story on Contracts, § 774 et seq.; Nash v. Towne, 5 Wall. 689, 18 L. Ed. 527; Barreda v. Silsbee, 21 How. 146, 16 L. Ed. 86; McKeefrey v. Connellsville Coke & Iron Co., 5 C. C. A. 482, 56 Fed. 212.

Considering the provisions of the contract in question in the light of the foregoing rules of construction and in the light of established and uniform usage and custom, we are brought to the following conclusions: (1) That its true construction required the plaintiff to pay the defendant, within six months from its date, the price of 7 cents for each ton of ore averaging 56 per cent. or better of iron found as a result of exploration work of the usual and customary kind, conducted with reasonable diligence during that period of time. (2) That upon such payment being made defendant bound itself to make due and proper assignments of the two leaseholds to plaintiff. (3) That the clause of the contract relied on by plaintiff's counsel to show that the parties contemplated the ascertainment of the actual ore in the premises, namely, "and shall thoroughly explore the lands, * * * so as fairly to determine the character and extent of the deposit of iron ore therein," cannot be read alone, but must be read in connection with all the other clauses and implications of the contract; and when so read the clause requires the exploration to be so reasonably and fairly conducted, in the usual way, as to determine with as much certainty as that kind of an exploration will permit the character and extent of the deposit of iron ore. (4) That the other clause relied on by plaintiff's counsel, namely, that which requires plaintiff to furnish the defendant a true report, showing the "substance encountered," cannot mean an absolutely true showing concerning the substance encountered, but does mean a showing as disclosed by the kind of exploration and development adopted by the parties to test it.

The other clause relied on by plaintiff's counsel to show that the parties contemplated the ascertainment of the actual quantity and quality of iron ore in the premises is found in that part of the contract relating to payment where plaintiff agrees to pay defendant "the sum of 7 cents per gross ton of 2,240 pounds for all iron ore discovered and shown to exist," etc. This clause must also be read in connection with the others, and, when so read, must necessarily be qualified by those provisions for making the exploration, so as to read, substantially, that plaintiff agrees to pay defendant 7 cents per gross ton "for all iron ore discovered and shown to exist by the completed explorations reasonably and fairly made," as already explained. Obviously, they

could not intend at the end of six months to require payment for all iron ore existing in the lands, for it could not be determined.

The contract in question, when construed in the light of all its terms and implications, furnished data for and erected a criterion from which to determine the value of a doubtful and uncertain subject. Neither party could accomplish the purposes of the contract, taken as a whole, without resort to some criterion; and, having so resorted to it, and having incurred corresponding obligations, neither will be allowed to disown or repudiate the criterion so voluntarily adopted.

In *Barreda v. Silsbee*, 21 How. 146, 16 L. Ed. 86, the Supreme Court, in dealing with a kindred subject, says:

"Parties have the right to select what criterion they please, and where their contracts are fairly made they must receive a reasonable construction, so as to carry their intention into effect; and, in general, that intention must be gathered from the language employed, the surrounding circumstances, and the subject-matter."

The clause of the contract requiring exploration to be conducted to the "mutual satisfaction of the parties," and creating Longyear a referee to determine in case of a difference between them as to whether the land had been fully and fairly explored, does not militate against the construction we have adopted. The parties contemplated good faith and reasonably diligent exploration, to the end that the land should be fully and fairly explored within the time fixed; but in order to secure that result and prevent any miscarriage of a well-understood purpose, they made provision for an umpire to determine the matter. The construction put upon this provision by the parties, which will be referred to later, is a reasonable one, and discloses a practical execution of the contract, in harmony with its main purpose, and consistently with all its provisions.

Was any mistake made by the parties in carrying out the method or applying the criterion adopted? If both parties made an actual mistake in computation of the results shown by the exploration as made, or in calculating the areas of the land surrounding the drill holes, whose mineral substances, it is conceded, were to be fixed by the showing made in the drill holes, and by such mistake had over or under paid the price agreed upon, a remedy under well-recognized equitable principles would be afforded to correct the mistake. It would involve no rescinding or denial of the agreement, but would be in affirmance or execution of it. But if, notwithstanding accurate computations and calculations, it turned out that the assumption that 100 feet area surrounding each hole contained the kind and quality of ore disclosed in the drill hole, or any other assumption connected with the exploration, was false, such falsity would confer no right of action. The parties by arranging for exploration of the land without critically defining how it was to be done adopted the usual and customary explorations of the region. See cases, *supra*.

The contract, as a whole, is obviously pregnant with assumptions adopted by the parties in order to accomplish the main purpose of making provision for assigning the leases and payment of the con-

sideration therefor before practical mining operations should begin. But it is contended that by reason of what is called unexpected and unusual decomposed taconite in strata, which some of the drills penetrated (which was not discovered or known to exist until the explorations were completed, the property paid for, and the leases assigned), the force pump which brought up from the drill holes specimens of the substances through which the drills passed brought up much of this taconite, which, instead of settling in the bottom of the vessel, remained, by reason of its fineness, in suspension, and ultimately flowed off with the water, leaving the iron ore which settled in the bottom of the vessel apparently of higher grade than it really was or would have been determined to be if the taconite had been deposited with it, and thereby made subject to calculation; that, as a result of this unexpected presence of taconite, the deposit which settled at the bottom of the vessel did not disclose the real substances brought out by the operation of drills. The mistake relied on arises from the fact that this unusual substance was encountered when the parties did not expect it to be encountered. Is such a discovery, made after the explorations provided for by the contract were completed, a mistake, for which recovery can be had in this action? We think not. The presence of the unusual taconite was a contingency, like the possibility of variation of the quality of ore within the radius of 100 feet, or like other possible departures from the usual and ordinary conditions relating to the deposit of iron ore of which, for want of any possible data of absolute certainty, the parties assumed the risk. The contract discloses on its face that the parties at the time of its execution had knowledge of the possibility of the existence of taconite in the leasehold premises in question, and that taconite might be encountered by the drills. Clause 6 of the contract reads as follows:

"It is agreed between these parties that whenever the term 'thoroughly explore for iron ore' is used in this agreement, and in all cases where it is herein provided that the said Cleveland-Cliffs Company shall thoroughly explore the premises hereinbefore described for iron ore, that it shall not be deemed that such premises have been so explored in cases where taconite shall be encountered, unless such taconite is either penetrated through the entire body thereof, or at least to a depth of 100 feet in three holes in each forty (40) acres, unless the said referee, E. J. Longyear, hereinbefore mentioned, shall notify the parties upon an examination thereof that he deems such work unnecessary or useless."

No claim is made by either party of any right or privilege arising under this clause of the contract, and reference is made to it only for the purpose of showing that the parties had in mind at the time the contract was made the possibility of encountering taconite, and for that reason its presence in the earth cannot properly be said to be unexpected. With knowledge of the possibility of this substance being encountered, the parties nevertheless adopted the customary method of exploring the premises by drill holes and test-pits as the criterion for determining the consideration which should be paid for the leaseholds. They probably knew from that large and general experience which alone could make any method of exploration customary that it afforded the most available and satisfactory criterion for measuring

the value of the unknown and uncertain substances in the earth, and when they fairly adopted such a criterion for determining such values they cannot complain because of the very uncertainties which induced them to adopt it.

Pomeroy on Contracts, § 239, lays down the doctrine as follows:

"Where parties have knowingly entered into a speculative contract—that is, one in which they intentionally speculate as to the result—and the facts upon which such agreement was founded, or the event of the agreement itself, turn out very different from what was expected or anticipated, this error, miscalculation, or disappointment, although relating to matters of fact and not of law, is not such a mistake, within the meaning of the equitable doctrine, as entitles the disappointed party to any relief either by way of defeating or rescinding the contract. In such classes of agreements the parties are supposed to calculate the chances, and they certainly assume the risks."

Beach, in his work (Mod. Eq. Jur. Vol. 1, § 56), states the rule thus:

"Relief will not be given on the ground of mistake where the subject-matter of the contract is of a doubtful or uncertain character or kind." See cases there cited.

In *United States v. Barlow*, 132 U. S. 271, 281, 10 Sup. Ct. 77, 33 L. Ed. 346, Mr. Justice Field, speaking for the court, says:

"It is also true that where the subjects in relation to which the contract of parties is made are necessarily of an uncertain and speculative character or value, and that is known to the parties, a mere mistake by them in their estimate of the value is not deemed sufficient to authorize a recovery of the moneys paid upon the erroneous estimate."

This court, in *Chicago & N. W. Ry. Co. v. Wilcox*, 54 C. C. A. 147, 116 Fed. 913, 915, considering a kindred subject, observes:

"Where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happen very differently from the expectation, opinion, or belief of one or both of the parties."

In *Eastman v. Water Power Co.*, 24 Minn. 437, 443, the court says:

"When the fact is doubtful from its own nature, in every such case, if the parties have acted with entire good faith, a court of equity will not interpose, for in such cases the equity is deemed equal between the parties."

See, to the same effect, *Buffalo v. O'Malley*, 61 Wis. 255, 20 N. W. 913, 50 Am. Rep. 137, and 1 Story Eq. Jur. § 150.

The exploration provided for by the contract, and upon the results of which plaintiff agreed to pay for the leaseholds, lacked in many respects that degree of certainty which is usually desired and attained. It involved many elements equally as uncertain and doubtful as the false assumption relied on by plaintiff that the pump would bring up and disclose in the bottom of the settling vessel true information concerning the substances through which the drill passed. But the parties contracted in view of all these uncertainties, and by reason of them agreed upon a criterion which they could practically apply and thereby accomplish their purposes.

In the light of the foregoing facts and authorities, we are irresistably brought to the conclusion that plaintiff cannot be released

from the obligation of the contract because one of the elements of uncertainty was largely disappointing. The others may have turned out more favorably than was expected. The parties agreed upon a result disclosed by all of them operating together, and one party cannot be heard to complain of an unfavorable showing made by one element, any more than the other party can be heard to complain of favorable showing made by other elements.

If any doubt exists concerning the true construction of the contract in question, resort can be had to that construction which the parties themselves placed upon it. The complaint discloses that the explorations were made in the manner provided by the contract and "by the methods approved and ordinarily employed by engineers in that locality." It appears beyond question that Longyear, who was the referee agreed upon to determine when the premises "had been fully and fairly explored for the purposes set forth," at the end of the six months' period decided that the property had then been fully and fairly explored, and when such decision was made the assignments of the leases were executed by the defendants, and the purchase money paid according to the result of the finished explorations.

Without entering further into detail, it can safely be said that the parties proceeded from and after the date of the execution of the contract, July 8, 1902, for and during the full period of six months, to treat the contract as requiring them to settle on the showing made by the explorations at the end of the six months, and the evidence is that at that time they settled accordingly.

This court, in the case of Long-Bell Lumber Co. v. Stump, 30 C. C. A. 260, 86 Fed. 574, 578, said:

"There is no better established rule, or one more instinct with the spirit of equity in the construction of contracts wanting in perspicuity or clearness of meaning, than to adopt that which the parties, by their course of dealing, place upon it before any controversy arose between them."

This court also said in the case of Housekeeper Pub. Co. v. Swift, 38 C. C. A. 187, 97 Fed. 290, as follows:

"The practical interpretation given to their agreements by the parties to them, while they are engaged in their performance, and before any controversy has arisen concerning them, is one of the best indications of their true intent, and courts that follow it rarely go far astray."

See, also, to the same effect, Chicago G. W. Ry. Co. v. Northern Pacific Ry. Co., 42 C. C. A. 25, 101 Fed. 792, and Chicago v. Sheldon, 76 U. S. 50, 19 L. Ed. 594.

When, at the trial below, all the evidence had been introduced touching the contract, custom, and usage involved in this case, and when the learned trial judge had been fully advised concerning the intentions of the parties, he, on defendant's objection, excluded all evidence offered by plaintiff tending to show that after the assignment of the leases and payment therefor by plaintiff it caused new explorations to be made to show the presence of taconite in the drill holes, and to demonstrate the true quantity and quality of iron ore in the

leased premises. The exclusion of this evidence raised the questions concerning the construction of the contract and its conclusiveness upon the rights of the parties thereto.

For reasons already expressed, the learned trial judge committed no error in excluding that evidence, and the judgment rendered, being for the right party, must be, and accordingly is, affirmed.

F. D. CUMMER & SONS CO. v. MARINE SUGAR CO.

(Circuit Court of Appeals, Sixth Circuit. June 16, 1906.)

No. 1,500.

SALES—CONSTRUCTION OF CONTRACT—WARRANTY.

A contract for the manufacture and delivery of a dryer for drying beet pulp contained the following provisions: "Guaranties: We will guaranty the dryer * * * to develop under test an easy capacity for evaporating not less than 6,000 pounds of moisture hourly from your pressed beet pulp; guaranty based on the pulp when delivered to the dryer carrying about 80 per cent. of moisture, and to be thoroughly disintegrated. We further guaranty that the dried pulp will be dried thoroughly and evenly to 10 per cent, or less of moisture, and without injury to flavor or color. We also guaranty an evaporation of about ten pounds of moisture to the pound of combustible consumed. * * *" *Held*, that the condition that the beet pulp delivered to the dryer should carry about 80 per cent. of moisture and be thoroughly disintegrated applied to all three of the guaranties, and not merely to the one which preceded it, and that where the dryer was never tested nor used under such condition the buyer could not allege a breach of the second guaranty in defense to an action for the purchase price.

In Error to the Circuit Court of the United States for the Eastern District of Michigan.

S. T. Douglas and George B. Perry, for plaintiff in error.

A. C. Dustin and Horace Andrews, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was an action on a contract for the manufacture and delivery by the plaintiff in error (plaintiff below) to the defendant in error, of a dryer for drying beet pulp. The suit was for the balance of the purchase price, and the defense that the dryer did not comply with the second guaranty of the contract, a copy of which is given below. The case went to the jury upon a charge giving to this guaranty an interpretation to which the plaintiff excepted, and resulted in a verdict for the defendant. There are many assignments in error, but the case turns upon the construction of the contract in the particular mentioned.

1. The contract involved is contained in the following proposal and acceptance:

"Cleveland, Ohio, June 26th, 1900.

"Marine Sugar Company, Marine City, Mich.—Dear Sirs: We submit the following proposal for your consideration, and, we trust, acceptance:

"Price: For the sum of \$6,425.00, we will furnish to you the ironwork complete for one Cummer patent dryer, to be equipped with Cummer patent mechanical stoker for burning slack bituminous coal, also Lee patented dust collector.

"Delivery: To be made F. O. B. cars Cleveland in about seventy-five days from date of receipt of your acceptance of this proposition, barring delays beyond our control.

"Plans: In about two weeks from date of receipt of your acceptance of this proposition, we will furnish a complete set of plans for the setting of the dryer.

"Guaranties: We will guaranty the dryer, when erected and operated according to our plans and instructions, to develop under test an easy capacity for evaporating not less than 6,000 pounds of moisture hourly from your pressed beet pulp; guaranty based on the pulp when delivered to the dryer carrying about 80 per cent. of moisture and to be thoroughly disintegrated. We further guaranty that the dried pulp will be dried thoroughly and evenly to 10 per cent. or less of moisture, and without injury to flavor or color. We also guaranty an evaporation of about ten pounds of moisture to the pound of combustible consumed on the bars of the stoker; slack bituminous coal of good quality to be the fuel used.

"Expert Man: We will furnish the services of an expert man to superintend and assist in the erecting, starting, and testing of the dryer. We will furnish such a man at the rate of \$5.00 per day, plus his board and expenses from the time he leaves Cleveland until his return thereto, payable to man direct weekly by you.

"Failure of Guaranties: Should fair and proper trials made within five months from date of shipment of the dryer demonstrate that the dryer is incapable of fulfilling the guaranties, you will be at liberty to load the dryer and appurtenances as furnished by us on cars at your place, subject to our order, when we will refund to you what you have paid to us on account of this contract, reimburse you for the actual amount expended by you in erecting the dryer in masonry, and neither party shall have any further claim on the other.

"Terms of Payment: \$1,000.00 to be paid in cash along with your acceptance of this proposition; \$3,425.00 in cash upon shipment of the dryer; \$2,000.00 in cash as soon as dryer has been tested and the guaranties fulfilled; but in no event is payment of the last \$2,000.00 to be deferred longer than five months from date of shipment of the dryer.

"Mutual: There are no conditions applying to this contract other than those expressed herein.

"Respectfully submitted,

W. M. Cummer, President."

"The F. D. Cummer & Son Co., Cleveland—Dear Sirs: We accept your proposition as written above, and agree to fulfill our part. We hand you herewith our check for \$1,000, same being first payment on account of this contract.

"Yours truly,

Marine Sugar Company."

Upon the acceptance of the proposal, the defendant paid the \$1,000 stipulated in the contract, but made no further payment. It refused to pay the \$3,425 stipulated to be paid upon the shipment of the dryer, because it desired to test the machine before making further payments. Thereupon the plaintiff brought suit to recover the second payment. No test of the dryer had been made prior to the time the suit was brought. Subsequently, preparations for a test were made, but the plaintiff declined to proceed with the test after a preliminary analysis of the pressed beet pulp showed that it contained 92 or 93 per cent. of moisture instead of the 80 per cent. mentioned in the con-

tract as the basis of the guaranty or guaranties. This brings us to the construction of these guaranties.

It will be observed that the contract contains three guaranties respecting the operation of the dryer—the first as to the total capacity of the dryer for evaporation per hour; the second as to the quality of the product; the third as to the capacity for evaporation to the pound of coal consumed. The first guaranty is expressly based upon the condition that the pressed beet pulp, when delivered to the dryer, should carry about 80 per cent. of moisture, and be thoroughly disintegrated. The court, during the trial and in its charge, limited this condition to the first guaranty, and respecting the second guaranty, upon which the controversy hinged—the question submitted to the jury being whether the quality of the dried pulp produced complied with this guaranty—said:

“As the court has construed this guaranty in the course of the trial, it is independent of the undertaking on the part of the defendant that the pulp should contain a specific amount of moisture.”

It is conceded that the “pressed beet pulp” delivered to the dryer carried between 92 and 93 per cent. of moisture. The court below held that this made no difference; that, under the second guaranty, the product of such pulp must be “dried thoroughly and evenly to 10 per cent. or less of moisture, and without injury to flavor or color,” regardless of the fact that the material when placed in the dryer carried about 13 per cent. more of moisture than that stipulated in the contract at the conclusion of the first guaranty.

We think the court erred in so construing the second guaranty. It appears from the testimony that the sugar company was just entering upon the business of producing beet sugar, and the Cummer Company was making its first dryer for beet pulp. Both were new to the business. Both took risks in thus entering an untried field. Each had a right, and it was the part of prudence, under such circumstances, to define its obligations and limit its risks, and this was done in the contract under consideration. The proposal at its close containing the following explicit provision: “Mutual: There are no conditions applying to this contract other than those expressed therein.” This, along with the other provisions of the contract, was accepted by the sugar company, and should have been treated by it as notice that a strict compliance with the terms of the contract would be insisted upon by the Cummer Company.

The fact, to which we have alluded, that the field was a new one, appears in the provisions respecting the “failure of guaranties,” limiting the liability of the parties. This provides that should proper trials made within five months from the shipment of the dryer demonstrate that it was incapable of fulfilling the guaranties, the buyer would be at liberty to return the same, when the seller would refund the amount paid, reimburse the buyer for the actual amount expended in erecting the dryer, and neither party should have any further claim on the other. The contract, as we read it, was an entirety, and the three guaranties were each based upon the same con-

dition, that condition being that the beet pulp delivered to the dryer should carry about 80 per cent. of moisture, and be thoroughly disintegrated. It is true that this condition is found at the end of the first guaranty, but that is where it belonged. The first guaranty applies to the process of evaporation, the second to the result, the third to the cost in coal. The raw material is properly conditioned in the first. Here it is designated as "pressed beet pulp," and it is stated that the guaranty is based on such pulp when delivered to the dryer, carrying about 80 per cent. of moisture. The second guaranty treats of the "dried pulp." This "dried pulp" is plainly the result of the evaporation described in the first guaranty. It is the pulp dried from "the pressed beet pulp," mentioned in the first guaranty, carrying about 80 per cent. of moisture. The same thing is true of the third guaranty, although it does not appear to be involved in the case. In short, the plaintiff, in designing the dryer, figured upon the pressed beet pulp delivered to the dryer carrying about 80 per cent. of moisture. It matters not why it did so, or whether it was correct in doing so. If both the Cummer Company and the sugar company were mistaken in the belief that the Cummer Company could produce "pressed beet pulp" carrying only 80 per cent. of moisture, that would not alter the contract, and change it to one based upon the delivery of pressed beet pulp containing 93 per cent. of moisture.

The proposal of the Cummer Company when accepted limited its liability to a failure to produce a successful dryer for pressed beet pulp carrying about 80 per cent. of moisture, and if no such pulp was delivered to the dryer, and it failed, under the second guaranty, only with beet pulp containing 93 per cent. of moisture, it had a right to insist that, in the absence of a failure of the dryer when tested with beet pulp carrying only 80 per cent. of moisture, it must be held to have complied with the contract, and the sugar company was bound to retain the dryer and pay the purchase price.

For the reasons stated, without considering other assignments of error, we have reached the conclusion that the judgment of the court below must be reversed, and the case remanded for a new trial.

In re WEINREB et al.

(Circuit Court of Appeals, Second Circuit. February 26, 1906.)

No. 129.

BANKRUPTCY—CONCEALMENT OF ASSETS—EVIDENCE TO JUSTIFY FINDING.

The indebtedness of bankrupts who were dealers in diamonds and jewelry was about \$90,000, all of which had been contracted within the past 15 months. There was a shortage of assets, not satisfactorily accounted for of \$60,000, and besides that within 10 days shortly prior to their bankruptcy they drew from the bank on checks \$18,200. On their examination they refused to answer questions in respect to such transaction, but later when their discharge was opposed on that ground, testified that they had paid the money drawn for diamonds previously

purchased from a stranger which they suspected to have been smuggled, and that at his request the transaction was not entered on their books, but was shown in a small book kept by them. Such book was not produced and their testimony was wholly uncorroborated. *Held*, that their testimony was not credible, and that the evidence justified a finding that they had concealed the money, and an order requiring them to pay it over to their trustee.

Petition for the Revision of Proceedings of the District Court of the United States for the Southern District of New York.

The following is the opinion of Holt, District Judge, in the court below:

This is a certificate to review an order of the referee, denying a motion that the bankrupts turn over certain money to the trustee. The bankrupts were jewelers and diamond brokers at New York. They had been in business for about \$20,000 a year. During the year from January, 1902, to December, 1902, the sales aggregated \$72,115. During the seven months from January, 1903, to the end of July, 1903, they aggregated \$79,601. On August 4, 1903, an involuntary petition was filed and an adjudication in bankruptcy thereafter had. The schedules show liabilities of about \$90,000 and nominal assets of about \$18,000, from which about \$10,000 has been realized. The liabilities shown in the schedules were contracted during the 15 months prior to the filing of the petition. No adequate explanation is given of this large deficiency, and all the circumstances of the case show, in my opinion, that the bankrupts, during the last six months that they continued in business, contemplated a fraudulent bankruptcy. During the period between July 11 and July 20, 1903, the bankrupts drew from the bank cash on checks aggregating \$18,200, as follows: July 10th, \$3,000; July 11th, \$2,000; July 11th, \$2,000; July 13th, \$2,200; July 13th, \$6,000; July 20th, \$3,000. On the day after the last check was drawn, Merker, one of the bankrupts, went to Europe, and about a week after Weinreb, the other bankrupt, having heard that proceedings in bankruptcy were contemplated, also left for Europe. After jurisdiction had been obtained by publication of the subpoena, and an adjudication in bankruptcy had, they returned and were examined. On their first examination, when asked as to what had been done with this \$18,200 drawn in cash, each of them refused to answer, on the ground that the answer would tend to incriminate and degrade him. Several months later they applied for a discharge, and one of the specifications of objection to discharge was that they had refused to answer material questions. Thereupon the bankrupts appeared before the referee and offered to answer the questions which they had previously refused to answer, and they thereupon testified, in substance, as follows: That Merker, when in Paris, in May or June, 1902, was introduced to a man named Freundlich, by a diamond broker. He does not remember the name of the broker. He does not know the residence, business address or first name of Freundlich. Freundlich told Merker that he would like to do business with him. Merker said that he would buy if the goods were right and reasonable. Freundlich said that he would send a man to him in New York with the goods, and in the package he would find a memorandum of prices. Freundlich said that he sold goods only for cash, that he didn't want any note or receipt, and didn't want his name entered in the bankrupts' books. Merker explained that they were not able to pay cash, and Freundlich thereupon agreed to sell on eight months' credit. Thereafter, in the fall of 1902, a man came to the bankrupts' office. He said that his name was Jackson. The bankrupts did not know where he lived, or where his place of business was, or what his first name was. He brought some diamonds, and said that he represented Mr. Freundlich. The diamonds had inclosed with them a memorandum stating their weight and value. The memorandum had no billhead. The bankrupts purchased the diamonds on eight months' credit. They gave no receipt, note,

or writing of any kind for them. They made no entry of them in their regular books, but say they made an entry in a little book like a bank book, which the receiver did not find and which has never been produced. At the expiration of the eight months, which happened to be during the latter part of July, immediately before the bankruptcy, Jackson appeared at the office and asked to be paid. He objected to checks and wanted cash, and thereupon both bankrupts drew the checks in question and went to the bank and drew the cash and gave it to Jackson. Jackson gave them no receipt or paper of any kind. One of the bankrupts admitted that he suspected that these goods had been smuggled, and their claim is substantially that that fact was the explanation of the circumstances under which these goods were bought and paid for.

This story is extremely improbable. Of course, smuggled goods may be purchased, and, if purchased, the acts of the parties engaged in such a business are frequently stealthy and furtive. But if that is the explanation of the circumstances of this purchase, it is not enough for the bankrupts to simply say so. Their story, if true, could be corroborated in various ways. But it is entirely uncorroborated. It is precisely the kind of story which bankrupts would tell, who had been engaged in the diamond business, and had been planning a fraudulent bankruptcy, and had drawn \$18,000 in cash just before their bankruptcy, for the purpose of concealing it from their creditors. I cannot avoid the conclusion that their story is an entire fabrication, and that the bankrupts have this money concealed from their creditors, and that they should be ordered to pay it to the trustee.

There is, besides the sum of \$18,200 which they drew out in cash, a deficiency of assets amounting to about \$60,000. The only explanation of the disappearance of this large amount given by the bankrupts is that losses arose from bad judgment in buying and then selling at a sacrifice to pay pressing debts. They assert that at the end of each year they found they had lost money. This explanation is very unsatisfactory, but perhaps it is not impossible. I strongly suspect that the bankrupts have a large part of this deficiency hidden somewhere; but I think, upon the whole, that the proof that they have it is not sufficient to justify an order that they pay it over. An order may be entered directing them to pay to the trustee \$18,200.

Joseph Fried, for petitioners.

Joseph Rosenzweig, for respondent.

Before LACOMBE and COXE, Circuit Judges.

PER CURIAM. Order affirmed on the opinion of the District Court.

KELL v. TRENCHARD et al.

(Circuit Court of Appeals, Fourth Circuit. July 11, 1906.)

No. 660.

1. COURTS—CIRCUIT COURT OF APPEALS—CONSTRUCTION OF DECREE.

Where the Circuit Court of Appeals entered a decree directing that the costs in the trial court and on appeal should be borne equally between plaintiff and defendants, and a controversy subsequently arose in carrying out the decree concerning the expenditures to be divided, the Circuit Court of Appeals had jurisdiction to construe its decree on a subsequent appeal from the judgment rendered, though only presenting a question of costs.

2. COSTS—DIVISION—EQUITY—DISCRETION.

In federal courts of equity the giving or withholding costs or the apportionment and division thereof is within the discretion of the court, which is to be exercised, not arbitrarily, but with reference to the general principles of equity and the special circumstances of each case.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Costs, § 21.]

3. SAME—APPORTIONMENT—EXPENSES OF RECEIVERSHIP.

After continued litigation both parties were in part successful, defendant finally securing a decree for \$19,000 and interest for five years against plaintiff. An appeal was taken, on which the appellate court directed that the costs in both the trial court and on appeal should be borne equally between plaintiffs and defendant. *Held*, that the costs referred to were ordinary costs, incident to the litigation, and did not include the expenses of a receivership.

Appeal from the Circuit Court of the United States for the Eastern District of North Carolina.

This is the second appeal from the United States Circuit Court for the Eastern District of North Carolina, at Raleigh, in the equity cause therein depending wherein W. B. Trenchard and others were plaintiffs and F. Kell was defendant, the original appeal taken by the defendant in the court below having been decided by this court on the 9th day of November, 1905 (142 Fed. 116); the present appeal by the same appellant, the defendant in the court below, being from the decree of the latter court entered on the 2d day of January, 1906, after the receipt of the mandate of this court respecting the costs in said cause.

F. H. Busbee (H. H. Little, on the brief), for appellant.

James H. Shepherd (W. H. Day, Peebles & Harris, Gay & Midyett, Shepherd & Shepherd, on the briefs), for appellees.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

WADDILL, District Judge. The sole question presented by this appeal arises upon the taxation of costs by the lower court in carrying out the decree and mandate of this court in the former appeal; the opinion and judgment of this court prescribing that the costs of the cause in both this and the lower court should be borne equally between the appellant and the appellees. In the taxation of costs pursuant to this direction, the lower court by the decree appealed from included the allowance to the receiver as a part of the costs properly to be divided, and which action forms the basis of this appeal.

The appellees insist that the action of the lower court complained of is not subject to review by this court, as it relates purely to a matter of costs, which is a matter within the discretion of that court, and not subject to review on appeal. In the view taken by this court, that question is not a very material or practical one, since the appeal in this case relates to the construction to be given to a judgment and decree of this court; and for that reason the same should be subject to the review and action of this court, as it can manifestly best determine what was meant and intended by its own decree. A general discussion and citation of authorities on the subject of the right of appeal in cases affecting costs will be found in *Re Michigan Central R. R. Co.*,

124 Fed. 727, 733, 59 C. C. A. 643, a decision of the Circuit Court of Appeals of the Sixth Circuit. In the federal practice in equity the giving or withholding costs or the apportionment and division thereof is a matter within the discretion of the court; such discretion, however, to be exercised, not arbitrarily, but with reference to the general principles of equity and special circumstances of each case. 2 Bates, Fed. Eq. Proc. §§ 842, 844; *Primrose v. Fenno* (C. C.) 113 Fed. 375; *Electric Co. v. Scott* (C. C.) 101 Fed. 524, 11 Cyc. 36.

In decreeing the division of costs in this court and the court below was meant only the ordinary taxable costs of the litigation, and not such charges and expenses as the costs of the receivership and payments and allowances to receivers; those being costs properly appertaining to the receivership, and chargeable against the property in the receiver's hands. *Ferguson v. Dent* (C. C.) 46 Fed. 88; *Elk Horn Oil & Gas Co. v. Foster*, 99 Fed. 495, 39 C. C. A. 615. This case was a long and bitter controversy, in which both parties were in part successful, and it seemed to the court to be one eminently calling for apportionment of the costs between them in the manner indicated. The appellant, however, secured a decree for \$19,000 and interest for some five years against the appellees, which would ordinarily carry with it a decree for the full costs of the litigation; but the court did not give the latter decree as to costs, but determined that the ordinary costs incident to the litigation in this and the lower court should be divided between the parties. This was, at least, all that the appellees could have asked, and to visit upon the appellant in addition one-half of the receivership costs would seem to be clearly inequitable.

It follows from what has been said that the decree of the lower court, in so far as it decrees as a part of the costs to be borne by the appellant the receivership costs in question, is erroneous, and should be reversed, and this cause remanded to the lower court, to be proceeded therein in accordance with the views herein expressed.

Reversed.

ILLINOIS CENT. R. CO. V. DAVIES.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1906.)

No. 2,333.

APPEAL—REVIEW—EXCESSIVE DAMAGES.

An assignment that the verdict awarded excessive damages through passion and prejudice could not be reviewed on appeal to the Circuit Court of Appeals, such question being within the exclusive jurisdiction of the trial court, determinable on a motion for a new trial.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3944.]

In Error to the Circuit Court of the United States for the District of Minnesota.

James D. Armstrong, for plaintiff in error.

F. D. Larrabee, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was an action for a malicious assault upon Davies by one of the agents of the railroad company while engaged in the discharge of his duties as such agent. A verdict and judgment rendered in favor of the plaintiff for \$975 is sought to be reversed by this writ of error. The jury was so fully instructed on all questions of law, including those relating to the measure of damages, that no fault is found therewith. The only error assigned and urged for our consideration is that the jury, through prejudice or passion, awarded excessive damages. This, under the Constitution and law as interpreted in the following cases, we have no power to consider or determine. *Parsons v. Bedford*, 3 Pet. 443, 447, 7 L. Ed. 732; *Railroad Company v. Fraloff*, 100 U. S. 24, 31, 25 L. Ed. 531; *New York, Lake Erie & Western Railroad Co. v. Winter, Adm'r*, 143 U. S. 60, 75, 12 Sup. Ct. 356, 36 L. Ed. 71; *Lincoln v. Power*, 151 U. S. 436, 438, 14 Sup. Ct. 387, 38 L. Ed. 224; *Shauer v. Alterton*, 151 U. S. 607, 626, 14 Sup. Ct. 442, 38 L. Ed. 286; *Homestake Mining Co. v. Fullerton*, 16 C. C. A. 545, 69 Fed. 923, 931.

It is the duty of the trial court on a motion for a new trial to set aside a verdict in case of such misconduct, prejudice, or mistake on the part of the jury as unduly affects the award of damages. Such action being the only remedy available to a suitor complaining of excessive damages, the trial court should exercise its exclusive power conscientiously and fearlessly.

The learned trial judge, with full knowledge of all the facts and circumstances attending the trial, and in the light of all the evidence in the case, overruled the motion for a new trial. The defendant's remedy was thereby exhausted. The judgment is accordingly affirmed.

WALKER PATENT PIVOTED BIN CO. v. MILLER et al.

(Circuit Court E. D. Pennsylvania. June 22, 1906.)

No. 48.

1. PATENTS—SUIT FOR INFRINGEMENT—REFERENCE FOR ACCOUNTING.

Where in a suit for infringement the validity of a patent has been sustained, the general principles and scope of the invention determined, and certain structures made by defendants held to infringe, on an accounting for damages and profits the complainant is not limited to an inquiry as to the number of such particular constructions made and sold by defendants, but, except as concluded by the decree, and provided the differences be not so great and the question of infringement in such doubt that the complainant should be put to a supplemental, if not a new, bill, the whole question of infringement and its extent are generally open for consideration by the master.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 591.

Accounting by infringer of patent for profits, see note to *Brickill v. Mayor, etc.*, of City of New York, 50 C. C. A. 8.]

2. SAME—MOTION FOR INSTRUCTIONS TO MASTER.

Where, on a reference for an accounting as to damages for infringement of a patent, the master by his rulings limits the scope of the inquiry, the matter may properly be presented to the court for decision by a motion for instructions to the master.

In Equity. Suit for infringement of patent. On exceptions to ruling of master and motion for instructions in proceedings for an account.

Patent considered and sustained in *Walker Patent Pivoted Bin Co. v. Brown & Krause* (C. C.) 110 Fed. 649, and in *Walker Patent Pivoted Bin Co. v. Miller & England*, 132 Fed. 823; affirmed (C. C. A.) 139 Fed. 134. See, also, *Miller & England v. Walker Patent Pivoted Bin Co.* (C. C.) 138 Fed. 919, affirmed (C. C. A.) 145 Fed. 832.

Ernest Howard Hunter, for the motion.

Henry E. Everding, opposed.

ARCHBALD, District Judge.¹ On the accounting before the master, Alexander H. Miller, one of the defendants, being under examination, and having been interrogated with regard to certain bins, which the defendants had furnished and installed at No. 3,300 North Twenty-Second street, Philadelphia, being further asked what kind of bins they were, made answer, "Well, they are not mentioned in either of these types"; referring to those discussed in the opinion sustaining the patent and finding that it had been infringed. 132 Fed. 823. He was thereupon asked whether they were counterbalanced, swell front, pivoted bins, to which he answered, "They were neither type 1 nor type 2"; referring again to those so designated in the opinion. The question was then put: "Do you refuse to say whether they were counterbalanced, swell front bins"? these, as declared by the court, being the distinguishing characteristics of the complainants' bins. 110 Fed. 649, 651; 132 Fed. 823, 826. This, by the instruction of his coun-

¹ Specially assigned.

sel, he declined to answer. There was also a similar inquiry, with a similar result, as to bins which had been furnished to J. C. Morris, 41 Main street, Manayunk, Philadelphia. At a subsequent meeting the following question also was put:

"Will you please look at the drawing which I now show you, and state whether or not that correctly represents the construction of some of the pivoted, counterbalanced, swell front bins which your firm constructed and sold, and which you say do not fall within types 1 and 2."

Whereupon, upon objection by defendants' counsel, the master ruled, in substance, that the types of bin which were decided to be an infringement were clearly shown by the drawings already in the case, being designated by the court as type 1 and type 2; that the witness might be examined as to the number of bins of these types constructed by the defendants, but should not be required to answer as to other constructions; and that if the complainants contended that other bins constructed by the defendants were infringements, the bins should be produced, and expert evidence given as to their character. With this the objection of counsel was sustained, and the witness directed not to answer the question. The subject came up again, with regard to bins furnished to James Arthur, at Fifty-Seventh and Market streets, Philadelphia, the inquiry being directed as before, to whether they were counterbalanced, swell front bins, and the same ruling was made; the master holding that the witness should only be required to answer as to the two particular types of bins which the court had decided to be an infringement. Counsel for complainants thereupon took an exception, and the rulings of the master have been certified to the court for disposition.

By the proceedings previously had in the case leading up to the accounting, the complainants established the validity of the patent which they held, and that the defendants had infringed it. Two kinds of bins were shown to have been manufactured by the defendants with regard to which this was held, one of which was hinged to the exterior casing, at the lower front edge of the bin body, and the other was pivoted at the same point, but upon links, by which, if desired, it could, as an additional feature, be swung clear of the casing. As already stated, the general character of bin covered by the patent, of which these were infringing types, was declared to be a tiltable or pivoted swell front, counterbalanced bin, by which it was differentiated from other previous forms, and held to comprise a class of its own. So far as the defendants may be shown to have infringed upon the exclusive rights secured to the complainants by their patent by the manufacture, sale, or use of this kind of a bin, they must respond in damages, and it is for the purpose of determining the extent of their infringement that the accounting proceeds. Undoubtedly, as to the immediate forms of bins considered by the court, there can be no question. But the complainants are not confined to this. They are entitled to have the defendants charged with all such bins as embody or adopt the principle of the invention, even though they may vary from the particular construction which the court has passed upon and condemned, and from this they cannot rightly be cut off.

The first question which the witness refused to answer was directed to the inquiry, whether the bins installed at the place mentioned were counterbalanced, swell front, pivoted bins, which, as so characterized, apparently brought them within the terms of the patent. Had the witness said "No," the complainants might have had to accept it, although they would have been entitled to proceed to the further inquiry, as to just what construction they were. But the answer did not meet the question in this way, and was in fact evasive. The witness declared that they were neither type 1 nor type 2. But this was not to the point. The inquiry was not so limited, and is not to be. The complainants, moreover, were entitled to the facts, and not to the witness' conclusions from them. The question may have been objectionable as calling for a conclusion, and it certainly would have been better if a direct description of the bins referred to had been asked. But no point was made of that either before the master or here, and the witness cannot be allowed to conclude inquiry by what may happen to be his own ideas upon the subject. The basis of the master's rulings upon this and the other matters certified is disclosed by his subsequent explanation, although the subject came up next in a somewhat different form. A drawing being exhibited to the witness, the question was asked whether it correctly represented the construction of bins which his firm manufactured, which did not, as he said, fall within the two types named. Had the master declared upon this, that bins of the character shown by the drawings were not within the terms of the patent, and so were immaterial, it would have been entirely within his prerogative to do so, subject, of course, to a review by the court upon exception. His ruling, however, was aside from this. He virtually held that the investigation was confined to the particular forms of bins which the court had passed upon. It is true that he added that, if the complainants contended for either types of bins as infringements, they should produce the bins, and have experts pronounce upon them; which apparently left the door open for that line of proof. But assuming that the character of bins displayed in the drawings was within the terms of the patent, which he did not undertake to pass upon, it was material to show that the defendants manufactured them, as to which the witness was excused from answering, and the evidence upon the subject was thus cut off. As already intimated, the idea of the master evidently was that, at least as the case stood, only the immediate forms of bins which had been put in issue and passed upon were to be considered in the accounting. But this clearly is not the rule. Except as concluded by the decree, the question of infringement is always open for consideration before the master. *Turrill v. Illinois Cent. Railroad*, 5 Biss. 344, Fed. Cas. No. 14,272; *Wooster v. Thornton* (C. C.) 26 Fed. 274; *Thomas v. Electric Porcelain Co.* (C. C.) 114 Fed. 407; *Hanifen v. Armitage* (C. C.) 117 Fed. 845, 851; *Westinghouse Mfg. Co. v. Sangame Electric Co.* (C. C.) 128 Fed. 747. In directing an account no more is decided, aside from the validity of the patent, than that infringement has been made out. The extent of it is an after consideration. No doubt, to make sure, all the defendant's devices are usually put in, but it also not infrequently happens that,

pending litigation, and in order, possibly, to get around it, changes are made of more or less substance, with regard to which, if the litigation is to be effective, the complainant in proceedings for an account must have the right to inquire and show that they infringe, and is not to be confined to the immediate structures or devices which were passed upon by the court. It is true that there may be cases where the differences are so great and the question of infringement in such doubt that neither the master nor the court will feel justified in going into them, and where the complainant may properly be put to at least a supplemental, if not a new, bill. *California Paving Co. v. Moliter*, 113 U. S. 609, 618, 5 Sup. Ct. 618, 28 L. Ed. 1106; *Westinghouse Air Brake Co. v. Christensen Engineering Co.* (C. C.) 126 Fed. 764; *Chicago Grain Door Co. v. C. B. & O. R. R.* (C. C.) 137 Fed. 101. But, however that may be in other cases, there is nothing of the kind here. The claimants, to all intents and purposes, were pursuing a legitimate line of inquiry, calculated to determine the extent of the defendants' infringement, and were entitled to prosecute it to the end.

It was also entirely in conformity with the established practice to bring this matter up by a motion for instructions, in the way that has been done (*Coddington v. Propfe* [C. C.] 112 Fed. 1016); nor, rightly considered, is there anything to the contrary in *Hoe v. Scott* (C. C.) 87 Fed. 220. All that was there decided was that the court would not give directions to the master to refuse to take evidence concerning machines which the defendants claimed were not an infringement until the court itself had had opportunity to determine whether they were or not; it being held that the question was, in the first instance, for the master. This is exactly the opposite of what we have here; the master, by a misconception of the scope of the inquiry and of his own powers, without passing upon the question presented, having refused to receive what was apparently relevant evidence. The effect of this was too serious to pass over, and his ruling was therefore properly brought here for review, without waiting for the coming in of his report. The case of *Hoe v. Scott* also, as it will be observed, is direct authority for the position already taken that the question of infringement is open, and to be passed upon as to devices and structures outside of those directly considered by the court.

An order will therefore be made requiring the witness to answer the questions which have been certified.

NATHAN MFG. CO. v. DELAWARE, L. & W. R. CO. et al

(Circuit Court, N. D. New York. July 12, 1906.)

PATENTS—INFRINGEMENT—LUBRICATOR FOR LOCOMOTIVE ENGINES.

The Woods patent, No. 645,026, for a lubricator for the valves and cylinders of locomotive engines, was not anticipated, and discloses invention; nor is it limited in scope to the precise form of valve used in the by-passage, or the precise position of the valve-controlled by-passage and the choked passage with relation to the duct or pipe between the lubricator and the steam chest, shown in the drawing of the preferred construction. As so construed, *held* infringed.

This is a suit in equity to restrain alleged infringement of letters patent No. 645,026, dated March 6, 1900, and issued to Hugh Woods, assignor to the Nathan Manufacturing Company, for improvement in lubricators for the valves and cylinders of locomotive engines, and for an accounting. The defendant the Delaware, Lackawanna & Western Railroad Company uses upon its locomotive engines lubricators furnished by the Michigan Lubricator Company, and these lubricators furnished by this company are the alleged infringing devices. The defendant Michigan Lubricator Company has become a party to the suit, and has assumed its defense.

Wetmore & Jenner (Edmund Wetmore, of counsel), for complainant.

Kernan & Kernan (John B. Corliss, George S. Payson, of counsel), for defendants.

RAY, District Judge. The drawing of the patent in suit represents in vertical section and partly in elevation a lubricator embodying the invention claimed in its preferred form, and shows what is termed a "double-feed lubricator," one in which both of the cylinders and valves of a locomotive engine are lubricated from one common oil reservoir. The patent expressly states, however, that the number of feed outlets with which the lubricator is provided may be varied without departure from the invention. The specifications then give a general description of the lubricator, following this with a more specific description of the structure in which the invention is found. The specifications then state that in ordinary lubricators of this class each of the upper sight-feed brackets contains, near the outlet point into the oil pipe which leads to the cylinder, an outlet nozzle with an exceedingly small opening, which nozzle, in connection with the equalizing tubes, M, serves in the usual manner to equalize the pressure within the lubricator. Owing to the fact that the steam supply for the lubricator comes directly from the boiler, it is evident that the escape of steam and oil through the upper sight brackets is practically continuous, even though the throttle valve be closed and the engine motionless. It has been found, however, that when the throttle valve is opened and steam admitted to the steam chest the small volume of steam passing through the nozzles condenses within the oil pipes, resulting in a reduced pressure therein. This reduced pressure is not sufficient to resist the back pressure of steam from the steam chest, with the result that the feed of the lubricator becomes irregular, and eventually stops altogether. "It is the object of my invention to overcome this effect in a simple and reliable manner." The patentee then describes the mode and manner in which this objection is overcome, and says:

"It is the object of my invention to overcome this effect in a simple and reliable manner. To this end I combine with the lubricator and the oil or tallow pipe leading therefrom to the cylinder of the locomotive engine, through which pipe there is a constant flow of steam and oil in limited quantity to the cylinder through the usual plug or nozzle or its equivalent, a valve or piston plug, preferably of the differential type, controlling a steam passage from the lubricator side of the apparatus to the tallow pipe, and adapted to be operated by the back pressure from the cylinder, to open said passage to the tallow pipe under these conditions, and thus admit an additional supply of steam to neutralize the back pressure from the cylinder. I prefer to so arrange things

that, with the additional supply of steam, an additional supply of oil shall also be furnished at this time, the latter passing then not through the constantly open choke plug alone, but also through the passage or passages opened up by the valve. Thus not only is the back pressure from the cylinder neutralized or equalized by the additional volume of steam admitted at the lubricator end of the oil or tallow pipe, but the oil feed is increased also; in other words, the feed is increased when the throttle is open, and is decreased when the throttle is closed, because in the latter case the oil can pass through the small constantly open choke passage or plug only. These features, broadly considered, are not new with me, as a lubricating apparatus embodying said characteristics is shown and described in United States patent No. 267,430, granted to R. J. Hoffman on January 14, 1882."

The patentee then proceeds to describe what he employs in connection with a lubricator having suitable boiler, cylinder, and equalizing pipe connections, and then describes the structure which embodies the features mentioned and shown in the drawing, and then says:

"The operation of my improved device is as follows: When the engine is standing still or running on a down grade with no steam in the cylinders, the steam passing continuously directly from the boiler through the equalizing pipes, M, will press against the smaller head of piston, d, compressing the spring, h, and moving back the piston until the holes, f, will be covered by the partition, n, of casing, a. In this case only the very small hole, e, will be operative for the passage of steam and oil into the cylinder, and the lubricator will operate as an ordinary lubricator, with fixed outlet nozzle or choke plug. When steam, however, is admitted into the cylinders, it will press against the larger head of piston, d, and, aided by the spring, overcome the pressure of steam against the small end of the piston, which latter will then assume the position shown in the drawing, with its holes, f, opening into the recess, c. In this case, in addition to the small hole, e, the holes, f, will be open to the passage of steam and oil, and the increased volume of steam passing through these additional openings will effectually overcome the retarding effect of the back pressure from the cylinder. I believe myself to be the first to have devised a lubricating apparatus provided with suitable cylinder and equalizing pipe connections wherein the duct connecting the lubricator and the steam chest at any point in the length of the duct is provided with a minimum supply choked passage, a relatively larger by-passage, separate and distinct from the minimum supply choked passage, and a valve for controlling said by-passage automatically operated by variations of pressure within the duct. What I claim, and desire to secure by letters patent, is as follows:

"(1) In a lubricating apparatus provided with suitable boiler, cylinder, and equalizing pipe connections, and in combination with the lubricator and the steam chest or cylinder, a duct connecting the same containing a minimum supply choked passage, a relatively larger by-passage, separate and distinct from the minimum supply choked passage, and a valve for controlling said by-passage, automatically operated by variations in pressure within the duct at the times and in the manner substantially as hereinbefore set forth.

"(2) In a lubricating apparatus provided with suitable boiler, cylinder, and equalizing pipe connections, a casing communicating with the delivery end of the lubricator, provided with a choked or very small permanently open passage for continuous flow of steam and oil in restricted quantity from the lubricator to the steam chest, and with a valve-controlled by-passage separate and distinct from the minimum supply passage, for permitting an increased flow of steam and oil from the lubricator through the casing into the steam-chest, substantially as hereinbefore set forth."

The defendant presents two defenses—lack of patentable novelty in view of the prior art and noninfringement.

I have gone carefully over the prior state of the art, and considered all prior patents and devices of this description, and am

satisfied that the Hoffman patent does not anticipate the patent in suit, nor show that it is destitute of patentable novelty. This is also my conclusion in regard to the Schmidt and the several McCoy patents. To give a detailed description of these patents and of their operation would not be profitable. The changes made by Woods were new, useful, and involved such creative elements as to constitute invention. I think the most important feature in the Woods patent is the fixed minimum or choked passage separate from and independent of the valve-controlled automatically open and shut by-passage. The utility of this feature of the Woods patent is demonstrated by the fact that the defendant has adopted it, and strenuously contends for the right to retain it. I do not find it described or suggested in the prior art.

Coming to the question of infringement, it seems to me that infringement is established. Defendants' experts point out at least two features of the defendants' apparatus which it is contended take it out of the scope of the patent in suit. It is claimed that in the defendants' apparatus the choked passage and the valve-controlled by-passage is situated at the steam-chest end of the duct or tallow-pipe connection between the lubricator and the steam chest, instead of at the end nearest the lubricator, as shown in the drawing of the Woods patent and that the form of valve used by the defendants to control the by-passage is different from the preferred form shown by Woods. I cannot find that the patent in suit is so limited in terms or scope that the position of the choked passage and the valve-controlled by-passage with relation to the duct is material. In fact the patent says:

"I believe myself to be the first to have devised a lubricating apparatus provided with suitable cylinder and equalizing pipe connections wherein the duct connecting the lubricator and the steam chest at any point in the length of the duct is provided with a minimum supply choked passage, a relatively larger by-passage, separate and distinct from the minimum supply choked passage, and a valve for controlling said by-passage, automatically operated by variations of pressure within the duct."

I think the operation, function, and effect of the devices is the same located in any position along the duct. The defendants' valve which controls the by-passage is a ball valve, acting by gravity, while the valve of the Woods patent in suit is a differential valve, actuated by a spring. I do not see how this is material or avoids infringement. The Woods patent states that this differential form is preferential merely. The patent says that the piston valve is preferentially of the differential type, and that the patentee can, and prefers to, combine it with a spring. It is clear that the patent is not limited, and that either form of valve satisfies the patent.

Claims 1 and 2 of the patent in suit only are in question, and I do not think it would be profitable to discuss or go at length into the expert testimony or a minute description of the drawings and specifications and modes of operation of the defendants' lubricator. It is true that identity of result is not the test of infringement. Ordinarily, there must be substantial identity of means and of operation, and I think this is found here. The defendants claim that the ball valve

of the defendants could not be substituted for the piston valve of Woods without an entire reconstruction of the device. I do not think this is true, broadly stated. It is true that to substitute the one for the other would involve considerable reconstruction, and many changes in construction, but, if any difference in the mode of operation is involved, it is clearly contemplated by the explicit terms of the Woods patent, who provides for the use of either form of valve, and merely suggests the one as being preferred by him. The form of valve is not the essential feature of the invention disclosed by the Woods patent.

It is perhaps proper to mention that I have fully considered the disclosures made in the Woods file wrapper, and find nothing to change my views. The defendants press the point or inquiry rather as to the sufficiency of the description of the invention claimed in the Woods patent. All that is necessary is that the specification be so full, clear, and exact as to enable one skilled in the art to which the invention relates to make and use it without experiments of his own.

It follows that it must be held that claims 1 and 2 of the patent in suit are valid, not anticipated, and infringed by the defendant the Delaware, Lackawanna & Western Railroad Company as a user, and by the Michigan Lubricator Company as maker and vendor.

There will be a decree accordingly.

BOWKER v. HAIGHT & FREESE CO. et al.

(Circuit Court, S. D. New York. May 26, 1906.)

WITNESSES—REFUSAL TO ANSWER QUESTIONS BEFORE MASTER—LIABILITY TO PUNISHMENT FOR CONTEMPT.

It is the duty of a witness being examined before a master in chancery to answer such questions as the master directs after objections thereto have been overruled, and for his refusal to do so he is subject to punishment for contempt, unless he himself makes some claim of personal privilege.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 37-41.]

On Motions to Require Witness to Answer Questions Before Master, and to Punish Him for Contempt for His Refusal.

Roger Foster and Wm. P. Maloney, for the motion.
Franklin Bien, opposed.

LACOMBE, Circuit Judge. This is a motion to require a witness who is being examined before the master to answer certain questions, and also to declare him to be in contempt for refusal to answer, and to punish him for such contempt. The objections to the questions are all, in substance, on the ground of incompetency, irrelevancy, or immateriality. The objections were overruled, and the master directed the witness to answer, whereupon the defendant company reserved its rights by duly recorded exceptions. It was then the duty of the witness to answer; nevertheless, he remained silent. He should answer questions 305, 319, 322, and 400.

As to the motion to punish for contempt, the witness is evidently ig-

norant of his duty when under examination, apparently supposing that he is to answer or remain silent as his counsel may elect. For that reason no penalty will now be imposed, but he should take notice that as a witness it is his duty to answer such questions as the court may direct him to answer, and that on the hearing where he is being examined the master sits as a court, with power to rule upon all objections. Should this witness hereafter decline to answer questions which the master directs him to answer, he will run the risk of being adjudged in contempt, and punished by fine or imprisonment, unless to such question he may himself interpose some personal privilege which would excuse his refusal. Council for the receivers will see to it that such witness is served with a copy of this opinion, so that in the case of future contumacy there may be no appeal to the clemency of the court on any theory that he was ignorant of his rights and duties, or supposed that advice of counsel would protect him.

BOWKER v. HAIGHT & FREESE CO. et al.

(Circuit Court, S. D. New York. May 26, 1906.)

1. ASSIGNMENTS—CHECK AS ASSIGNMENT OF FUNDS ON DEPOSIT IN BANK.

Both at the common law and under the New York statute a check does not operate as an assignment of funds on deposit to the credit of the drawer in the bank against which the check is drawn until it has been accepted or certified by the bank.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 89-94.]

2. RECEIVERS—RIGHT TO POSSESSION OF PROPERTY—BANK DEPOSIT.

An attorney who received a check from a corporation as a retainer for services to be rendered, and who presented and received payment of the check after he had knowledge that a receiver had been appointed for the property of the corporation, will be required to turn over the sum so received to the receiver.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Receivers, §§ 117-123.]

On Motion by the Receivers to Compel Mr. Franklin Bien to Pay Over to Them the Sum of \$2,000.

Fredk. J. Moses, for the motion.

Franklin Bien, opposed.

LACOMBE, Circuit Judge. There is no dispute as to the facts, and the conclusion to be drawn from such facts is abundantly settled by authority. The Haight & Freese Company was a corporation, with which, prior to May 9, 1905, Mr. Bien apparently had no business relations. It was a New York corporation, had its principal office and transacted business here, and had a branch office in Boston. On May 8, 1905, the United States Circuit Court in Massachusetts, in an action brought in that court, appointed Mr. James D. Colt a receiver of the property of the corporation within that jurisdiction. On the morning of May 9th Mr. Bien was informed of that proceeding, and was retained for the company for the purpose of proceeding at once to Bos-

ton to protect the interests of the corporation. He demanded a retaining fee of \$2,000. Thereupon a check for \$2,000, dated May 9th, drawn by the defendant company upon the Colonial Bank, in which it kept a deposit account, was delivered to Mr. Bien. It was drawn to the order of "Harvey Watson, Manager," and indorsed, "Pay to the order of Franklin Bien on account of retainer. Harvey Watson, Mgr." At the time of these transactions, which took place in the morning, no receiver had been appointed in this jurisdiction, but later in the same day, the papers in this suit being presented to the court, Mr. Colt and Mr. Walter D. Edmonds were appointed receivers of the property of the defendant corporation in this jurisdiction, and about 4 p. m. said receiver, Edmonds, having duly qualified, went to the office of the company, served a certified copy of the order upon the proper officer, and demanded delivery of all its property and assets. The papers were promptly turned over to Mr. Bien, and he was, some hours after he had received the check, informed that receivers had been appointed in this jurisdiction. This check was not presented to the bank until the next day, when it was certified; the bank not having yet been advised of the appointment of receivers. Subsequently it was paid to Mr. Bien.

The statute law of this state provides that "a check, of itself, does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder, unless and until it accepts or certifies the check." Negotiable Instruments Law, Laws 1897, p. 756, c. 612, § 325. This is but a statutory expression of what was before the well-settled law in both the state and federal courts (*Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55; *Florence Mining Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424), and it disposes of this case.

On the morning of the 10th, when the check was presented for acceptance (certification), there had been no assignment, legal or equitable, of any part of the moneys of the Haight & Freese Company on deposit with the Colonial Bank. The bank was debtor to the company for whatever balance stood to the latter's credit, which it was to pay out on the order of the corporation. Down to the time when the bank actually executed its acceptance, payment of the check might have been countermanded by the company, and in such case it would be the duty of the bank to refuse payment. The money on deposit was property of the company which was not turned over to Mr. Bien until the morning of the 10th, when the check was certified, and at that time he knew that receivers in this jurisdiction had been appointed, and that he was receiving from the bank money which should be turned over to them. As an employé of the company, its retained counsel, and as an officer of this court, he may not retain in his possession property of the company thus obtained.

Receivers may take an order directing payment, with interest, within 10 days.

NATIONAL STARCH CO. v. KOSTER.

(Circuit Court, S. D. New York. June 6, 1906.)

1. TRADE-MARKS AND TRADE-NAMES—UNFAIR COMPETITION—SIMILARITY OF DRESS.

Where articles of merchandise of the same kind are made by different manufacturers in the same city, the name of which appears on the packages, one having a long established reputation, a later manufacturer is required to exercise care to differentiate his packages, so that purchasers will not confuse the two products.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 73, 74, 86.]

Unfair competition, see notes to *Scheuer v. Muller*, 20 C. C. A. 165; *Lare v. Harper & Bros.*, 30 C. C. A. 376].

2. SAME—RIGHT TO INJUNCTION—FRAUDULENT USE OF PACKAGES BY COMPLAINANT.

A motion for preliminary injunction to restrain unfair competition by the imitation of complainant's packages will not be granted although such imitation is shown where there is evidence which, though disputed, tends to show that complainant has used its packages for an article different from that for which they were designed, of inferior quality, and not made at the place thereon stated.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trade-Marks and Trade-Names, §§ 94, 108.]

In Equity. On motion for preliminary injunction.

Louis C. Raegener, for the motion.

Archibald Cox, opposed.

LACOMBE, Circuit Judge. In the case of the small yellow packages of edible cornstarch and the large wooden six-pound boxes of gloss starch, I think there has manifestly been an attempt to imitate complainant's style of package. There are so many resemblances that defendant's packages might readily be mistaken for complainant's when none of the others would. That these resemblances are unnecessary is seen from an inspection of the packages of other manufacturers, who seem to have had no difficulty in differentiating them. Using, as it does, the name Oswego, the defendant, or, rather, the manufacturer from whom he bought, was required to be careful not to mislead the public in any way, so as to confuse the identity of the two products, both made in Oswego—the one for more than 25 years, the other quite recently. Injunction would issue against these particular styles of packages were it not for the dispute as to the character and quality of the starch which complainant made temporarily in Indianapolis, and sold in the old style of package without any announcement that it was not made at Oswego. There is a conflict of evidence on this point, and it should be reserved for final hearing.

Motion denied.

MURRAY v. JOSEPH et al.

(District Court, S. D. New York. February 21, 1906.)

1. EVIDENCE—PRESUMPTIONS—INFERENCES FROM FAILURE TO PRODUCE EVIDENCE.

If a party to a cause fails to produce evidence which in the opinion of the jury he could produce in support of his position if his testimony, which is contradicted, is true, the jury is justified in drawing the inference from such omission, either that there is no such evidence that can be produced, or that if it was produced it would not be favorable to such party.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 97.]

2. JUDGMENT—MATTERS CONCLUDED—ORDER OF BANKRUPTCY COURT.

An order made by a court of bankruptcy in summary proceedings therefor, refusing to direct a third person to turn over to the trustee money and property of the bankrupt, claimed to be in the possession or under the control of such third person, is not a bar to a subsequent action by the trustee against such person to recover the value of such money and property, on the ground that it was transferred to defendant by the bankrupt with intent to hinder, delay, and defraud his creditors.

3. BANKRUPTCY—ACTION BY TRUSTEE—FRAUDULENT TRANSFER OF PROPERTY.

Evidence reviewed in a charge to the jury in an action by a trustee in bankruptcy against the bankrupt and another to recover the value of money and property alleged to have been fraudulently transferred by the bankrupt to his codefendant and to others through a conspiracy between defendants.

The complaint was based upon section 67e of the United States bankruptcy act (Act July 1, 1898, c. 541, 30 Stat. 564, 565 [U. S. Comp. St. 1901, p. 3450]). The specific charges were: That the two defendants entered into a conspiracy to defraud the creditors of Gilroy & Bloomfield; that in pursuance of this conspiracy Joseph, an attorney, aided Gilroy in transferring assets beyond the reach of creditors; that on March 19, 1904, and within four months of the filing of the petition in bankruptcy, in pursuance of the scheme, Gilroy transferred to Joseph certain firm property, consisting of 64 pieces of woollens, of the value of \$4,500, and firm money; the latter amounting to \$1,250. Defendant Gilroy, in his answer, admitted the transfers to Joseph, but denied the allegation of fraud and conspiracy. He alleged the transfers were made upon the advice of his attorney, Joseph, and that said Joseph assured him that the proceeds would be used solely for the purpose of effecting a settlement with creditors. Defendant Joseph denied the conspiracy, and denied the receipt of the woollens and money. As a plea in bar of further proceeding, Joseph set up an order entered by the district judge on the report of a referee, which order dismissed the proceedings as to Joseph, and required D. L. Feinman, Rosie Korn, and Tobias Korn, the other respondents therein, to pay over certain sums to the receiver.

Bird & Tarbox (Abram I. Elkus, of counsel), for plaintiff.

Arthur Furber (Arthur Palmer, of counsel), for defendant Joseph.

Paul M. Herzog, for defendant Gilroy.

HOLT, J. (charging jury). This action is brought by the trustee in bankruptcy of the firm of Gilroy & Bloomfield against Abraham A. Joseph and Louis K. Gilroy; Gilroy having been a member of the firm of Gilroy & Bloomfield, and Joseph being a lawyer who acted in some professional capacity in the matters to which the suit relates. The charge in the complaint is, in substance, that Gilroy and Joseph entered into a conspiracy to transfer property belonging to the firm of Gilroy

& Bloomfield, for the purpose of hindering, delaying, and defrauding the creditors of the firm. In another part of the complaint it is alleged that Joseph aided and abetted Gilroy in making a transfer of property, and that the property was transferred by Gilroy to Joseph for the purpose of hindering, delaying, and defrauding the creditors of the firm. The property alleged to have been transferred is a certain amount of cloth, which is alleged in the complaint to have been of the value of \$4,500, and certain payments in cash amounting to \$1,250, so that the complaint demands judgment for \$5,750, with interest on it from March 19, 1904, which is the date on which it is alleged that the conspiracy took place to transfer this property. A conspiracy is defined in the law as an agreement between two or more people to do an illegal or criminal act, or to accomplish a legal act by criminal or illegal means. The charge here is a conspiracy to transfer property in fraud of creditors. A transfer of property with intent to hinder, delay, or defraud creditors is an illegal act under the state law. If it takes place before any bankruptcy occurs, it is an illegal act. If it takes place after bankruptcy occurs, and it is done knowingly and intentionally, it is a criminal act under the bankruptcy law, as well as an illegal act. In either case a trustee in bankruptcy has authority under the bankrupt act to bring a civil action to recover for the transfer of property, whether it is done in fraud of creditors before the bankruptcy occurs, or whether it takes place after the bankruptcy occurs. The plaintiff's claim generally in this case is that Gilroy transferred this cloth and cash to Joseph with intent to hide it and conceal it from the creditors. Gilroy's claim, as I understand it from his testimony, is that this was done to enable Joseph, as his attorney, to effect a settlement with his creditors. I suppose he would claim that the property was intended to be applied in that way, to settle with his creditors, and if the settlement was not accomplished, and if the estate had to be settled in bankruptcy, the property was to be turned back to the trustee. Joseph's claim, as I understand it, is, in substance, that this property was intended to be turned over to Mrs. Korn in payment of a debt, or upon account of a debt, and that the only part which he took in the transaction was as attorney for Mrs. Korn. It appears in evidence in this case that Mrs. Korn was a creditor of this firm. If a debtor owes a just debt to a creditor, he can pay that debt at any time before bankruptcy occurs, and making such payment is not a crime nor an illegal act. It may be a preference, and if bankruptcy occurs subsequently, and the payment has taken place within four months, with knowledge of the insolvency, and with reasonable ground on the part of the person who gets the payment to suppose it was intended as a preference, the trustee in bankruptcy can require it to be paid back; but there is nothing done which is illegal or criminal when a debtor pays a creditor, although he knows that by paying a particular creditor that creditor will get payment in full, and that the rest of his creditors will not. So that in this case, if you should come to the conclusion that all that Mr. Joseph was doing in this case was to endeavor to get Mrs. Korn's debt paid, and that all he did in that respect took place before the bankruptcy occurred, then you should find a

verdict in his favor in this case. But after the bankruptcy occurred, after the petition was filed, and the order appointing the receiver was made, then neither the person against whom the petition was filed nor Joseph nor anybody else would have any right to take the property of the bankrupt, and apply it to the payment of a particular creditor. The bankrupt's property under those circumstances belonged to the receiver, and was to be held by the receiver pending the adjudication in bankruptcy, and if the adjudication in bankruptcy took place, it was then to be applied ratably and equally to all the creditors, and not to some particular creditor to the prejudice of the others.

Now, in order to understand the bearings of the question which is presented to you, it is necessary to comprehend somewhat the general facts of this case, and if in stating those facts I state them in a way different from your own recollection of them, you must be guided by your own recollection; you are the judges of the facts.

It seems that this firm of Gilroy & Bloomfield were in business, and that along in January, I think in January or February, 1904, an arrangement was made by which Mrs. Korn put between \$8,000 and \$9,000 into the business. There was a man named Feinman who was a salesman in the employ of Gilroy & Bloomfield, who knew Mr. and Mrs. Korn, and he introduced them to the members of the firm of Gilroy & Bloomfield, and negotiations were entered into which resulted in Mrs. Korn putting into the firm this sum of between \$8,000 and \$9,000, and Mr. Korn being employed there. He was to be paid a salary, and Mr. Gilroy says he was to be paid also a percentage of the profits of the business, and at the time that this transaction took place, or subsequently, an assignment of certain accounts was made by the firm of Gilroy & Bloomfield to Mrs. Korn to secure this loan. Mr. Gilroy says that originally there was no agreement to give this assignment of accounts. He says she was to loan money in consideration apparently of the employment of her husband, and that the giving of the assignment was a subsequent suggestion.

The evidence of the other side is to the effect that it was all a part of the original arrangement, and that she was to have the assignment of these accounts as security for the repayment of this loan. At all events, it was subsequently executed, and a short time thereafter dissatisfaction seems to have arisen between the Korns in regard to this loan. They consulted Mr. Joseph on the subject, as they had originally consulted him in regard to getting the assignment, and they were in consultation with him thereafter. They claimed that they had been defrauded or deceived, asserting that some of these accounts had been pledged to banks. Mr. Gilroy says that it was only intended to give them an equity in these accounts as security, and that that fact was explained to them. At all events, without going further into detail in that matter, dissatisfaction arose. Joseph was consulted, and he advised them to say nothing; to let the business go on, and to draw out, on account of their claim, from the profits of the business as far as they could without making any attack. Then subsequently some altercation arose between Feinman and Bloomfield, Feinman

claiming that Bloomfield had been taking goods out of the business, and in that way affecting the interest of the Korns, which resulted in an altercation; so that generally, down, apparently, to about the middle of March, there was a condition of dissatisfaction and controversy there in this concern. Joseph says that he knew they were insolvent and that they were going to fail, and that things were getting worse and worse. At all events, the Korns went to Joseph's house along about Wednesday or Thursday before this Saturday, the 19th, as I understand it, and consulted him on the subject of securing their claim. This consultation resulted in Joseph's drawing a bill of sale, which has been produced here, signed Gilroy & Bloomfield, by Gilroy. Gilroy says when he signed it it only contained a transfer of three articles, silks, satins, and romaines. It now contains, in addition to these silks, satins, and romaines, a list of other property, and it practically includes all the assets in the store. Joseph says that after that was signed by Gilroy he took it up to Bloomfield's house. Bloomfield was ill. He wanted to have Bloomfield sign it, and Bloomfield declined to sign it, and thereupon he came back. Now, generally, of course, one partner could transfer firm property, but here was apparently a transfer of the entire assets of the concern, and it appears to have been understood by Joseph that it would be desirable, at all events, to have both partners acquiesce in it, and it is admitted that Bloomfield did not. It is therefore for you to say what weight is to be given to this bill of sale; whether it was considered by the parties as an actual legal transfer of the property of this concern, or whether it was not; whether Bloomfield's refusal to sign it led the parties to not undertake to act under that bill of sale. At all events, on Saturday morning, the 19th of March, Mr. Joseph was sent for to come up to Gilroy & Bloomfield. I think he went first to the St. Clair House, and then went around to the store of the firm of Gilroy & Bloomfield. When he got there, he found that papers had been served on Gilroy in a suit brought in the state Supreme Court by Bloomfield for a dissolution of the partnership, and with it a notice of a motion was served for the appointment of a receiver. Mr. Gilroy called up Joseph, and consulted him about it, and gave him the papers, and the evidence would appear to be such as to justify you in finding that from that time on Joseph was acting as attorney for Gilroy or for the firm, as well as that he had previously been acting for Mrs. Korn. That is one of the questions in the case. If you think he was not acting as counsel for Gilroy, but was acting throughout as counsel for Mrs. Korn, simply representing a creditor here who was trying to get payment of a debt, then you will draw your conclusions accordingly. What occurred was that Joseph, after ascertaining that this suit was brought and an application for a receiver made in the Supreme Court, which naturally would lead any attorney to expect that there would be trouble, and that bankruptcy proceedings might take place, especially in view of the fact that Mr. Joseph admits here he knew the firm was insolvent, and was expecting that they would get into difficulty—Joseph started out by telephoning to the clerk of this court to ascertain whether any bankruptcy petition had been filed, and was told that none had been. He sent a clerk down here to the clerk's

office to ascertain whether that took place at any time in the morning. The morning passed without any such petition being filed. The offices were closed, and the time came when it was apparent that nothing more could be done that day, if any one contemplated proceedings, and word was sent to Mr. Joseph to that effect. The significance of this depends upon the principle that the filing of a petition in bankruptcy acts as an injunction or a caveat, as the law terms it. It is notice to the world that bankruptcy proceedings are pending, and anybody who takes the property of the bankrupt after such a petition is filed takes it subject to whatever may take place in the bankruptcy proceedings. Of course, the filing of a petition does not make a man bankrupt. He may have a defense, and if he puts in a defense, and it is decided he is not a bankrupt, then any proceedings that a person takes in reference to his property are not affected by the bankruptcy; but, on the other hand, if the proceeding results in bankruptcy, then anybody who has taken the property or interfered with it after the filing took place holds it subject to the adjudication in bankruptcy, and to the effect of the proceedings in bankruptcy, which would be an explanation of why Mr. Joseph wanted to know whether any bankruptcy petition had been filed here on that Saturday morning. After ascertaining that there had been none filed, and that the office was closed for the day, he stayed at this store, according to his own statement here, from about 11 until after 2. I think some of the evidence is that he stayed there longer that day, and during that day what took place is substantially this, as shown by the evidence on this trial: The silks, satins, and romaines in the place, substantially—some of them, at all events; I don't know but all of them—were packed in trunks by Feinman, and taken away and taken to Baltimore that night. They were intended, as I understand it, to be applied on account of Mrs. Korn's indebtedness. There remained some 50 or 60 pieces of piece goods. Some of these were complete, and a number of them had had a portion cut from them, and used in manufacturing garments, but a large portion of which remained on the piece; woolen goods, I think, principally. The question arose what was to be done with those goods. Joseph had stated, according to Mr. Gilroy, that it was necessary to put some of this property away, in order that he (Joseph) should be able to accomplish a settlement with the creditors; the idea being that after the failure took place—after it became known that there was a failure—if he had some property with which to make propositions of settlement, he could accomplish his object. The question was what was to be done with these piece goods, and Joseph said "Who are your spongers," and Gilroy said "Altschul," or the Perfect Sponging Works, the name under which he did business, and Joseph advised that these goods be sent there. They were there-upon packed, and a truckman called in, and they were sent there, and it also appears that during this day various people in the place took away smaller quantities. Mr. Von Praag says he took away a silk dress. Mr. Hardin took away a suit of clothes, and there were various other people there who took out rolls under their arms, of comparatively small amounts. On this same day it seems that in the

morning Mr. Gilroy had sold a lot of made up garments, amounting to about \$1,200, to a man named Taylor, and on Monday morning they were taken away, and the result was that on Monday morning, the petition in bankruptcy was filed and the receiver in bankruptcy was appointed, and when the receiver in bankruptcy reached the store there was substantially nothing left of the assets of that store, except, as I understand, goods in process of manufacture, cloth which had been cut up, and was in process of being made into garments, which I think some of the witnesses said were worth about \$4,000. All the piece goods, all the unmanufactured goods, and apparently all the manufactured goods were substantially gone. This took place on Monday, the 21st, and I think there is some evidence in the case that there was some telephonic communication that day between Joseph and Altschul, and that Altschul that day—it is for you to say whether it occurred that day—announced that he had a bill against Gilroy & Bloomfield of \$157 for previous work done as a sponger—a legitimate bill—and he informed them that that must be paid before those goods would be allowed to go out, and at all events it occurred that \$150 in cash was paid him before the goods were given out. That was the condition of things on Monday. That was what the receiver, when he went down there, found. Those goods were delivered by Altschul upon order subsequently, and the story of the plaintiff's witnesses in respect to that is substantially this: Cohen, who was a clerk in the firm of Gilroy & Bloomfield—Cohen testified that Joseph sent for him on Wednesday, and asked him to come down to the office, and when he got there Joseph said he wanted to see Gilroy, and the result was that Cohen went to Gilroy in East Orange, and got him to come over to New York. They went to the Cosmopolitan Hotel, and sent for Joseph, and they had an interview there with Joseph, and Joseph said he wanted an order for these goods that had been sent to Altschul, to be used for the purpose of accomplishing this proposed settlement. Thereupon Gilroy wrote on a card an order for them, and gave it to Joseph. This order is dated March 19, 1904, and reads as follows:

"The Perfect Sponging Co.—Gentlemen: Please deliver to bearer the goods sent you for examination.

"Gilroy & Bloomfield.

"Per Louis K. Gilroy."

It is written on the back of one of their business cards.

Gilroy says that Joseph suggested that he date it back on the 19th, which was the date the goods were sent to the Perfect Sponging Company's place, and Cohen says that he saw the card written and delivered, but he didn't hear the conversation between them, and is not able to identify this as the card, except that he saw a card delivered on that day. Now Joseph denies that he ever received that card, and he denies that he sent Cohen over to Orange, or asked Cohen to get Gilroy to come over here. He says Cohen came to see him, and asked him if he couldn't bring about the payment of some commissions that were due Cohen from the firm of Gilroy & Bloomfield, and he said he didn't see how he could. Thereupon he testifies Cohen went away, and went over to Orange in his own interest, and got Gilroy to come

over to the Cosmopolitan Hotel, and sent for Joseph, to endeavor to accomplish his purpose of getting these commissions settled. Joseph says there was no talk at that interview about giving any order of this kind, and that this order was not given to him there, and he never did receive this order, or take any action under this order. He also calls as a witness Altschul, who says that this order was given to him at his place of business on the 21st of March, the date on which he produces a receipt for the goods. He produces a receipt for goods received on the 21st, that is Monday, March 21, 1904, having entries of nine or ten different lots of goods, which he apparently delivered to different teamsters, and for which he took receipts, and which has at the end of the receipt "Gilroy & Bloomfield, Two cases of cloth, Richard Smith." Mr. Von Praag is also called as a witness, and testifies that he purchased from Feinman certain goods which had been put in two cases, evidence from which you would be justified in drawing an inference that these goods were those sent to Altschul, but which the other side claim were the other goods which were taken off in a trunk to Baltimore. Von Praag produces certain checks given to Feinman, which he says were in payment of these goods, and which checks are dated before the 23d—the 22d, I think. That is to say, gentlemen, if you believe the evidence of Joseph, of Altschul, and of Von Praag, this order was given on the date it bears date, the Saturday, on the same day the goods were sent to Altschul. It was given to some truckman, a man who signed his name here as Richard Smith, so that he could go and get them on Monday the 21st, and he did go and get them Monday the 21st, and they were thereupon sold to Von Praag in such season that he would draw his check in payment on Tuesday the 22d, and all this had taken place before Wednesday the 23d, which is the date on which Gilroy and Cohen say this order was first given. Altschul's own testimony is that the goods were delivered on this order, and he produces this order.

Gentlemen, it is a pretty material point in this case which of these stories is true. If that order was not given until Wednesday, everybody knew that the bankruptcy proceedings had taken place, and that a receiver had been appointed at that time, and if Mr. Joseph and Mr. Gilroy on Wednesday gave this order, and under it took possession of those goods, whether they were intending to give them to Mrs. Korn ultimately, or to hold them for the purpose of forcing a settlement with their creditors, or concealing them for their own advantage, in any way they were doing an illegal act. A receiver had been appointed and had qualified, and the property of this bankrupt estate had then passed to him. The title to it had then passed to him, and no person having knowledge of the condition of affairs had any right to take any property of that firm at that time, or do anything else with it except to hand it over to the receiver. So, as I say, it becomes important for you to determine whether in fact this order was given on the 19th, and was received and the property obtained under it before the bankruptcy occurred, or the parties had knowledge of the bankruptcy, or whether it was issued on Wednesday the 23d.

Upon that point you will notice, in the first place, that, if Gilroy's

story is true, the plaintiff has produced in this case all the corroborative evidence that he can; that is, it is for you to say whether they have not done so. Gilroy says he made this card out at the Cosmopolitan Hotel that Wednesday, and that the only persons present were Joseph and Cohen, and Cohen corroborates Gilroy's story in his testimony, and says he gave Joseph the card, and he went away with it. Joseph says it is not so; that he didn't give it to him at the time or at any time. Now, gentlemen, it is for you to say, under those circumstances, whether, if Joseph's evidence is true, he has produced all the evidence to corroborate his statement that he might produce. If a party to a cause has in his control and can produce in support of his position evidence which in the opinion of the jury he could produce if his story was true, and he omits to do so, the jury is justified in drawing the inference from such omission either that there is no such evidence that can be produced, or, if it was produced, that it would not be favorable to that side. Somebody had that card between the time when Gilroy surrendered it and Altschul received it. Richard Smith, Altschul says, was the teamster who brought this card and delivered it to Altschul, and to whom this property was surrendered. Now, gentlemen, it is a fair question for you to ask in this case why Richard Smith is not called, if he exists. If he exists and has gone away somewhere, where has he gone, or what search has been made to find him? Is it probable that with Von Praag and Altschul friendly to Joseph no such person can be found? This matter was investigated only a few days after the thing occurred. The receiver had the parties up under examination on Thursday of the same week in which he was appointed—three days after he was appointed—and it has been the subject of repeated investigation since. Mr. Joseph is an experienced attorney. He knows the importance of this case. He said on the stand that he said to Feinman that this is a case not only relating to a claim of money against him, but affecting his professional reputation. He is represented here by counsel of experience, and it is for you to say whether he did not know before this trial the importance of supporting his evidence that he never received that paper on Wednesday and if you find that he is not corroborated in the respects in which in your opinion he might have been corroborated if his statement is true, you may give such weight to the omission to produce such evidence as in your opinion such omission ought to receive. You should indeed not give too much weight to the consideration of evidence not being produced. A case should be decided mainly on the actual evidence, but you have a right in passing upon the truth of such a case to take into consideration not only the actual evidence that is in the case, but the omission to produce evidence, if in your opinion it might have been produced, to corroborate the party whose evidence is under consideration.

In addition to this evidence about the goods there is evidence about the cash. Gilroy says he gave Joseph \$300 on Saturday, the 19th. He says that Joseph said he needed some cash and some goods in order to accomplish the settlement, and that this \$300 was given to Joseph for that purpose. Joseph says it was paid to him by Korn, or paid to

him by Gilroy for Korn, or something of that sort, in payment of his professional services up to that time. Gentlemen, if that is true—if that was paid to him by Korn or for account of the Korns—in payment of his professional services up to that time, the plaintiff in this action cannot recover for that amount. Joseph says that he was never paid anything further by anybody in this case except that he was reimbursed in the sum of \$12 by Mr. Gilroy for a little payment he had made to a bookkeeper, I think it was, some employé, and that he was paid \$100 later by Altschul, which took the form of a loan, as I understand, and that there were no other cash payments made him at all. Gilroy says he subsequently paid him \$250 or \$300 to be added to this sum he had previously paid him to make up the fund for settlement with the creditors, and that still later, after he got in the payment from Taylor for about \$1,200 worth of goods, he turned over \$650 more to Joseph. You will recall the dates of these last two payments which Gilroy says took place certainly after these bankruptcy proceedings occurred and after the receiver was appointed. If his testimony in that respect was correct, those were payments which Gilroy had no right to make, and which Joseph had no right to accept, because both of them knew that that money belonged to the receiver, and they had no business to do anything else with it but turn it over to the receiver. It is for you to say, gentlemen, if you should find in this case against the defendant, in the first place, what was the value of those goods, which are alleged in the complaint to have been worth \$4,500, and how much money in fact was advanced by Gilroy, if any, and to base your verdict, if you find one for the plaintiff, upon the actual value of the goods at the time they were turned over, and the actual amount of money paid to Joseph, deducting from it the first \$300, if you find that that \$300 was paid to him by Korn for a fee, and was not transferred to him by Gilroy as a fund with which to settle with creditors.

Now there is alleged in the answer here as a defense that there was an investigation made. I think there is an order put in evidence. There has not been much said about it by counsel in summing up, but a proceeding was taken in this court to compel the Korns and Gilroy and Feinman and Joseph, I think, to pay back to the receiver or to the trustee, one or the other, this property, or portions of it, and it resulted in an order, which as they say, exonerated Mr. Joseph; that is, an order was entered which refused to direct that Mr. Joseph pay over anything, and that was subsequently modified, and the matter sent back again to the referee. You see this has been a matter of a good deal of examination.

I charge you, gentlemen, as to the effect of that order, that it is not a bar to this suit. Ordinarily, of course, if a man is sued in a lawsuit, and there is a judgment recovered in that case, he cannot sue again for the same thing. The first judgment determines the question. But this was a summary proceeding, based upon the theory that there was clear and conclusive proof that the parties proceeded against in this case had property in their possession. In those cases, where the proof is perfectly clear and substantially decisive, the courts of bankruptcy exercise a summary jurisdiction in such cases, and order that property

be turned over to the trustee; and, if it is not obeyed, the parties under those circumstances are committed to jail for contempt for not obeying the order. But it is perfectly well-settled law that a case may be sufficiently doubtful to prevent the court of bankruptcy from making a summary order in one of those proceedings, although there may be sufficient evidence in the case, such that if it were submitted to a jury on a trial it would justify a verdict against the party, which the court would not feel authorized to set aside. Therefore, it is my opinion that any order made in a proceeding of this kind which does not find the party proceeded against liable to pay over is not a legal bar to a suit brought by a trustee where the evidence can be taken in full, and the jury can pass upon the question.

Now, gentlemen, if the plaintiff's charge is true, you have one of those cases in which it is to be expected that you will have a class of witnesses on all sides who may not be very much relied on. In these cases of bankruptcy failures, where goods are gotten away the day before the petition is filed or a short time before, and they are purchased by people who are in the habit of dealing in goods so obtained, it is not surprising if you find you have to deal with a class of witnesses whose veracity may not be entirely satisfactory. You have to do the best you can in these cases. A trustee in bankruptcy has to do the best he can, and it would not do in such cases if you formed an unfavorable opinion of any of the witnesses to simply say you cannot put any reliance in such evidence, and therefore won't decide anything. It is just this class of cases in which it is the duty of a jury to investigate the case carefully, and to see that justice is done.

Now in this case each of the leading witnesses undoubtedly has a considerable interest in the case. Mr. Joseph has a large interest in this case. Suit is brought against him for a judgment of \$5,000 or \$6,000, and it is a suit which will affect to some extent his professional standing. Mr. Gilroy has an interest in this case. He has the natural interest of trying to justify himself for whatever has taken place. According to his own statement here, if Joseph isn't responsible for the money he has paid out he is, and so with the goods. Altschul and Von Praag have an interest here. Altschul admits that, knowing that the bankruptcy occurred, he took advantage of the fact that he had this property in his custody to coerce the payment of his claim in full. He stood in the same position as any other creditor, and he has the interest of justifying himself, and defending himself from the charge of willingly taking part in a transaction of this sort. Von Praag is a witness under similar circumstances. The plaintiff claims, in substance, that he is in the business very much like a receiver of stolen goods; that he is in this business of buying up stock from bankrupts, and in aiding them in that manner in cheating their creditors. All these men have these interests, but the mere fact that they may be interested should not prejudice you against them in the slightest degree. You should look at the whole case fairly, candidly, reasonably, bearing in mind the just rights of these defendants, particularly of Mr. Joseph, a man who has been a member of the bar here for many years,

and also taking into view the rights of the plaintiff in this case, who represents the creditors of this firm.

It is all a question of fact. The plaintiff has the burden of proof. He must establish his claim by a preponderance of evidence. This is an important case in the sense that all such cases are important. It is important that in bankruptcy cases the parties on the eve of bankruptcy should not be permitted with impunity to hide their property and to transfer it for the purpose of cheating their creditors, and on the other hand it is important to the defendants in this case that no rash or unjust verdict should be found against them, and that care should be taken to insure that the verdict, if a verdict is found against them, is justified by the evidence.

I have been handed some long requests to charge by each counsel in this case. Some of them are correct, and some of them in my opinion are not correct. Some of them I should modify, and charge as modified. I have endeavored to touch upon the subjects to which they refer, and, if there is any subject referred to in them which I have not touched upon, counsel are free to call it to my attention. But I think I will not go over them at length. It would occupy a long time, and the reading of them to the jury would in my opinion tend to confuse the issues in this case and confuse the jury. I therefore decline to charge in the special language of these requests, or otherwise than as I have already charged in respect to the subjects which are touched upon in these requests to charge.

Mr. Furber: May it please the court, I will ask the court to charge the eighth request, which we have handed up to you specifically. That if a transaction is equally susceptible of two presumptions, one of guilt and one of innocence, the presumption of innocence must prevail.

The Court: I so charge.

Mr. Furber: I ask your honor to charge the ninth and tenth propositions, in view of Mr. Elkus' statement to the jury with reference to the goods being sent to Altschul.

(9) That every sale of personal property, unless accompanied by an immediate and continued change of possession of the property sold, is presumptively fraudulent, and that if the jury believe that the bill of sale of March 18th purported to sell all the property now described in it to Rose Korn, it would have been presumptively fraudulent if the property had been left in the possession of Gilroy & Bloomfield.

The Court: I so charge.

(10) That a delivery of an order on a warehouseman or custodian for personal property in the possession of such custodian, with the intent to vest title to the same for whose account the order is delivered, is a symbolical delivery of the property.

The Court: I so charge.

Mr. Furber: The twelfth I will ask your honor to charge. That it is not essential to the validity of a written bill of sale that it should bear a date, and the date on which a bill of sale is delivered may be proved, irrespective of whether it is dated or not.

The Court: That is so gentlemen; I so charge.

(13) That the law does not require a written bill of sale to be filed,

and filing it or failing to file it in no way affects its validity or effect.

The Court: I so charge. It certainly does not affect it as between the parties.

(19) I would ask your honor to charge the nineteenth. That there is no evidence when the name of the commissioner of deeds was erased from the assignment of accounts of January 19th, and that no inference adverse to Joseph can be drawn from such erasure.

The Court: Gentlemen, it is for you to say whether there is any evidence. I don't recall any evidence to that effect. I think there is no evidence that Joseph had anything to do with the erasure. He said he ordered it to be erased. I think I shall decline to charge the latter part of that request. It is for the jury to say what inference they will draw from it.

Mr. Furber: May I have an exception to the modification.

(20) That such erasure in no way changed the character, validity, or effect of the bill of sale.

The Court: I so charge.

Mr. Furber: I also draw your honor's attention to the order relieving Mr. Joseph from responsibility, and draw your honor's attention to the fact that it was not that we relied upon, but the further provision in that order that it required the Kornes, Mrs. Korn and Feinman, to pay over to the receiver the 31 pieces of goods, broadcloth and cashmere, taken from the sponger's, Samuel Altschul, and that is what it required them to do, and they have been charged with that specific property upon that inquiry.

The Court: That order is before you, gentlemen. Give it such weight as it requires.

Mr. Kerfoot: I ask your honor to direct a verdict for the defendant Gilroy for the reason that there has been no proof of the allegations in the complaint of fraudulent intent to hinder, delay, or defraud the creditors of the estate, or that he had any of the assets.

The Court: I deny the motion.

Mr. Kerfoot: I request your honor to charge that the intent to hinder, delay, and defraud the creditors, as alleged in the complaint, is an essential element of this cause of action, and that unless the jury believes from the evidence that such intent actuated Gilroy in these transactions they must find a verdict for Gilroy.

The Court: I so charge.

Mr. Elkus: I ask your honor to charge the jury that in considering the evidence in this case they may take into consideration the fact that the bill of sale which is claimed to be delivered on March 18th bears no date, and was not filed, but remained in the possession of the defendant Joseph until the present time.

The Court: Yes, take it into consideration, gentlemen, with all the other evidence in the case.

Mr. Elkus: I ask your honor to charge the jury that they may, upon the question of whether or not the goods delivered to Altschul were delivered to Altschul for Korn, take into consideration the fact that the goods were stored in the name of Gilroy & Bloomfield, and that the order for the goods which Altschul received is in Gilroy & Bloom-

field's name, and that the receipt which Altschul claims was signed by Richard Smith was also of Gilroy & Bloomfield's goods.

The Court: Yes, gentlemen, it is all a part of the evidence, and proper for you to consider.

Mr. Elkus: I ask your honor to charge the jury that they may take into consideration the testimony elicited from Von Praag as to the financial transactions of Joseph with Von Praag.

The Court: Yes; that is part of the evidence.

Mr. Elkus: I ask your honor to charge that the jury may consider in deciding this case the failure to call Greenberg and Hershman as witnesses on the part of the defendant.

The Court: You may consider it, gentlemen. I shouldn't give it very much weight, it seems to me. I do not see that there is evidence that the defendant has any more special control over Greenberg and Hershman than the other side. No inference should be drawn from the failure to call witnesses, except in those cases where there is evidence which naturally they should produce, and which is in their custody and control to produce.

Mr. Elkus: I ask your honor to charge the jury that in considering the testimony in the case they may take into consideration the fact that on Monday after the petition in bankruptcy had been filed Joseph conversed with Altschul with reference to the merchandise stored at Altschul's place of business, and that Joseph went to Von Praag's place of business with Korn on that day, or whatever day it was they went there.

The Court: Yes; I so charge.

Mr. Elkus: I ask your honor to charge that the jury have the right to disregard the testimony of any witness entirely, if they so desire, if they find that such witness has testified falsely to any material fact.

The Court: Yes, that is so, gentlemen.

Mr. Elkus: I ask your honor to charge the jury that in considering the weight to be given to the evidence of the defendant Joseph in this case they may take into consideration his prior testimony given March 24, 1904, before the commissioner.

The Court: I so charge, gentlemen.

Mr. Palmer: In view of the requests that have been made by Mr. Elkus, I ask your honor to charge the jury in regard to the goods sent to Altschul. They may take into account that it was said by Gilroy in his testimony that the silks and satins sent over on account of Rosie Korn's claim were about the value of \$3,000, and it is stated that her claim was between \$5,000 and \$6,000.

The Court: Certainly.

Mr. Palmer: I ask your honor to charge the jury if they find that the goods sent to Altschul were sent as goods to satisfy the claim of Rosie Korn, it does not matter in whose name they were sent.

The Court: I so charge.

Verdict for the plaintiff for \$3,250.

Mr. Kerfoot: I move to set aside the verdict as to the defendant Gilroy, for the reason that it is contrary to the evidence, and for a new trial.

Motion denied. Exception.

Mr. Furber: I move to set aside the verdict on the ground that it is against the weight of evidence.

Motion denied. A stay of 30 days after entry of judgment granted.

IN RE SHAW.

(District Court, D. Maine, July 5, 1906.)

No. 4.203.

1. CHATTEL MORTGAGES—VALIDITY—TRANSFER OF POSSESSION—SUFFICIENCY—VALIDITY OF LIENS.

A bankrupt, who operated a tannery in Maine, some two years prior to the bankruptcy executed a chattel mortgage to a creditor on all the stock and materials at his tannery and such as should thereafter be acquired. By agreement the mortgage was not recorded, nor was any possession ever taken thereunder. Subsequently the mortgagee made a mortgage to secure an indebtedness to a bank on certain bark at the bankrupt's tannery, to which it had no title unless by virtue of its own mortgage. Also, by agreement, this mortgage was not recorded, but an attempted delivery of possession was made by going to the tannery, scaling the bark, and placing on each pile a small board, having thereon a letter of the alphabet, and then formally delivering each pile to the agent of the bank, who appointed the bankrupt its custodian. There was no visible change of possession, and the bankrupt's trustee took possession of and sold the bark as assets of his estate. *Held* that, under Rev. St. Me. c. 93, § 1, which provides that "no mortgage of personal property is valid against any other person than the parties thereto unless possession of such property is delivered to and retained by the mortgagee or the mortgage is recorded," there was no such delivery and retention of possession as to validate either mortgage, but that both were fraudulent as attempted secret liens, and void as against the bankrupt's trustee.

2. BANKRUPTCY—FRAUDULENT TRANSFERS—RIGHTS OF TRUSTEE—EFFECT OF ESTOPPEL OF BANKRUPT.

The estoppel of a bankrupt to deny the validity of a lien on his property does not affect his trustee, where such lien was voidable by his creditors.

In Bankruptcy. On review of decision of referee.

Charles K. Cobb, for the National Exchange Bank of Boston, Mass.

Joseph W. Lund, for Jos. W. Lund, trustee of W. S. Keene Leather Co. of Boston, Mass.

Powers & Archibald, for George A. Gorham and Willis I. Shaw.

HALE, District Judge. This case comes before the court upon the report of Edwin L. Vail, Esq., one of our referees in bankruptcy. The report is as follows:

"I, Edwin L. Vail, the referee in bankruptcy in charge of this proceeding, do hereby certify that in the course of such proceeding an order, a copy of which was annexed to the petition hereinafter referred to, was made and entered on the 30th day of August 1905; that Joseph W. Lund, as trustee in bankruptcy of the W. S. Keene Leather Co., a party in interest, feeling aggrieved thereat, filed a petition for review, which was granted; that the National Exchange Bank of Boston, a party in interest, feeling aggrieved thereat, also filed a petition for review, which was granted; that a summary of the evidence upon which said order was based, together with a review of the case, as follows: This is a controversy over the title to 1,844.27 cords

of hemlock bark, situated in the town of New Limerick, Me., which said bark was at one time unquestionably the property of Willis I. Shaw, the bankrupt in this case. There are three claimants to this property or the proceeds of the sale of the same: First. George A. Gorham, Jr., of Houlton, Me., trustee in bankruptcy of Willis I. Shaw, claims title as said trustee. Second. Joseph W. Lund, of Boston, trustee in bankruptcy of the W. S. Keene Leather Co., claims title as said trustee by virtue of a certain chattel mortgage hereinafter referred to. Third. The National Exchange Bank of Boston claims title by virtue of a certain chattel mortgage hereinafter referred to. The bark in controversy was sold by George A. Gorham, Jr., as trustee of Willis I. Shaw, and the following was agreed to by all parties in interest: 'It is hereby agreed and stipulated that the bark in controversy and contended to be secured by its mortgage when scaled was found to contain 1,844.27 cords, and that number of cords was sold at \$5 per cord by the trustee of Willis I. Shaw with the consent of all parties in interest.' A further agreement was entered into between the parties in interest, wherein they agreed to submit this controversy to this court for determination; all questions of jurisdiction being waived, reserving only the right of appeal. Said agreement is herewith inclosed, and marked 'Exhibit 7, E. L. Vail Referee.' This matter came on for a hearing before me after several continuances on the 19th day of May, 1905. The three parties in interest were present with their counsel, as more fully appears by the examination and records in this case. The said Willis I. Shaw was adjudged a bankrupt June 25, 1904, on his petition filed June 21, 1904. The title of Joseph W. Lund, trustee of W. S. Keene Leather Co., to the bark in question is claimed by virtue of a certain chattel mortgage given by Willis I. Shaw to W. S. Keene Leather Co., and dated March 10, 1902, which said mortgage was never recorded in the town records of the town of New Limerick, nor possession taken under said mortgage. This mortgage was given for the amount of \$97,344.13, the balance due the W. S. Keene Leather Co. from the said Willis I. Shaw, as appeared by the books of said Keene Leather Co. This mortgage is herewith inclosed, and marked 'Exhibit 11, E. L. Vail Referee.' The first clause of said mortgage, after reciting the consideration, reads as follows: 'All hemlock bark that I now have on hand at my tannery at said New Limerick, also all hemlock bark that I shall hereafter acquire in the usual and ordinary course of my business as a tanner at said New Limerick, for the purpose of running my tannery at said New Limerick, purchased from the proceeds of the using up in said tannery business my bark now on hand in tanning leather, and from receipts from said bark through the tanning of leather at said tannery.' The mortgage in the same manner attempts to cover all materials used in the tanning business, including stock on hand, horses, carriages, carts, and wagons. On May 10, 1902, before the execution of the above mortgage, Willis I. Shaw, so far as the records in this case show, unquestionably had an absolute title to the property covered by the mortgage, and had a perfect right to mortgage the same. In order to part with that title, either absolutely or conditionally, there must be a transfer of said property or a public record. In the present case the mortgage was never recorded, and there is no claim that possession was taken under the same. Therefore, I do not consider the title of the trustee of the W. S. Keene Leather Co. of sufficient strength to demand any lengthy discussion at the present time.

"Now as to the claim of the National Exchange Bank. On January 23, 1904, the W. S. Keene Leather Co. was indebted to the National Exchange Bank of Boston for moneys previously advanced without security on a line of credit previously arranged and limited to \$25,000. About January 23, 1904, the bank demanded security, claiming as a reason that certain notes of the Keene Co. were found in the hands of note brokers of questionable financial reputation. Mr. Cauley, treasurer of the Keene Co., and Mr. W. S. Keene, president of the Keene Co., had a conversation with Mr. Murdock, president of the bank, and agreed to give him a chattel mortgage of certain hemlock bark, about 4,000 cords, situated at the Shaw tannery in New Limerick, Maine. In this conversation it seems to have been agreed that the mortgage was not to go on record, as it might hurt the credit of the

Keene Co. [Examination of J. W. Cauley, page 17.] Mr. Shaw states on page 25 of his examination that it was agreed and understood that the mortgage was not to be recorded. Mr. Whitmore states on page 30 of his examination that it was agreed that the mortgage was not to be recorded, and that in conversation with Mr. Shaw, Mr. Shaw said, 'Of course, this mortgage is not to be recorded.' The Keene Leather Co. has attempted to transfer the title to 4,000 cords of bark by an unrecorded mortgage as above, its own title to the same bark being by virtue of an unrecorded mortgage, wherein there is no assumption of title by possession. After the conversation with Mr. Murdock as president of the bank, Mr. Whitmore as attorney of said bank, and Mr. Keene went to New Limerick for the purpose of executing to the National Exchange Bank the mortgage agreed upon, which purported to secure an indebtedness to the bank of about \$25,000. The bark covered by this mortgage was situated in the town of New Limerick, at the tannery yard of Willis I. Shaw, and a delivery of the bark was attempted in the presence of Shaw from the Keene Co. to W. D. Whitmore, as agent or attorney of the National Exchange Bank. The different piles of bark were scaled, and lettered A, B, C, D, E, and F, respectively, on each end of the piles, and then and there Mr. Whitmore delivered said bark contained in the mortgage to Mr. Shaw to hold as the agent of the bank; thus attempting to acquire title to the bark by evading a public record.

"The evidence in this case to my mind clearly shows that a fraud has been attempted. According to Mr. Whitmore's testimony, the entire scheme was blocked out in his office in Boston, including a letter to be signed by Shaw and directed to the bank. At the time this mortgage was given the bank unquestionably controlled the financial destiny of the Keene Co., and the Keene Co., on the other hand, controlled Shaw's financial future. It was a financial necessity for the Keene Co. to secure the bank, as also Shaw's financial existence depended upon his mutely agreeing to any terms which the Keene Co. might dictate. Shaw says, on page 34 of his examination, that he never sold the bark except by mortgage, and there is no evidence to show that he ever parted with the bark, or gave any one sufficient title to give a valid mortgage of the same; and the vital point at issue in the whole case is simply this, could Shaw stand mutely by, and allow the Keene Co. to mortgage the bark in question, regardless of their right to convey title to the same, and is such transaction good as against the creditors of Shaw? To say the least, the transaction is open to the gravest suspicion. Mr. Whitmore, on page 30 of his examination, in reply to a question by Mr. Archibald, 'What is the conversation with Shaw?' A. (by Whitmore) 'As I recall it, when Mr. Shaw came out from his conference with Mr. Keene, he said to me "Of course this mortgage isn't going on record," and I said "No, it is not. I have drawn papers to effect a delivery and retention by us (meaning the bank), with you acting as our custodian."' Whitmore, as attorney for the bank, denies that he knew the source of the title of the Keene Co. to the bark. From the above conversation he must have known that Shaw still held enough interest in the same to insist that no record should be made of any mortgage. There was no notice given to any creditor of this transaction other than the bank, and no possession taken except as above. As far as the public and other creditors were concerned, the ownership remained the same as before; Shaw now acting in the capacity of custodian for the bank instead of the real owner. The only attempt at notice was the wooden placards, about six inches square, nailed to each end of the piles. The bark was taxed to Shaw, and his trustee in bankruptcy has already paid the tax. The placards placed on the ends of each pile were evidently placed there for the purpose of evading notice rather than to give it. What notice could possibly be given to the public or to creditors of a change of title simply by nailing up placards with certain letters upon them? It might be a scaler's identification as to the scaling of the bark, or for numerous other reasons, any one of which would be as reasonable as notice to the public of a sale. No one was qualified or authorized to explain the meaning of the notices, and it was certainly intended that no one except Shaw, Keene, and the bank should know of the transfer at least until four months had elapsed. If parties in-

tend to rely upon possession and retention rather than a public record, it had been repeatedly held in Maine and Massachusetts that it must be an open and notorious possession and retention of the goods. The case of *Moors v. Reading*, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460, has been cited, and I think has some bearing upon the present case. In this case the court says: 'That, even if it be assumed that there was a taking of possession, there was no such retention of possession as satisfied the statute. The purpose of the statute is to prevent mortgagors by means of possession from misleading people into the belief that they are owners.'

"The further question of after-acquired property is involved in this case. Shaw testifies in his examination (page 36) that about one-half of the bark mentioned in his original mortgage to the Keene Co. was on hand in his yards when the mortgage to the bank was given by the Keene Co. True, the mortgage to the bank attempts to cover after-acquired property, but there is no pretense that the Keene Co. took possession under its mortgage of 1902. And in the case of *Hamlin v. Jerrard*, 72 Me. 62, 78, a case relied upon by the bank's attorneys, the court says: 'At law, although a power is given in a deed of assignment to take possession of after-acquired property, no interest is transferred, even as between the parties, unless possession is actually taken.' If the Keene Co. never took possession of the after-acquired property under its unrecorded mortgage of 1902, it certainly would have no legal right to mortgage this after-acquired property to the bank; and, aside from the question of fraud, a legal title to only one-half of the bark in controversy could pass to the bank. Again, the vote of alleged directors or stockholders of the Keene Co., authorizing the giving of this mortgage, has many suspicious earmarks. First, it is undated. Second, it is signed by J. W. Cauley, clerk, when in fact Frederick Hale of Portland, Me., was the clerk of the corporation. The record does not show whether it is a vote of the directors or the stockholders, nor does it show or describe any particular bark which was to be mortgaged, and no record of the transaction was ever annexed to the vote. The whole transaction was evidently consummated in great haste, for what purpose there can be but one conclusion—to secure the bank at the expense of the creditors of Shaw.

"It further appears from the schedules filed in this case and from the proofs of debt on file that after the giving of this mortgage to the National Exchange Bank January 23, 1904, extensive credit was given to Shaw by creditors who had no possible way of knowing or finding out the existence of the incumbrances on his estate. So far as the records showed, the bankrupt's property, valued at about \$100,000, was unincumbered, with the exception of a balance due on real estate to the Dexter Savings Bank of Dexter, Me., of about \$1,500. The effect of the enforcement of this transfer to the bank would be certainly to give them a preference over the other creditors of the same class, and in *Re Blennerhasset v. Sherman*, 105 U. S. 100, 121, 26 L. Ed. 1080, the court say that a transaction similar to this is a fraud upon creditors, and void at common law. If the contention be true that Shaw parted with his title to the bark, and gave the Keene Co. authority to mortgage the same, Shaw should certainly have credit for the same upon the books of the Keene Co. No such credit appears.

"My conclusions, reached from a review of the whole transaction, are that a fraud has been attempted upon the creditors of Shaw, and that an allowance of this mortgage would be a consummation of the fraud. I here-with submit to the honorable court my finding in this case with this review, together with all exhibits and examinations pertinent to the same.

"Respectfully submitted,

"Edwin L. Vail,
"Referee in Bankruptcy.

"Dated at Houlton, Maine, March 5, 1906."

It will be seen from the above report of the referee that this controversy involves the title to about 2,000 cords of hemlock bark, which formed a part of the assets of Willis I. Shaw, and which passed to his trustee in bankruptcy. The proceeds of this bark are now claimed—

first, by Shaw's trustee in bankruptcy; second, by Joseph W. Lund, of Boston, trustee in bankruptcy of the W. S. Keene Leather Company, under a mortgage given by Willis I. Shaw to the W. S. Keene Leather Company, dated March 10, 1902; third, by the National Exchange Bank of Boston, by virtue of a mortgage from the W. S. Keene Leather Company to said bank, dated January 23, 1904.

The referee has sufficiently stated the testimony. It appears that Willis I. Shaw, the bankrupt, had an absolute title to the bark in question at the time he executed the mortgage to the W. S. Keene Leather Company. The claim of Shaw's trustee in bankruptcy is good, unless the claim arising under one or both of the above mortgages is sustained. The property was not delivered to the Keene Leather Company, nor retained by it under the mortgage, and the mortgage was not recorded. Chapter 93, section 1, of the Revised Statutes of Maine, provides that:

"No mortgage of personal property is valid against any other person than the parties thereto, unless possession of such property is delivered to, and retained by the mortgagee, or the mortgage is recorded by the clerk of the city, town, or plantation organized for any purpose, in which the mortgagee resides, when the mortgage is given."

It is clear that the claim of the Keene Leather Company under this mortgage cannot be sustained, as there is no testimony tending to show that the mortgage was ever recorded, or that possession of the property was delivered to and retained by the mortgagee.

In reference to the claim of the National Exchange Bank, it appears by the report that at the date of the mortgage given by the W. S. Keene Leather Company that company was indebted to the National Exchange Bank for loans which had previously been arranged, limited to the sum of \$25,000. No new advances were made upon the giving of the mortgage. On that day, the treasurer of the Keene Leather Company, in a conference with the president of the bank, agreed to give him a chattel mortgage of 4,000 cords of hemlock bark, situated in the Shaw Tannery, at New Limerick, Me. The testimony tends to show, also, an agreement, made at this conference, that the mortgage was not to be recorded, for the reason that such record might injure the credit of the Keene Company. After this conference, Mr. Murdock, president of the bank, and Mr. Whitmore, its attorney, went with Mr. Keene, president of the Keene Leather Company, to New Limerick. The bark covered by the mortgage was found at the tannery yard of Willis I. Shaw in New Limerick. The mortgage was executed. A delivery of the bark was attempted from the Keene Company to W. D. Whitmore, as agent of the National Exchange Bank. This delivery consisted in locating the different piles of bark, having them scaled, and attaching to each pile a wooden block, about six inches square. Each of these blocks was marked with a letter of the alphabet. Mr. Keene, Mr. Shaw, and Mr. Whitmore went to these several piles of bark lying in the tannery yard, and Mr. Keene, touching each pile, said, "I deliver to you this pile of bark under the terms of this mortgage, to hold as the agent of the National Exchange Bank." Mr. Whitmore then delivered a letter to Mr. Shaw which had been written in Boston, ap-

pointing Mr. Shaw as the agent of the bank to hold the property. Mr. Shaw then gave Mr. Whitmore a receipt for the bark. No notice of this transaction was given to anybody other than the parties to the transaction. It does not appear that the bark was marked in any way as the property of the W. S. Keene Leather Company, or as the property of the bank, or that any mark indicating proprietorship was placed upon it. There was no delivery of possession other than the delivery as stated above. The yard and the bark remained open as before. Other piles of bark remaining in the yard were used by Mr. Shaw in the course of business. There is nothing in the testimony to indicate that there was any intention that any one except Shaw, Keene, and the bank should know of the transfer of the bark; there was no scaling of the bark by a public scaler, and the bark continued to be taxed to Shaw.

The learned counsel for the bank has contended with great ability and learning that a mortgagee may obtain title by one of two methods pointed out by the statute—either by the recording of the mortgage, or by taking and retaining possession under it—and that possession, taken and retained under the mortgage, was sufficient to validate his title; that Shaw, by standing by and assisting in the delivery of possession, estopped himself, and now estops his trustee, from being heard in court to claim a title to the bark in question.

After a careful review of the case, I cannot sustain the contention of the bank. Under the statutes of Maine, there are alternative methods of obtaining title under the mortgage. It is true that by taking one method it cannot be said that the other method is evaded. Title by either method is equally valid. In the case at bar the mortgage was not recorded. It cannot be claimed, then, that this one of the alternative methods was complied with. The other alternative is that possession of the property shall be "delivered to and retained by the mortgagee." The evidence does not, in my opinion, disclose a state of facts which warrant the court in coming to the conclusion that the bark in this case was delivered to and retained by the mortgagee. The testimony does not disclose an open, notorious, and visible delivery to, and retention by, the mortgagee. Whatever may be said of the action of Shaw being held as an estoppel to himself, it cannot be held to affect the rights of his trustee in bankruptcy. The trustee cannot be regarded to be one of the "parties" to the mortgage. The trustee not only represents the bankrupt, but, under the bankrupt act, he takes the property transferred by the bankrupt in fraud of his creditors, and all property which, prior to the filing of the petition, the bankrupt could by any means have transferred, or which might have been levied upon and sold under judicial process against him. There was no open change of possession resulting from what was done between the Keene Company and the bank and Shaw. There was nothing which would be a notice to creditors, and nothing in the transaction to have prevented creditors from attaching the bark "under judicial process against the bankrupt." I think the testimony reported by the referee to me warranted him in coming to the conclusion which he has stated in his report.

The question as to the compliance with either statute, alternative, is a question of fact. There is no testimony tending to show that the mortgage was recorded, and no claim that such was the fact. When we come to consider the other alternative, the question of delivery to, and retention by, the mortgagee is as distinctly a question of fact. After hearing all the testimony, the referee has decided that there was no such open possession and retention of the property by the mortgagee as is sufficient to comply with the statute. I cannot find that he was in error in coming to this conclusion. In *Griffith v. Douglas*, 73 Me. 532, 40 Am. Rep. 395, the court held that the mortgage, even though recorded, was not valid unless the goods were delivered by the mortgagor to the mortgagee with the intention to ratify the mortgage, and the mortgagee retained open possession of the after-acquired property until the time of the attachment. Chief Justice Appleton, speaking for the court, said:

"The authorities are uniform in requiring that not merely delivery, but retention of the property delivered, is indispensable to the perfection of the mortgagee's title, whether the mortgage purports to convey after-acquired property or should be unrecorded."

See, also, *Wright v. Tetlow*, 99 Mass. 397; *Moors v. Reading*, 167 Mass. 322, 45 N. E. 760, 57 Am. St. Rep. 460; *Drury v. Moors*, 171 Mass. 254, 50 N. E. 618; *Haskell v. Merrill*, 179 Mass. 120, 60 N. E. 485.

As I have already said, the testimony in the case at bar does not show such open delivery to, and retention by, the mortgagee of the property as would, in my opinion, have prevented a general creditor from attaching it, and holding it as the property of Shaw. Instead of tending to show an open transfer to, and retention by, the mortgagee, the testimony rather leads to the belief that the transfer was intentionally secret, and not intended to be notorious. There is no testimony tending to show that the Keene Leather Company ever asserted any rights under its mortgage, or did anything to vest the title in itself. On the date of its mortgage, then, to the bank, the Keene Leather Company had no title which it could convey. The title remained in Shaw. The only rights against Shaw which passed to the bank by the mortgage from the Keene Leather Company were rights by estoppel, which resulted from Shaw's standing by and assenting to the transfer. This is made the most of by the learned counsel for the bank; but, if the conveyance shall be held to be a conveyance by estoppel from Shaw to the bank, this estoppel can relate only to Shaw, and not to his trustee in bankruptcy. In spite of anything done by way of delivery to, and retention by, the mortgagee, I am of the opinion, as I have already indicated, that an attaching creditor of Shaw could have prevailed in an attachment of the bank, and, therefore, that there passed to this trustee property which might have been levied upon and sold under judicial process against the bankrupt. I think the case at bar presents an instance of a fraud on the policy and objects of the bankrupt law as clear as that contained in *Blennerhasset v. Sherman*, 105 U. S. 100, 26 L. Ed. 1080, which latter case is cited by the referee in his report.

In *Rogers v. Page*, 140 Fed. 596, Judge Lurton, speaking for the United States Circuit Court of Appeals in the Sixth Circuit, said:

"The fact that this was a secret lien gave this property the appearance of being unincumbered, and was the moving inducement of some of his existing creditors to grant delay by extension and renewal. The debtor actively represented this land as an available asset, which he was in constant expectation of selling, and that the proceeds would pay all his debts and disincumber his other property. These representations operated to quiet his existing creditors, and to obtain from some of them extensions and renewals of new credit, in at least one proven case. * * * The mere fact that a mortgage has by negligence been omitted from registration does not avoid it as between parties. * * * But there is a distinction between a mere negligent failure to record a mortgage or deed and a deliberate agreement to do so, although the mere fact of an agreement to withhold from record is not of itself such evidence of a fraudulent purpose as to constitute fraud in law. It is, however, a circumstance constituting more or less cogent evidence of a want of good faith, according to the particular situation of the parties and the intent as indicated by all of the facts and circumstances of the particular case."

In the case at bar the testimony tends to show that, at the time of the giving of the mortgage to the bank, Shaw was insolvent, that there was an obvious attempt to make the delivery to the mortgagee secret, rather than open, and that there was a distinct and affirmative understanding that the mortgage was not to be recorded. The case discloses a want of good faith, resulting in an actual fraud upon the general creditors.

I think the referee was correct in his conclusion "that a fraud was attempted upon the creditors of Shaw, and that an allowance of the mortgage to the bank would be a consummation of the fraud."

The finding of the referee in his report is confirmed.

The claim of George A. Gorham, trustee, to the proceeds of the 1,844.27 cords of hemlock bark is affirmed.

UNITED STATES v. MARTINDALE.

(District Court, D. Kansas, First Division. October 12, 1903.)

No. 3,575.

1. BANKS AND BANKING—MISAPPLICATION OF FUNDS OF NATIONAL BANK—ELEMENTS OF OFFENSE.

Funds of a national bank are not misapplied by an officer for the purpose of constituting a criminal offense, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], merely by the drawing of a draft on a fund on deposit in another bank, or by entering a credit to a depositor on the books; but it is necessary that the fund should have been actually withdrawn or converted in some form, so that it is lost to the bank, and such loss must be averred in an indictment for the offense, and the facts set out showing it to have been unlawful.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 964.]

2. SAME—INDICTMENT—DESCRIPTION OF OFFENSE.

An averment in an indictment, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging that defendants, as director and cashier of a national bank, by means of a draft drawn by them or by other stated means misapplied the moneys, funds, and credits "of said association without

the knowledge and consent thereof," is not equivalent to an averment that the act was done without the knowledge and consent of the directors, as required by the statute, and is insufficient.

3. SAME—MISJOINDER OF SEPARATE OFFENSES.

Where an officer of a national bank is charged in an indictment with the fraudulent misapplication of its funds in the payment of several and distinct notes, each payment constitutes a separate misapplication, and must be charged in a separate count.

4. SAME—INDEFINITENESS.

A count in an indictment, under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], charging that defendant, as a director of a national bank, between certain given dates abstracted and misapplied a stated sum of the moneys, funds, and credits of the bank, without further specification, is insufficient, as too general and indefinite.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 973.]

On Motion to Quash Indictment.

John S. Dean, U. S. Atty.

C. B. Graves, L. B. Kellogg, and Frank Hagerman, for defendant.

PHILIPS, District Judge. The defendant, William Martindale, with one D. M. Davis, who has never been arrested, is indicted for alleged violations of the provisions of section 5209 of the national banking laws [U. S. Comp. St. 1901, p. 3497] of the United States. He was vice president of the First National Bank of Emporia, Kan. There are 19 counts in the indictment. The defendant Martindale has filed a motion to quash all the counts of the indictment.

First Count.

The specifications in the first count are much involved, indefinite, and obscure; so much so, that after much study of its phraseology it is difficult for the court to comprehend it without resorting to implication—an infirmity in criminal pleading that should never be tolerated. Reduced to its substantive effect, it charges that the defendant, Martindale, was vice president and director of said bank. That on or about the 16th day of April, 1899, he and said Davis, who was then the cashier of said bank, misapplied the moneys, funds, and credits "of said association without the knowledge and consent thereof," with the intent then and there to injure and defraud the association, and with intent to convert the same to the use and benefit of the Salina Gas & Electric Light Company, and William Martindale, D. M. Davis, Martindale & Cross, and C. S. Cross, in the sum of \$5,150 of the moneys, funds, and credits of said association, in that said William Martindale and D. M. Davis did issue and cause to be issued a certain draft of the First National Bank of Emporia, Kan., drawn on the First National Bank of New York City, payable to the order of G. A. Fernald & Co., in the amount and value of \$5,150, of date April 16, 1896. It is then alleged that said draft was drawn for the purpose of paying a certain promissory note, dated October 11, 1895, due April 14, 1896, signed by the Salina Gas & Electric Light Company, payable to the order of Martindale & Cross, and by Martindale & Cross and William Mar-

tindale and C. S. Cross indorsed to one Piper, cashier, and by him indorsed for collection and remittance to Geo. A. Fernald & Co., which said note was payable at the office of the Central Loan & Debenture Co., Kansas City, Mo. That said draft was afterwards, on the 21st day of April, 1896, presented to and paid by the First National Bank of New York City out of the funds, moneys, and credits of the said First National Bank of Emporia, Kan., then on deposit in the First National Bank of New York City. It is then alleged:

"That at the time of the issuance of the draft aforesaid by the said William Martindale and D. M. Davis, vice president and director and cashier, respectively, as aforesaid, on to wit, the 16th day of April, 1896, there was nothing due or owing by the First National Bank of Emporia, Kan., or out of the funds, moneys, and credits thereof, to the said Salina Gas & Electric Light Company, Martindale & Cross, or William Martindale, or C. S. Cross, or D. M. Davis, and the said association had received no consideration for the same."

—as they, the said named parties, then and there well knew, and said draft was issued without said banking association receiving any consideration for the same, and was used for the benefit of the said Salina Gas & Electric Light Company, Martindale & Cross, William Martindale, C. S. Cross, and D. M. Davis, and certain other persons than the First National Bank of Emporia, Kan., to the grand jurors unknown, with intent to injure and defraud said bank.

It is difficult to escape the impression, after a careful reading of this count, that it was drawn upon the theory that the offense of misapplication was completed at the time the draft was drawn on the New York bank. It has been expressly ruled by the Court of Appeals of this circuit that to complete the misapplication of the funds of a bank it is necessary that the fund should be withdrawn from the possession or control of the bank, or a conversion thereof in some form should occur, so that the bank loses the same. *Dow et al. v. United States*, 82 Fed. 904, 27 C. C. A. 140, 49 U. S. App. 605; *Mohrenstecher et al. v. Westervelt*, 87 Fed. 157, 30 C. C. A. 584, 57 U. S. App. 618. This is so, for the obvious reason that, in respect of a check drawn on a bank, although the drawer may not at the time have any fund on deposit with which to pay it, non constat, he may have when the check is presented for payment; and in respect of the draft issued by the Emporia bank on the New York bank, the drawer might at any time before presentation and payment thereof withdraw it or stop payment.

It is suggested by the District Attorney that this ruling has no application to the count in question for the reason that the draft was drawn payable to a third party (Geo. A. Fernald & Co.), and, eo instanti, the bank thereby became obligated therefor to such third party. This, undoubtedly, is a correct proposition of law as applied to a proper state of facts. If the draft had been placed to the credit of Geo. A. Fernald & Co. in the Emporia bank, it would at once inure to the depositor's benefit, and the funds of the bank, by this credit, would thereby have been lessened. But the draft in question having been drawn on the New York bank at the city of New York, it was the duty of the payee to duly present to the drawee at its place of business the draft for payment, "without unreasonable delay, or the drawer or indorsers will be discharged; for they have an interest in having the

bill accepted immediately, in order to shorten the time of payment, and thus to put a limit to the period of their liability, and also to enable them to protect themselves by other means before it is too late, if the bill is not accepted and paid within the time originally contemplated by them." 4 Am. & Eng. Ency. of Law (2d Ed.) 350. It therefore follows that no loss could have been sustained by the Emporia bank until the draft was presented and paid in New York and charged up to the Emporia bank. It is not even affirmatively alleged in this count that the money thus paid by the New York bank was lost to the Emporia bank. This important fact is left to mere inference, which is vicious pleading in indictments.

Be this as it may, there is a fatal objection to this count in that it does not allege that the transaction in question, out of which the draft was issued, was without the knowledge and approval of the board of directors or the discount committee of the bank. The allegation of the indictment is that it was a misapplication "of the moneys, funds, and credits of said association, without the knowledge and consent thereof." It is to be spelled out of the loose recitations of the indictment that said note of the Salina Gas & Electric Light Company, indorsed by the defendant and others, was discounted at the bank as the basis for issuing the draft to Fernald & Co. It has been the understanding of the law of pleading in such indictments, ever since the ruling of the Supreme Court in *United States v. Britton*, 108 U. S. 193-197, 2 Sup. Ct. 526, 27 L. Ed. 701, that it must be alleged that the note, placed in the bank as the basis of the fund drawn out by the check or draft, should have been discounted or received without the knowledge or approval of the board of directors or governing discount committee. The court said:

"One branch of the business of a banking association is the discounting and negotiating of promissory notes, and this is to be done by its board of directors or duly authorized officers or agents. Section 5136, Rev. St. [U. S. Comp. St. 1901, p. 3455]. There is no provision of the statute which forbids the discounting of a note not well secured, or both the maker and indorser of which are insolvent. It is within the discretion of the directors, or the officers or agents lawfully appointed by them, to discount such a note if they see fit, and it might, under certain circumstances, tend to the advantage of the association. This count does not charge that the note of the defendant was discounted at his instance, without the authority of the board of directors. * * * It is not alleged that the discount was procured by any fraudulent means. From all that appears, the board of directors, or the officer or agent by whom the note was discounted, may, upon knowledge of all the facts, in the utmost good faith and for the advantage of the association, have decided to discount the note. The discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of its discount. But whether the discounting of the note was an advantage to the association or not, and whether the note was paid or not, is immaterial. If an officer of a banking association, being insolvent, submits his own note, with an insolvent indorser as security, to the board of directors for discount, and they, knowing the facts, order it to be discounted, it would approach the verge of absurdity to say that the use by the officer of the proceeds of the discount for his own purposes, would be a willful misapplication of the funds of the bank, and subject him to a criminal prosecution."

This proposition evidently was present to the mind of Judge Taft in his charge in *United States v. Youtsey* (C. C.) 91 Fed. 868, 869.

This is a reasonable ruling. As such negotiations and credits are committed by the national banking law to the board of directors, or the constituted discount committee, if the transaction undergoes their observation and approval, the vice president, who obtains the benefit of the credit, is not culpable unless he procures the approval by some fraud or deception; and therefore the indictment should either negative any knowledge or approval thereof by said directors or committee, or aver some fraudulent imposition practiced by the defendant in securing its approval.

The District Attorney relies upon the case of *McKnight v. United States*, 115 Fed. 972-986, 54 C. C. A. 358, for the proposition:

"That where the circumstances proven are such that the consent of the board of directors would constitute no offense, it is unnecessary to aver the want of such consent; that under the circumstances as alleged in this count the consent of the board of directors would not have relieved the transaction of its criminal character; that it is only in cases where the consent of the board of directors would relieve the transaction of its otherwise criminal character that it would be necessary to allege the want of consent," etc.

The case under consideration there by the court was a charge of embezzlement, and it is to be observed that the indictment in that case (see page 986, of 115 Fed., page 372, of 54 C. C. A.) "averred that the transactions of McKnight were without the consent of the board of directors or of the discount committee." All that the learned judge who wrote the opinion meant to say was that, where the proof on the trial disclosed a state of flagrant criminality on the part of the bank officers in loaning the funds of the bank to irresponsible parties, it would, without more, raise the presumption that it was done without the approval of the board of directors or governing committee, so as to devolve the burden of proof on the defendant to show that his action was authorized by the directors or committee; and further, that notwithstanding it should be shown that the act of the offending officer was approbated by the directory or committee, if it were an unlawful act, prohibited by law, connived at by the directors, proof of their approval could not avail the defendant. The opinion does not hold that an indictment is good which simply charges that an insolvent note, placed in the bank as the basis of a discount, the fruit of which is appropriated to the private use of the bank officer, without more, or that an averment is sufficient which simply charges that the act was done without the knowledge or consent of the association.

The pleader in this case recognized the obligation, in drawing the indictment, to charge that the transaction had "passed muster" without the proper authority, and he therefore alleged that it was done without the knowledge of the association. The term "association" is generic. It may comprehend the whole body of men, like the stockholders, who unite in forming the body politic of a banking institution; in which sense the allegation of the indictment might be true when the board of directors or the governing committee had not passed upon the transaction. As it is a recognized usage and fact that the matter of daily discounts and transactions of this character in a national bank are conducted by and through discount committees, the indictment, as applied to the instance of this count, should negative the knowledge and

approval of the recognized body for passing on such transactions. In criminal proceedings the rule *strictissimi juris* obtains. Nothing can be left to inference or implication.

There are other objections made on the argument and in the brief of defendant's counsel to this count, but, as the objections already discussed are fatal, it is not deemed necessary to go further in this discussion.

Second Count.

This count is similar to the first, except in the date and amount of the draft drawn, which is for \$10,000, issued February 20, 1897, on a New York bank, payable to the order of the Investors' Agency Company, and paid in New York on February 25, 1897. It is subject to the same objections.

Third Count.

The charge in this count is similar to that contained in the first count in respect of a draft issued on October 20, 1897, for \$5,000 on a Kansas City, Mo., bank, paid in Kansas City October 22, 1897. It is subject to the same objections.

Fourth Count.

This count charges misapplication of the funds of the bank, growing out of a draft drawn by the Excelsior Water Mill Company for \$5,000 on the defendant, in favor of the Burlington National Bank, with the allegation that said draft was paid out of the moneys, funds, and credits of the said Emporia bank to the Burlington bank by the defendant and said Davis by making and causing to be made a deposit slip in the words and figures as follows: "First National Bank of Emporia, Kansas. Deposited for account of Burlington Nat. 7-17-97. \$5,000.00. W. Martindale," who made and caused to be made by one ———, whose name is to the grand jurors unknown, a clerk in said bank, in a book used by said association, and designated as "Cash Book X," a certain entry to the credit of Burlington National Bank: "July 17, 1897. Burlington Nat. Martindale, \$5,000." That afterwards said Burlington National Bank drew from the funds of said First National Bank the sum of \$5,000 so placed to its credit, as aforesaid; the defendant and said Davis knowing that said Excelsior Water Mill Company and the defendant had no moneys, funds, or credits in said First National Bank to pay said draft, and that said association received no consideration for the same, and that the same was without its knowledge and consent, the defendant and said Davis then and there fraudulently devising that the said Burlington National Bank, the Excelsior Water Mill Company, and the defendant should obtain possession of said \$5,000 for the use and benefit of said Excelsior Water Mill Company and the defendant, whereby the said funds and credits were then and there unlawfully misapplied and converted to the use of the said Excelsior Water Mill Company and of the defendant. This count is subject to the objection discussed respecting the first count, that the transaction is not alleged to have been without the knowledge or approval of the board of directors or governing committee.

It is furthermore apparent from a careful reading of this count that it proceeds upon the theory that the misapplication was in entering a credit to the Burlington National Bank of the sum of \$5,000, the same as if it had been deposited by the defendant in cash. The entry was not the misapplication of the fund, but the wrong would consist in withdrawing the money from the bank. The only allegation of the indictment in this respect is, "that afterwards said Burlington National Bank drew from the funds of said First National Bank the sum of five thousand dollars so placed to its credit." There is no allegation as to when this was done, or that there was any wrong or fraud in withdrawing the money; nor is there any negation that any additional consideration may have been given by the Burlington Bank at that time. Neither is there any allegation of any loss of this money to the bank. The only statement is that at some time after July 17, 1897, the Burlington Bank drew the sum of \$5,000. Whether or not this was ever lost or paid, or sufficient security therefor given, is nowhere alleged. As shown in the previous discussion, it is essential to show a loss. As said in *Britton's Case*, *supra*, the discount may have turned out to be a benefit to the association, for there is no averment that the note was not paid at maturity, or that the association suffered any loss by reason of this discount. As heretofore stated, as held in the *Dow Case*, a mere entry in the books of the association did not constitute a misapplication, but as the crime was committed and consummated only when the money was drawn from the bank, it must follow that the indictment must show that the money got out of the bank in some way. As stated by the court in *Britton's Case*, 108 U. S. 193-197, 2 Sup. Ct. 526, 27 L. Ed. 701, the terms "willfully misapplied" have no marked, technical meaning. "They do not, therefore, of themselves, fully and clearly set forth every element of the offense charged. It would not be sufficient simply to aver that the defendant willfully misapplied the funds of the association. This is well settled by the authorities we have already cited. There must be averments to show how the application was made, and that it was an unlawful one." See, also, *United States v. Northway*, 120 U. S. 327-332, 7 Sup. Ct. 580, 30 L. Ed. 664; *Batchelor v. United States*, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478; *United States v. Eno* (C. C.) 56 Fed. 218, 219, 220.

Fifth Count.

This count charged misapplication, in that on July 10, 1897, there was deposited in said Emporia bank to the credit of said defendant the sum of \$5,000 by entry of such deposit in his account, "which said sum was afterwards drawn by and paid to said William Martindale by said banking association," without any averment as to when it was so drawn or paid, or the manner thereof. This count is subject to the same objections discussed in respect of the first count, with the further objection that there is no averment to show how the application was made, and that it was an unlawful one. Neither is there any sufficient showing of any loss to the bank by reason of the transaction. The averments respecting lack of consideration and fraudulent intent of the defendant have reference to the entries on the books, which seems to have been the gist of the offense in the mind of the pleader.

Sixth Count.

As the District Attorney at the hearing announced that he would enter a nolle as to this count, it is useless to take the time of the court in discussing its validity or invalidity, as under such announcement it is the duty of the court to direct a nolle to be entered.

Seventh Count.

This count charges a misapplication, in that there was deposited to the defendant's credit on April 1, 1898, the sum of \$5,000. It is quite evident from reading the specifications of this count that it was in the mind of the pleader only to charge the completion of the misapplication by the act of entry in the books of the bank, and not in the withdrawing of the funds. There is no showing when or under what circumstances the money was drawn from the bank, nor is any loss directly alleged to have occurred. The count is also subject to the objection discussed in respect of the first count of the indictment for a failure to allege that the transaction was without the knowledge or approval of the board of directors or discount committee.

Eighth Count.

The misapplication alleged in this count consists of a deposit of \$6,000 in the Emporia bank to the defendant's credit on August 1, 1898, the charge being that a deposit slip was made on that day crediting Martindale with \$6,000, "which said sum was afterwards drawn by and paid to William Martindale by said association." No allegation is made that the transaction was without the knowledge or approval of the board of directors or governing committee. The count proceeds, evidently, upon the theory that the misapplication consisted in the entry in the account of the defendant, and not in drawing out the money from the bank. Neither does it show how, when, nor the circumstances under which, the money was drawn from the bank, nor does it appear that the money was lost to the bank. It is made apparent to the court that the government does not rely upon a conviction under this count, inasmuch as the District Attorney has subsequently indicted the defendant in several counts, which at the argument was stated by the District Attorney to grow out of and to cover this \$6,000 transaction, in which second indictment the palpable infirmities of this eighth count are sought to be corrected.

Ninth Count.

As it was stated by the District Attorney at the argument that a nolle would be entered as to this count, it need not be considered.

Tenth Count.

The charge in this count is based upon a deposit in said Emporia bank to the credit of Martindale & Cross August 2, 1897, of \$10,000, and the misapplication grew out of an entry of a deposit slip, as heretofore discussed. The averment is, "which said sum was afterwards drawn by and paid to Martindale & Cross and William Martindale," without any showing as to how, when, or under what circumstances

the money was drawn or paid, showing that it was drawn upon the theory that the misapplication of the funds of the bank was accomplished in the entering in the account of Martindale, and not in drawing out the money from the bank; nor is it directly averred that any loss occurred to the bank, nor that the transaction was without the knowledge or approval of the board of directors or discount committee.

Eleventh Count.

The charge of misapplication of the funds of the bank in this count is predicated of a payment September 27, 1897, of a note of Leibfried, indorsed by Martindale & Cross and Martindale, which payment is alleged to have been made out of the moneys of the Emporia bank then on deposit with the First National Bank of New York City, by which bank it was there paid. This count is subject to the same objections discussed in the first count of the indictment.

Twelfth Count.

As the District Attorney at the hearing announced that he would enter a nolle as to this count, its discussion is unnecessary.

Thirteenth Count.

As the District Attorney at the argument announced that he would enter a nolle as to this count, its consideration by the court is unnecessary.

Fourteenth Count.

This count is subject to the same objections discussed in respect of the first count.

Fifteenth Count.

This count is subject to the same objections heretofore discussed.

Sixteenth Count.

This count is subject to the same objections heretofore discussed. To this count, as also to other counts of the indictment, counsel for defendant makes the further objection that the indictment, in effect, charges three acts of misapplication in one count, for the reason that the sum drawn from the bank was applied to the payment of three separate notes; and, as the misapplication of the funds of the bank was only completed when the money was paid, and payment was made of three separate notes, they were separate, distinct misapplications, and it was error to join them in the same count. If the misapplication was consummated only when the money was applied and used, the acts of misapplication were separate and distinct, and it would follow that this objection is well taken.

Seventeenth Count.

This count charges the misapplication on November 27, 1898, of a note of the Salina Gas & Electric Light Company of \$1,768.17. There is no averment that the transaction was without the knowledge or approbation of the board of directors or governing committee, and there is nothing alleged in this count showing any loss to the bank on account

of this transaction. The pleader seems to have proceeded upon the idea that it was wholly unnecessary to charge that any money was paid on account of this transaction, and contented himself with predicated the offense on the mere entry to the credit of the defendant.

Eighteenth Count.

As the District Attorney at the argument announced that he would enter a nolle as to this count, its discussion is omitted for the reasons heretofore stated.

Nineteenth Count.

This count alleges, in general and comprehensive terms, that between the 16th day of April, 1896, and the 16th day of November, 1898, the defendant abstracted and misapplied \$150,000 of the moneys, funds, and credits of the bank. As suggested by the court at the argument, this count might properly be termed an omnium gatherum, a summing up in one general, broad, sweeping charge the aggregate of the funds which the defendant might be supposed to have wrongfully misapplied or taken from the bank. No man should be put to trial upon such a wholesale charge without specifications or particularization to indicate to him, definitely, what is intended to be proved under such charge. Such pleading in an indictment is decisively disapproved of by the Supreme Court in *Batchelor v. United States*, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478.

It results that the motion to quash the counts of the indictment discussed is sustained, and that an order will be made on suggestion of the District Attorney, directing a nolle as to the sixth, ninth, twelfth, thirteenth, and eighteenth counts of the indictment.

UNITED STATES v. MARTINDALE.

(District Court, D. Kansas, First Division. January 18, 1904.)

BANKS AND BANKING—PROSECUTION FOR MISAPPLICATION OF FUNDS OF NATIONAL BANK—VARIANCE.

An indictment under Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], against an officer or director of a national bank for willful misapplication of its funds, in order to advise the defendant of the issues to be met, must set forth all of the facts necessary to show how the misapplication was made, and that it was an unlawful one. Under such an indictment charging that the misapplication was made by the drawing of checks on the bank, and obtaining their payment when he had in fact no money on deposit, where it appeared on the trial that defendant had an apparent credit on the books of the bank sufficient to cover the checks, the government cannot impeach such apparent credit by showing that a deposit previously entered on the books to the credit of defendant's account was false and fictitious, and the entry thereof fraudulently procured by defendant; no such transaction being charged in the indictment.

John S. Dean, U. S. Atty.

C. B. Graves, L. B. Kellogg, and Frank Hagerman, for defendant.

PHILIPS, District Judge. The question submitted for decision is as follows: The defendant stands indicted under section 5209 of the 146 F.—19

Revised Statutes of the United States [U. S. Comp. St. 1901, p. 3497], so much of which as is pertinent to the case in hand reads as follows:

"Every president, director, cashier, etc., of any association who embezzles, abstracts or willfully misapplies any moneys, funds or credits of the association * * * shall be deemed guilty of a misdemeanor," etc.

The indictment, in substantive effect, charges that the defendant, being a director and vice president of the First National Bank of Emporia, in the state of Kansas, on the 13th day of September, 1898, unlawfully, knowingly, willfully, and fraudulently, with the intent to injure and defraud said banking association, without the knowledge and consent of the board of directors and committees thereof, abstracted certain of the moneys, funds, and credits of said bank for his use and benefit, and for the use, benefit, and advantage of the person and persons unknown to the grand jurors, of the sum and value of \$15, the property of said bank, by the manner and means of the said defendant then and there paying and causing to be paid to certain persons to the grand jurors unknown a check for said sum of money, drawn by the defendant out of the moneys, funds, and credits belonging to said bank, said check authorizing and directing said bank to pay to the order of Charles Cross said sum; that the same was then and there willfully, wrongfully, and unlawfully appropriated and converted to the use and benefit of the defendant, and was thereby wholly lost to the said bank; that when said check was paid and caused to be paid the defendant then and there had no moneys, funds, and credits on deposit to his credit with said bank; that his account as a depositor with the bank was then overdrawn many hundreds of dollars; that there was then and there no money owing to the defendant from said bank; that the repayment thereof was not in any way secured, and the defendant had no right to draw any moneys from said bank, or to convert the same to his or any other person's use and benefit; that this was done with the intent to injure and defraud said bank—concluding with the charge that the defendant, as such director and vice president, thereby abstracted said sum of \$15 from said bank. The indictment contains 18 similar counts, for similar sums, drawn subsequently at different times, as late as the 16th day of November, 1898, aggregating about \$5,078.

Under this indictment the government, after making proof of the giving of said checks to various parties by the defendant and the payment thereof by the bank, about which no controversy is made, seeks to show that while by the books of the bank there appears to have been a deposit entered to the credit of the defendant on the 1st day of August, 1898, on a deposit slip in words and figures following, to wit, "First National Bank, Emporia, Kansas. Deposit for account of W. Martindale 8-1-98, \$6,000.00," the amount of which credit more than covered the aggregate of said checks so drawn and paid, said credit was fraudulently procured by the defendant without any consideration moving from him to the bank, and without the knowledge and consent of the board of directors or the discount committee of the bank, and that the same in legal effect was fictitious. This offer of proof by the government is objected to by the defendant for the reason that the

indictment, in describing the method and means of misapplying the moneys and funds of the bank, gives the defendant no notice that the integrity of said credit on the books of the bank is to be inquired into and assailed, and because the indictment alleges there was nothing to the defendant's credit in the bank. If this evidence is excluded by the court, the District Attorney conceded that the prosecution must fail under this indictment.

In the leading case of *United States v. Cruikshank et al.*, 92 U. S. 544, 23 L. Ed. 588, it is held that where the statute itself does not employ terms describing the offense with a well known and established meaning at common law, it is not a sufficient compliance with the sixth amendment to the federal Constitution, which demands that in criminal cases prosecuted under the laws of the United States the accused has the constitutional right to be informed of the nature and cause of the accusation, to simply employ the generic terms of the statute. Every ingredient of which the offense is composed must be accurately and clearly alleged. "The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause. * * * For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances." Bishop, in his work entitled *New Criminal Procedure* (volume 1), epitomizes the rule of pleading in indictments as follows:

"The facts in allegation must be the primary and individualizing ones, and therefore the pleader must set out the primary facts, disconnected from the law. (Sec. 331) All the facts which constitute the crime should be given. (Sec. 509) The protection of the innocent is the highest duty of the government, and an innocent man, as every defendant is presumed to be until convicted, can know nothing of what is to be brought against him beyond what is set down in the indictment. Hence, the precise and full allegation, which one conscious of crime would not need, is essential to him who would make a just defense against a false charge; and such, in the eye of the law, is every indicted person previous to conviction. (Sec. 517) The indictment must be in distinct and full terms, so plain as to preclude the necessity of guessing at the meaning. (Sec. 518) Every fact which is essential in the *prima facie* case of guilt must be stated; otherwise there will be at least one thing which the accused person is entitled to know whereof he is not informed. And that he may be certain what a thing is, it must be charged expressly, and nothing left to intendment. All that is to be proved must be alleged. (Sec. 519)."

Accordingly, it has been uniformly ruled that an indictment predicated of section 5209, Rev. St., under the banking law, for the misapplication or abstraction of the funds of a bank, as these terms have no such technical meaning, like the word "embezzle" as used at common law and in statutes, or the words "steal, take, and carry away," must "specify the particulars of the application, so as to distinguish that charge in the indictment as willful and criminal from those others contemplated by the statute which are unlawful but not criminal." And it is held "to be of the essence of the criminality of the misapplication

that there should be a conversion of the funds to the use of the defendant, or of some person other than the association, with intent to injure and defraud the association, or some other body corporate or natural person." Therefore an indictment founded on these offenses must show "how the misapplication was made, and that it was an unlawful one. Without such averments there is no sufficient description of the exact offense with which the defendant is charged, so as to enable him to defend himself against it, or to plead an acquittal or conviction in bar of a future prosecution for the same cause." *United States v. Britton*, 107 U. S. 655, 669, 2 Sup. Ct. 512, 27 L. Ed. 520; *United States v. Northway*, 120 U. S. 327, 332, 7 Sup. Ct. 580, 30 L. Ed. 664; *Batchelor v. United States*, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478.

The contention on the part of the government is that in no form of pleading, including an indictment, is the pleader required to set out his evidence; and in support of the allegation that when the defendant drew checks in question he had no moneys or credits to his account with the bank, when he offers evidence falsifying the \$6,000 entry of credit on the books of the bank, of date August 1, 1898, showing that it was in point of fact wholly fictitious and without consideration, such proof is within the allegations of the bill, as it tends, as matter of evidence, to support the general allegation of a willful and false misapplication of the funds of the bank, by drawing checks thereon when in fact he had no money or credits to his account therein. The principal reliance in support of this broad proposition is the language employed by Judge Jackson in *United States v. Harper* (C. C.) 33 Fed. 484, as follows:

"Loans made and credits given in bad faith, for the purpose of defrauding the bank or to enable him to convert the same to his own use and benefit, or for the use and benefit of another, would be an unlawful and criminal exercise of authority. The form of a loan or giving of credit upon the books of the bank may be adopted as a cover and pretense to conceal a fraudulent transaction; and when resorted to for that purpose, and the moneys of said association are withdrawn by such means, and converted to the officer's own use, whereby injury results to the bank, he is guilty of a criminal act. A false and fictitious credit given to himself or to others acting for his benefit is no credit in the sense of the law. It neither confers rights in favor of the party to whom it is given, nor imposes obligations on the bank. The form which such a transaction may take, the methods adopted to reach the fraudulent ends, or the instrumentalities employed—whether consisting of one act or a succession of acts—to accomplish the fraudulent purpose, in no way changes or alters the character of the act. The law looks through forms, devices, and contrivances to results. No system of bookkeeping, however adroitly or cunningly devised, can give validity to a fraud. If, therefore, fictitious or fraudulent credits were given upon the books of the bank, either to the defendant or to other persons acting for him, neither he nor they acquired thereby any right to the funds of the bank represented by such credits. A credit upon the books of the bank, to be valid and create the relations of creditor and debtor between the parties having such credits and the bank, must represent value received by the bank in the shape of actual cash, or what is honestly deemed its equivalent. It must represent bona fide indebtedness of the bank. Such a credit obtained by an unauthorized charge or credit ticket, without consideration passing to the bank, is no credit in the eye of the law; and when the funds of the bank are drawn out under such a credit, they are wrongfully obtained."

It is to be kept in mind, however, that the learned judge was not discussing the question of pleading in an indictment, but rather the effect of such evidence. He was speaking in respect of an indictment predicated of the direct charge of a false entry made in the books of the bank. The only information given us by the report of the case is that, "the counts relating to false entries charge intent to defraud the bank or deceive its officers." It must be assumed that the indictment set out, in conformity to the requirements of established rules heretofore discussed, a description of the false entries, how and when made, with the essential precision, coupled with the specific charge that it was done with intent to defraud and injure the bank. No conviction could be had on such false entries without such descriptive allegations in the indictment, directly predicated of such distinct offense, under section 5209 of the banking statute. Whereas, in the case at bar it is sought to enter into proof of such entry, to show that it was false, fraudulent, and fictitious, without any allegation whatever of its character, when or how done, or with what intent, or on what consideration, when concededly without falsifying said entry no conviction can be had under the pending indictment.

Even in civil actions it is well settled that fraud respecting the identical act to be avoided must be pleaded before it becomes an issuable fact. It cannot be pleaded in general terms, but the essential constitutive facts must be specified. "Fraud is never presumed, and in order to entitle a party to relief either at law or in equity on that ground it is essential that the fraud be distinctly alleged in the pleadings, so that it may be put in issue, and evidence thereof given. * * * In the absence of such an allegation, evidence of fraud will not be received at the trial." 9 Enc. of Pl. & Prac. 684, 685. "The reason of this rule is that fraud is a conclusion of law from the facts stated, and it is a well-settled rule of pleading that facts, and not legal conclusions, are to be pleaded. Mere general averments of fraud or the fraudulent conduct of a party, without the facts, do not constitute a statement upon which the court can pronounce judgment." Id. 686, 687. "Every material fact to which the plaintiff means to offer evidence ought to be distinctly stated in the premises. If fraud is charged, it must be distinctly and clearly set out." Story, Eq. Pl. par. 28, 251; Noonan v. Braley, 2 Black (U. S.) 499, 17 L. Ed. 278; Knox v. Smith, 4 How. (U. S.) 298, 311, 11 L. Ed. 983; Brooks v. O'Hara (C. C.) 8 Fed. 529, 532; Hazard v. Griswold (C. C.) 21 Fed. 178, 179. So in Phelps v. Elliott (C. C.) 35 Fed. 455, 461, it is said:

"The proofs must be according to the allegations of the parties, and if the proofs go to matters not within the allegations, the court cannot judicially act upon them as a ground for decision, for the pleadings do not put them in contestation. * * * A party can no more succeed upon a case proved but not alleged than upon a case alleged but not proved."

If this were a proceeding in equity to compel restitution of the money covered by the checks in question, on the ground that the defendant at the time had no credit in the bank entitling him to draw on

the bank, when the books of the bank as a matter of fact showed that at the time the checks were drawn there was an apparent credit, of anterior specific date, the entry of a sum to the defendant's credit sufficient in amount to cover such checks, if it were the purpose of the complainant to attack such entry as fraudulent, false, and fictitious, by all the established rules of pleading he would be required, by direct averments in the bill, to falsify the entry in order to open up the account for rectification before any such proof could be admitted. 1 Enc. Pl. & Prac. 107; Bispham's Prin. of Eq. (5th Ed.) § 486. Indeed, there is authority from which the conclusion might be drawn that where such credit entry is given on the books of a bank, and the depositor receives from the bank the usual checkbook, in which said deposit was entered by the receiving teller of the bank (a custom so universal as to well warrant the court in concluding it was observed in this instance) on which the customer is drawing, the checkbook being posted, the transaction partakes of the nature of an account stated, the effect of which can only be avoided in equity by a bill surcharging or falsifying it. *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 6 Sup. Ct. 657; 29 L. Ed. 811; *McKeen v. Bank*, 74 Mo. App. 281, 286; 1 *Morse on Banks and Banking* (4th Ed.) § 291.

The case of *Hoyt v. State*, 50 Ga. 313, 315, is an apt illustration of the application of these protective principles of pleading to a criminal indictment. The defendant was charged with receiving specific sums in specific months from a railroad company for the purpose of paying for railroad ties, which sums he converted and embezzled. The evidence was that he reported to the company proper disbursements of the amounts thus received, but as a matter of fact in some instances he did pay to persons from whom he reported purchases less than the sums reported, and in some instances reported, purchases from fictitious persons. The court said that:

"Under an indictment making a general charge of fraudulent conversion, as stated, we do not think it competent for the prosecution to prove that the accused had reported to the bailor special payments as having been made to particular persons, in the performance of his duty as bailee, and that such payments were not, in fact, made to the amounts so reported; or, that there were no such persons as those to whom the payments were reported to have been made. Each of such fraudulent acts would be a crime, and proof thereof would be sufficient to sustain a conviction, and the defendant should be put upon notice of such charge. * * * If the state be aware of such acts, so as to be prepared to prove them on the trial, it would have the same knowledge and the same testimony so as to frame the indictment, that it may contain whatever is necessary to put the counsel on notice of that with which he is charged and of which he is to be convicted. Even in civil cases such a rule of pleading obtains. No trustee who has made his returns is liable to have them attacked, unless the notice is given in the proceedings against him. If he has omitted to make a proper charge against himself, a specific allegation must be made thereof, by way of surcharging, so as to hold him liable. If he has given himself a credit which is false, or to which he is not in law entitled, the proceedings against him must allege it by a charge falsifying it. If this be the liberal rule in a civil case, there should be as equally a benign one in a criminal procedure. * * * The testimony offered and objected to was that the defendant's books showed payments to certain persons in 1870, and that there were no such persons. There were three of this

class that were claimed to be proven not to exist. If it were a fact, in each case it was a crime proved, upon which a conviction could be founded. There were then three distinct offenses, each one independent of the other, each sufficient upon which to rest indictment and conviction, and yet of neither was there any charge or notice until the testimony was offered. The same may be said of the testimony as to larger credits being given by the defendant to himself than the amounts actually paid. That was sufficient to show fraudulent conversion in each case, and to support indictments charging them and convictions thereon. It might not be going too far to say that it is a good if not the true rule that where a specific act is an offense under the Penal Code, and that act is to be made by proof, the ground on which a conviction is to be had constituting the crime to be punished, that specific act should be charged in the indictment. It is not necessary that the indictment should allege or show the testimony which is to be used on the trial, but it should set forth sufficiently the act committed by the accused which constitutes the offense charged, and for which act the conviction is sought."

So in *Commonwealth v. Shepard*, 1 Allen (Mass.) 578, 583, the court, speaking of the charge of embezzlement against the treasurer of a bank, where the evidence might perhaps produce some result of incriminating evidence of the transaction in a different form, said:

"The government was bound to prove the exact offense as it was charged in that count. Doubtless there was proof that the defendant had been guilty of making false entries in his books, and perhaps evidence which tended to show previous acts of embezzlement, but he was not convicted on any count in the indictment which charged such offenses."

Turning to the indictment at bar, it is manifest from the condition in which the question to be decided arises that the real controversy in this case is as to the validity of the transaction of August 1, 1898, by which the \$6,000 credit was obtained. It is the initial and central fact, which draws to it the decision of this case. That transaction, under the proof offered in this case, would show a false entry, within the meaning of said section 5209, and would constitute a distinct offense under the statute. *Coffin v. United States*, 162 U. S. 683, 684, 16 Sup. Ct. 943, 40 L. Ed. 1109; *Agnew v. United States*, 165 U. S. 52, 17 Sup. Ct. 235, 41 L. Ed. 624. When this indictment was drawn the statute of limitations had run against the offense of such false entry.

It may be conceded, however, that the giving of the checks and drawing thereon the money from the bank, was the culminating act of the offense of misapplication. But the fact of such entry having been made on the 1st of August, 1898, occasions no dispute, and the giving of the checks by the defendant on the bank occasions no dispute; but the real question which the government seeks to have litigated in this indictment is as to whether or not the entry of August 1, 1898, was false and fictitious. Ostensibly the defendant had a credit of \$6,000 on the books of the bank, entitling him to draw the checks in question. Therefore, as a part of the case to be made out by it, before it can go to the jury, the government admits that it must go back to the creation of this credit account on the books of the bank (as the books themselves, which the government must put in evidence, show this credit), assail and demolish it. It must show that by some effective fraud, such as deceit or false representation or

conspiracy, the defendant brought about this entry. It must show that the transaction was wholly fictitious, without consideration, procured without the knowledge and consent of the governing board of directors or the discount committee, designed and intended to defraud the bank of its moneys and funds, and that in furtherance of this scheme the checks were issued and the money withdrawn from the bank. The transaction of August 1, 1898, is therefore the initial point, a part of the means—the method—by which the defendant abstracted the money of the bank. If the government is to rely upon this proof, as it must, to make out a case, what right had the pleader to omit any reference thereto in the indictment? Under its contention, the scheme to defraud was necessarily composed of two parts—first, the fraudulent wrongful obtaining of the credit shown by the bankbooks; and second, the withdrawing therefrom the money based on this credit, as any bank teller of the bank, on presentation of checks drawn by the defendant, would treat such credit account as *prima facie* correct. It seems to me that the fraudulent scheme—the method—by which the false entry was made and the money abstracted constitute an indivisible unit, and cannot be halved, nor in less degree subdivided.

There is nothing on the face of the indictment to indicate to the defendant that this initial substantive transaction of August 1, 1898, was to be inquired into and its integrity determined by the jury on the trial of this case. It is true that in determining the question of the honest or evil motive—the intent—of the defendant when he gave the checks in question a wide latitude of inquiry may be indulged. Within reasonable limits, the government might be indulged to go into many of the antecedent acts and dealings of the defendant with the funds of the bank, and his methods of obtaining credit and moneys therefrom. This, however, would come under the head of the *quo animo* as to the particular instance on trial. But this rule does not trench upon the inflexible requirement in criminal indictments, that in describing the methods by which the defendant, as a director, misapplied or abstracted the funds of the bank, the indictment should, with reasonable certainty, specify every material requirement of the fraudulent scheme characterizing the particular transaction to be tried, and under the rules heretofore stated the government should be limited to the acts specified in the indictment.

It may be conceded that the indictment on its face is good in charging a misapplication or abstraction of the funds of the bank, in that, in substance, it charges that the defendant, with intent to defraud the bank of its moneys, gave the checks, and thereby enabled the drawee to obtain the money of the bank, knowing that the defendant had overdrawn his account, and had no credit to him in the bank, with no purpose to replace the fund. But the question presented for decision is, can the defendant be held, in the preparation of his defense, to anticipate that under the mere charge of giving the checks and drawing out the money of the bank, when he had overdrawn his account, and had nothing to his credit in the bank, he should come to trial prepared to show that the credit of \$6,000 of

August 1, 1898, placed to his account on the books of the bank long anterior to the giving of the checks, was genuine and honest? If so, where would be the limit to such inquiry? There might be several anterior entries of credits to the defendant's account with the bank, the last of which might be genuine and some of the others fraudulent and false. How many of them or which particular entry may the government assail, without premonition to the defendant, in attempting to make out the case presented under the indictment?

This court is advised from 18 counts in the first indictment against this defendant, the sufficiency of which it heretofore passed on, that this defendant had large dealings of debits and credits with said bank, extending over a long period of time anterior to the giving of the checks in question. If the government, under the present indictment, can go into proof of the integrity of the one, why may it not as to any other of the series by way of showing, as the sum of the result, that the defendant was not in law and fact entitled to draw on the bank the several checks in question? If such a range of inquiry is to be indulged to the government under this indictment, it does seem to the court that no defendant's liberty would be safe against the probability of surprises being sprung on him at the trial. One of the cardinal reasons assigned by the text-writers and the courts for requiring such indictments to set out with reasonable certainty of specification the essential acts constitutive of the fraud is that in case of another prosecution the defendant may avail himself of the record by plea of *autrefois acquit* or *convict*. It therefore becomes all-important to a defendant that the whole of the particular transactions leading directly to the constitution of the offense should be embraced within the allegation of the indictment. There ought not to be any uncertainty about it. Nor ought the defendant to be driven in his plea of former jeopardy to proof in pais, with its attendant difficulties and disputes, when the government seeking his conviction, in the interest of humanity and justice, being in possession of the facts when the indictment was drawn, could so easily make the proof a matter of record evidence by the allegations of the indictment. In other words, it would have been the exact method, in order to get the alleged false entry of August 1, 1898, in evidence, for the indictment to have alleged, in effect, that the defendant, intending to defraud and injure the bank, and obtain its moneys without consideration, procured an entry to be made on the books of the bank of date August 1, 1898, by which it was made to appear by a deposit slip that he had on that day placed and deposited with the bank to his credit the sum of \$6,000, when in truth and in fact he had placed no such sum with the bank; that the same was without consideration, fictitious, and fraudulent; and that in furtherance of his said scheme to defraud and injure the bank by obtaining its moneys he did afterwards issue the checks in question, whereby the moneys of the bank were withdrawn, and misapplied to the use of the defendant.

The court holds that the evidence in question, proposed to be offered on behalf of the government, is inadmissible under the indictment.

UNITED STATES v. NEW YORK CENT. & H. R. R. CO. SAME v. NEW YORK CENT. & H. R. R. CO. et al. (two cases). SAME v. GUILFORD et al.

(Circuit Court, S. D. New York. July 6, 1906.)

1. CARRIERS—INTERSTATE COMMERCE—REBATING—INDICTMENT.

An indictment against a railroad company for violation of the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as supplemented by the Elkins act (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), alleged that defendant published a sugar schedule for the transportation of sugar from New York to Cleveland at the rate of 21 cents per 100 pounds; that on a specified day the American Sugar Refining Company induced defendant to make an unlawful agreement to allow a rebate of 6 cents on sugar shipped by it to Cleveland for reconsignment, and 4 cents on sugar shipped to Cleveland as its ultimate destination; that the sugar company thereafter shipped various consignments, paid the schedule rate, and afterwards made claims on the railroad company, and was paid a rebate. *Held*, that such facts sufficiently showed a violation of the provisions of the act prohibiting deviations from the published rates.

2. SAME—OBSERVATION OF PUBLISHED TARIFF—WILLFUL FAILURE.

An indictment against a railroad company and the agent of certain shippers, alleging that full schedule rates were first paid by the railroad company for the transportation of certain freight, and that thereafter \$920.39 was paid to the shipper's agent by way of rebates and concessions in respect to the transportation of freight under a previously made unlawful agreement, sufficiently charged that the payment of the rebate was a willful failure to observe the published tariff, and therefore stated a violation of the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as supplemented by the Elkins act (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]).

3. SAME—PARTIES—JOINDER.

Under the interstate commerce act (Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), as supplemented by the Elkins act (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), providing that a corporation engaged in interstate commerce and its agents may be criminally liable for giving rebates, a carrier and its agents may be prosecuted for the same offense in a single indictment.

4. CONSPIRACY—CARRIERS—GIVING AND ACCEPTING REBATES—INDICTMENT.

Under the Elkins act (Act Cong. Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), abolishing imprisonment as a punishment for offenses committed against the acts regulating interstate commerce, an indictment alleging that the agents of a shipper and the agents of a railroad company engaged in interstate commerce stipulated to give and receive rebates on the transportation of sugar from New York to Detroit, and thereafter gave and received such rebates in pursuance of such fraudulent conspiracy, merely alleged a violation of the interstate commerce act as amended by the Elkins act, and was therefore not sustainable as alleging a conspiracy to commit an offense against the United States, punishable by imprisonment, under Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676].

5. STATUTES—PROSPECTIVE OPERATION.

Act Cong. June 29, 1906, amending the Elkins act (Act Cong. Feb. 19, 1903, c. 708, § 1, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]) by striking the provision abolishing imprisonment for offenses under the acts to regulate commerce, and providing a punishment of imprisonment for a term not exceeding two years, etc., was prospective only in operation.

Henry L. Stimson, U. S. Atty., William S. Ball, J. Osgood Nichols, and Henry A. Wise, Asst. U. S. Attys.

Austen G. Fox and John D. Lindsay, for defendants New York Cent. & H. R. R. Co., Nathan Guilford, and Fred L. Pomeroy.

Michael H. Cardozo and Howard S. Gans, for defendants C. Goodloe Edgar and Edwin Earle.

HOLT, District Judge. These are demurrers to four indictments. The indictments are based on alleged violations of the act to regulate commerce, passed February 4, 1887, commonly called the "Interstate Commerce Act," and the various acts amending and supplementing it, including the act of February 19, 1903 (chapter 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), commonly called the "Elkins Act." Three of the indictments charge a giving or taking of rebates in violation of such act, and one a conspiracy to commit an offense against the United States by inducing the giving and taking of a rebate, in violation of such act. The demurrers were argued at the same time and will be considered together.

The indictment against the New York Central & Hudson River Railroad Company contains two counts. The first count charges, in substance, that the defendant was a railroad corporation engaged in the transportation of freight for hire over its own and connecting roads, between, among other points, New York and Cleveland, Ohio; that its freight schedule, published as required by the interstate commerce act, fixed the rate for freight on sugar from New York to Cleveland at 21 cents per 100 pounds; that on November 20, 1902, the officers of the American Sugar Refining Company, a New Jersey corporation, induced the defendant to enter into the unlawful agreement to allow the sugar company a rebate of 6 cents per 100 pounds on sugar shipped by it to Cleveland for reconsignment to further points, and 4 cents per 100 pounds on sugar shipped to Cleveland to go no further; that the sugar company shipped various consignments of sugar under said agreement over defendant's road and connecting roads to Cleveland, and paid the schedule rate of 21 cents per 100 pounds; that afterwards claims for rebate on said shipments were presented by the sugar company to the defendant, upon which, on April 2, 1903, the defendant paid to the sugar company by way of rebate \$26,141.81. The second count is substantially the same as the first, except that the allegations of a preliminary agreement to pay rebates is omitted. The demurrer to this indictment alleges, in substance, that the acts set forth in the indictment and in each count thereof do not constitute a crime under the laws of the United States, and that the indictment is not sufficiently definite and certain.

The principal objection to this indictment urged by the defendant's counsel is that the charge made in both counts, that an unlawful discrimination was made in favor of the sugar company against other persons, is not sufficiently pleaded, because no other person is named who was charged a larger rate, and reliance is put on the case of *United States v. Hanley* (D. C.) 71 Fed. 672. In that case it was held, in substance, that the interstate commerce act prohibited discrimination in rates between shippers, and also deviations from the schedule rates; that

if an indictment was based on alleged discriminations between different shippers it was not enough to show that a particular shipper was charged less than the scheduled rate, but the indictment must allege that some other person designated in the indictment had been charged a higher rate. The court held that, as the company might make an equal reduction to everybody from the scheduled rate, an allegation that a rebate from the scheduled rate had been returned to a particular shipper was not a sufficient allegation of an unlawful discrimination. If it were necessary to base the decision of this demurrer upon this point, I should hesitate to follow the decision in *United States v. Hanley*. I think that if a railroad company receives from a shipper the full schedule rate, and then repays him a percentage of the amount paid as a rebate, there is weighty ground to hold that it is presumptively guilty of illegal discrimination under the act; and that if in fact the railroad company has pursued the extremely improbable course of making a uniform reduction of its rates to everybody, while retaining a higher rate on its published schedules, no substantial injustice will be done to any defendant if he is left to prove that fact as part of his defense. But, without passing definitely upon this question, it is sufficient to say that the case of *United States v. Hanley* also held that the payment of a rebate from the schedule rates violated the provisions of the act prohibiting deviations from the published rates. The allegations of this indictment certainly support that charge sufficiently. In my opinion the indictment is sufficiently definite and specific, and I think that the demurrer to it should be overruled.

The indictment against the New York Central & Hudson River Railroad Company and Nathan Guilford charges, in substance, that at all the times stated in the indictment the railroad company's scheduled rate on sugar from New York to Detroit, Mich., was 23 cents per 100 pounds; that Guilford was the other defendant's traffic manager; that on October 15, 1902, Lowell M. Palmer and Thomas P. Riley, acting as agents of the American Sugar Refining Company and of the firm of W. H. Edgar & Son of Detroit, induced the railroad company and Guilford to agree to pay a rebate of 2 cents per 100 pounds on all sugar shipped by the sugar company to Edgar & Son; that shipments were thereafter made and the scheduled rates paid; that thereafter, on May 14, 1903, the defendants paid to said Palmer, as such agent, \$920.-39 as a rebate. The grounds of demurrer to this indictment are that it is insufficient in law, and that the acts set forth in it do not constitute a crime. The objections urged in its support by counsel are that it does not properly allege that any discrimination resulted, that it does not allege any willful failure by the railroad company to observe the published tariff, and that the individual defendant is improperly joined with the corporation. The point of failure to properly allege discrimination I have already discussed under the first indictment considered. The fact that the indictment alleges that the full schedule rate was first paid to the railroad company, and that thereafter \$920.39 was paid by the defendants to Palmer as agent for the shippers "by way of rebate and concession in respect to the transportation of said sugars under said unlawful agreement" is in my opinion a sufficient allegation that the

payment was a willful failure to observe the published tariff; and as the interstate commerce act as amended and the Elkins act provide that the corporation and its agents may be criminally liable for giving rebates, I do not see why these defendants cannot be prosecuted for the same offense in one indictment. I think, therefore, that the demurrer to the indictment against the railroad company and Guilford should be overruled.

The indictment against the New York Central & Hudson River Railroad Company, Nathan Guilford, and Fred L. Pomeroy is, in substance, similar to the one against the railroad company and Guilford, and the objections taken to it in the demurrer and the agreement of counsel are similar to the objections taken to the indictment in that case. I think, therefore, that the demurrer to this indictment should be overruled.

The indictment against Nathan Guilford, Fred L. Pomeroy, C. Goodloe Edgar, and Edwin Earle differs essentially from the three other indictments. It is an indictment for an alleged conspiracy under section 5440 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 3676]. This indictment charges, in substance, that the New York Central & Hudson River Railroad Company was engaged in the transportation of freight for hire over an interstate route to Detroit, Mich., by its own and connecting lines; that it had published a schedule of rates over this route under the interstate commerce laws; that the rate for sugar from New York to Detroit was 23 cents per 100 pounds; that the American Sugar Refining Company and the American Sugar Refining Company of New York were corporations engaged in selling and shipping sugar from New York over said route; that the defendants Edgar and Earle with one James E. Edgar, now deceased, were a firm doing business in Detroit under the style of W. H. Edgar & Son; that the defendants Guilford and Pomeroy were traffic managers of the railroad company; that Palmer and Riley were agents both for the sugar companies and for Edgar & Son; that on April 1, 1904, at the Southern District of New York, the said Guilford, Pomeroy, James Edgar, C. Goodloe Edgar, and Earle, with other persons to the jurors unknown, conspired with each other and with said Palmer and Riley to commit an offense against the United States by causing and procuring the said railroad company to give rebates on sugar shipped by the sugar companies at New York to Edgar & Son at Detroit over the said route; that it was agreed by said conspirators that a rebate should be given on such shipments of 5 cents per 100 pounds; that sugars were so shipped, the carriage paid for at the scheduled rates, claims made for rebates, and the rebates paid by said Guilford and Pomeroy, acting in behalf of said railroad company, to said Palmer and Riley, acting in behalf of said sugar companies and Edgar & Son. The indictment also alleges as acts done to effect the object of the conspiracy that a letter was written by Pomeroy to Palmer stating the details of the agreement for rebates; that in July and August, 1904, Edgar & Son purchased certain sugars from the sugar companies, which Palmer and Riley caused to be shipped to them at Detroit, and paid for at the tariff rates; and that subsequently claims for rebates were presented, and certain checks paid for such rebates—

one check for \$2,474.54, dated October 28, 1904, and one for \$1,979.-64, dated October 29, 1904.

Various objections under the demurrer are taken to this indictment. In my opinion the most serious of these objections is the claim that, Congress having by the Elkins act expressly abolished imprisonment as a penalty for any offense committed under the acts to regulate commerce, an indictment will not lie for a conspiracy to commit such an offense, which is an offense punishable by imprisonment.

Section 5440 of the United States Revised Statutes, under which this indictment is brought, provides as follows:

"If two or more persons conspire either to commit an offense against the United States, or to defraud the United States in any manner or for any purpose, and when one or more of such parties do any act to effect the object of the conspiracy, all of the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment in the discretion of the court."

The tenth section of the interstate commerce act, as amended (Act Feb. 4, 1887, c. 104, 24 Stat. 382 [U. S. Comp. St. 1901, p. 3160]) previous to the Elkins act, provided that any common carrier, or, when it was a corporation, any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for such corporation, who should be convicted of the offense of an unlawful discrimination in rates, should be liable to a fine not to exceed \$5,000, or to imprisonment not exceeding two years, or both. Any such carrier or person who by false billing, classification, weighing, or other device should willfully assist or willingly permit any person to obtain transportation for property at less than the regular rates should be subject to the same punishment of fine and imprisonment. False billing by shippers or inducing carriers to discriminate unjustly was subject to the same punishment. But the Elkins act, passed in 1903 (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599]), abolished the punishment of imprisonment in such cases, and substituted for it a heavier fine than that authorized by the interstate commerce act. The punishment for the willful failure of a carrier to file and publish the rates required by the act was made a fine of not less than \$1,000 and not more than \$20,000. It was made unlawful for any person or corporation to offer, grant, or give, or to solicit, accept, or receive, any rebate concession or discrimination, and the same punishment was fixed—a fine not less than \$1,000 and not more than \$20,000. The act then provides as follows:

"In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished."

Section 4 of the act (32 Stat. 849 [U. S. Comp. St. 1901, p. 601]) also provides "that all acts and parts of acts in conflict with the provisions of this act are hereby repealed."

It is impossible to deny that Congress intended in the Elkins act to abolish the penalty of imprisonment for the offense of giving or taking

rebates, and to substitute for the previous punishment a much heavier fine than that which could be inflicted under the interstate commerce act. If, therefore, the offense charged in this indictment is essentially the same offense as that created and punished in the interstate commerce acts and the Elkins act, this indictment, in my opinion, cannot be maintained. If Congress has made a certain action an offense and prescribed its punishment, the courts cannot, by giving it some other name, increase the punishment. The question in this case, therefore, is whether the offense charged in the indictment as constituting the crime of conspiracy differs from the offense described in the interstate commerce acts and the Elkins act as the giving and receiving of rebates punishable by a fine. In most cases, undoubtedly, a conspiracy to commit a crime is a distinct offense from the commission of the crime itself. This is true, of course, of all crimes committed by one person, for two persons, at least, are necessary for a conspiracy. Even if more than one person commits the crime, there may be others engaged in a conspiracy to have it committed who do not take part otherwise in the commission of the crime. But there are certain crimes which require for their commission the concurrent action and co-operation of more than one person. Such crimes as rioting, or duelling, or bigamy, for instance, cannot be perpetrated by one person, and persons who do not perpetrate them might take part in a conspiracy to cause them to be done. But when the concurrent action of two persons is necessary to perpetrate a certain crime, and all that they do is to agree to do it and to do it, it seems difficult to claim that their agreement to act is in law a conspiracy, and their act a distinct crime, and that the agreement to act can be punished more severely or differently from the act itself. I think that the offense of giving or receiving rebates is such an act. It requires the concurrence of two persons. A rebate cannot be given unless there is some one who agrees to receive it and who does receive it, and cannot be received unless there is some one who agrees to give it and who does give it. The claim that the agreement to give it is a conspiracy punishable by imprisonment, while the actual giving it is an offense only punishable by a fine, seems to me too subtle a distinction to be drawn in the administration of criminal law. This view is not without authority to support it. In each of the cases of *Shannon v. Commonwealth*, 14 Pa. 226, and in *Miles v. State*, 58 Ala. 390, a man and woman were indicted for a conspiracy to commit adultery with each other. It was held in each case that the conspiracy was the same thing as the substantive offense, and the indictments were quashed. Wharton, in commenting on these cases, says:

"When the law says a combination between two persons to affect a particular end shall be called, if the end be effected by a certain name, it is not lawful for the prosecution to call it by some other name; and when the law says such an offense—e. g., adultery—shall have a certain punishment, it is not lawful for the prosecution to evade this limitation by indicting the offense as conspiracy. Of course, when the offense is not consummated, and the conspiracy is one which by evil means a combination of persons is employed to effectuate, this combination is of itself indictable; and hence persons combining to induce others to commit bigamy, adultery, incest, or duelling do not fall within this exception, and may be indicted for conspiracy." Wharton's *Crim. Law*, § 1339.

In *Regina v. Boulton*, 12 Cox, Cr. Cas. 93, Chief Justice Cockburn says:

"I am clearly of the opinion that when the proof intended to be submitted to a jury is proof of the actual commission of crime it is not the proper course to charge the parties with conspiracy to commit it; for that course operates, it is manifest, unfairly and unjustly against the parties accused. The prosecutors are thus enabled to combine in one indictment a variety of offenses, which if treated individually, as they ought to be, would exclude the possibility of giving evidence against one defendant to the prejudice of others."

In *United States v. Dietrich and Fisher* (C. C.) 126 Fed. 664, the indictment charged that the defendants entered into a conspiracy to commit an offense against the United States by agreeing that Dietrich, a member of Congress, should procure the appointment of Fisher as postmaster, and that Fisher should pay to Dietrich therefor a certain sum of money as a bribe. The court held that the indictment was bad, and in the opinion said:

"The making of such an agreement is not a conspiracy, within the terms of section 5440, but is a several and substantive offense, under section 1781 [U. S. Comp. St. 1901, p. 1212], upon the part of each of the parties, and this without the doing of any overt act in pursuance thereof. * * * As the transaction is stated in the indictment, it was Dietrich who agreed to accept the bribe, not Dietrich and Fisher, and it was Fisher who agreed to give the bribe, not Fisher and Dietrich. The charge is not that two or more persons agreed among themselves to corruptly obtain the aid of another, a member of Congress, in securing the appointment of some aspirant to a federal office, nor is it that two or more members of Congress agreed among themselves to obtain from another person a reward or compensation for their services, or aid in securing such an appointment. * * * The agreement or transaction stated in the indictment was immediately and only between two persons, one charged with the intended taking, and the other with the intended giving, of the same bribe. Concert and plurality of agents in such an agreement or transaction are, in a sense, indispensable elements of the substantive offenses defined in section 1781 of agreeing to receive a bribe and of agreeing to give one. A person cannot agree with himself, receive from himself, or give to himself. The concurrent and several acts of two persons are necessary to the act of acquiring, receiving, or giving. * * * Because concert and plurality of agents, in the sense we have hereinbefore shown, are essential to each of the offenses—there are two, not one—the commission of which is charged to have been the object of this so-called conspiracy, and because no other concert and plurality of agents are here charged, we are of opinion that the acts described in this indictment do not constitute a conspiracy under section 5440."

And see *Chadwick v. United States* (C. C. A.) 141 Fed. 225, 236, where the Dietrich Case is cited with approval.

The counsel for the government assert that the Dietrich Case is to be distinguished from this case because in the Dietrich Case but two persons—the giver and taker of the bribe—were charged with the conspiracy in the indictment, while in the case at bar the indictment charges that seven persons named and others to the jurors unknown were parties to the conspiracy. But only four of the seven persons named are indicted, and of those four Guilford and Pomeroy represent simply the giver, and Edgar and Earle simply the receiver, of the rebate. The government's counsel also claims that the bribery statute makes agreeing to give or receive a bribe an offense, while the statutes prohibiting rebates does not, in terms, prohibit an agreement to give or

receive a rebate. But they do prohibit an offer of a rebate or the solicitation of a rebate, and when such an offer or solicitation is acceded to by the opposite party, which the indictment alleges occurred in this case, an agreement is entered into. In short, the Dietrich Case seems to me, in its essential nature, strictly analogous to this case. The facts alleged in the indictment in the case at bar as steps taken to effect the object of the conspiracy are the same facts which it would be necessary to prove to sustain an indictment for giving and receiving rebates. On the trial of such an indictment the government would not make out a cause by simply proving the payment of the check. It would have to prove that the check was given in payment of a rebate. To establish that proposition it would be necessary to prove the agreement to give a rebate, the shipment of sugars, the payment of the full scheduled rates of freight, the filing of the claims for rebate, and the payment of such claims as rebate. Without proof of these facts these defendants could not be convicted of the crime of giving or taking rebates; with such proof, they could. They would thereupon be liable to be punished by the fines prescribed by the Elkins act, and by no other punishment, and especially not by imprisonment, which penalty for such a crime is specifically abolished by the Elkins act. In my opinion, it is not in the power of the government, by calling the same acts a conspiracy, to indict these defendants for a different crime, and to thereby subject them to the liability of imprisonment for acts for which such punishment was expressly abolished by the Elkins act.

Since writing this opinion my attention has been called to an act to amend the act to regulate commerce and all acts amendatory thereof, which was approved on June 29, 1906, the day on which these demurrers were argued. That act amends section 1 of the Elkins act by striking out the provisions abolishing the punishment of imprisonment for offenses under the acts to regulate commerce, and inserting in lieu thereof a provision:

"That any person, or any officer or director of any corporation subject to the provisions of this act or the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court."

This provision, upon general principles and by the express terms of the 10th section of the act, is not retrospective, and does not make any person liable to the punishment of imprisonment for such offenses committed before the passage of the recent act; but it authorizes the inference that in the opinion of Congress, without such an amendment, no punishment by imprisonment for such offenses could be imposed.

My conclusion is that the demurrers to the three indictments for giving or receiving rebates should be overruled, and the demurrer to the indictment for conspiracy should be sustained.

UNITED STATES v. MATTHEWS.

(District Court, E. D. Washington, S. D. May 7, 1906.)

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER—CREATION OF CRIMES.

The provision of the sundry civil appropriation act of June 4, 1897, c. 2, 30 Stat. 34 [U. S. Comp. St. 1901, p. 1540], making it a criminal offense to violate any rule or regulation which should thereafter be made by the Secretary of the Interior, under the power therein conferred (since transferred to the Secretary of Agriculture), for the protection of forest reservations, is void as an attempted delegation of legislative power to an administrative officer, and an indictment will not lie for the pasturing of sheep on a forest reservation without a permit, in violation of a regulation made by the secretary, but which is not prohibited by any statute of the United States.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, §§ 96-99.]

On Demurrer to Indictment.

A. G. Avery, U. S. Atty.

H. J. Snively, for defendant.

WHITSON, District Judge. The defendant was indicted for having on the 11th day of September, 1905, "wrongfully, unlawfully, and without the permit required by law and the regulations made by the Secretary of Agriculture," grazed sheep on the Mount Rainier Forest Reserve. The indictment was framed under the act approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1898, and for other purposes" (chapter 2, 30 Stat. 11 [U. S. Comp. St. 1901, p. 3768]), and the act approved February 1, 1905, entitled "An act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture" (chapter 288, 33 Stat. pt. 1, p. 628 [U. S. Comp. St. Supp. 1905, p. 343]). The latter act simply transfers from the Secretary of the Interior to the Secretary of Agriculture the authority to execute or cause to be executed all laws affecting public lands theretofore or thereafter reserved under the provisions of section 24 of the act approved March 3, 1891 (chapter 561, 26 Stat. 1103 [U. S. Comp. St. 1901, p. 1537]), entitled "An act to repeal the timber culture laws and for other purposes," while we must look to the former for a definition of the crime. That part of the act under which it is sought to sustain the indictment reads:

"The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations, and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States." Act June 4, 1897, c. 2, 30 Stat. 34 [U. S. Comp. St. 1901, p. 1540].

The Secretary of Agriculture has made rules and regulations which apply to the "occupancy and use" of the Mount Rainier Forest Reserve, and those alleged to have been violated are set out in full in the indictment, as follows:

"Reg. 9. All persons must secure permits before grazing any stock in a forest reserve, except the few head in actual use by prospectors, campers, and travelers, and milch cows and work animals not exceeding a total of six head owned by bona fide settlers, which are excepted and require no permit. Any person responsible for grazing stock without a permit is liable to punishment for violation of the law."

"Reg. 11. The Secretary of Agriculture will determine the number of stock to be allowed in a reserve for any year. The period during which grazing will be allowed is determined by the forester. The supervisor is authorized to issue grazing permits in accordance with the instruction of the forester."

"Reg. 14. Permits will be granted only to the actual owners of stock and for their exclusive use and benefit, and will be forfeited if sold or transferred in any manner or for any consideration without the written consent of the forester."

The sufficiency of the indictment has been challenged by demurrer, upon the ground that the provision above quoted, making it an offense to violate rules and regulations made by the Secretary of Agriculture, is an attempt by Congress to delegate its legislative power. The United States Attorney relies upon the case of *Dastervignes v. United States* (Ninth Circuit) 122 Fed. 30, 58 C. C. A. 346, to sustain the indictment, and he has called attention to *Dent v. United States* (decided by the Supreme Court of Arizona) 76 Pac. 455, as fortifying his position that the Circuit Court of Appeals had in view criminal offenses as well as civil actions when the decision was made. That case will therefore be first examined to ascertain whether the rule has been so declared in this circuit. To avoid confusion it is necessary to bear in mind the subject-matter of the suit. It arose out of a controversy between the government and certain persons who were herding and grazing sheep on the Stanislaus forest reservation in the Northern district of California, the complainant praying for an injunction. The holding was that the right to make rules, expressly granted by Congress, to regulate the occupancy and use of forest reservations, "and to preserve the forests thereon from destruction," did not involve the delegation of legislative power as applied to the property of the government, but, on the contrary, that the making of such rules was a proper exercise of administrative authority delegated for the control of that portion of the public domain embraced within the provisions of the act. Undoubtedly it was in that sense, and with that thought in view, that the language of Chief Justice Marshall, in *Wayman v. Southard*, 10 Wheat. 1-43, 6 L. Ed. 253, was quoted, namely: "Congress may certainly delegate to others powers which the Legislature might rightfully exercise itself"—for those words are immediately preceded by the following: "It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."

The recent decision of the same court in *Stratton v. Oceanic Steamship Company* (C. C. A.) 140 Fed. 829, makes the matter, if possible, all the more apparent. In addition to the cases already noted

the following have been cited as upholding the indictment: *Van Lear v. Eisele* (C. C.) 126 Fed. 823; *United States v. Slater* (D. C.) 123 Fed. 115; *E. A. Chatfield Company et al. v. City of New Haven et al.* (C. C.) 110 Fed. 788; *United States v. Breen* (C. C.) 40 Fed. 402; *United States v. Ormsbee* (D. C.) 74 Fed. 207; *United States v. Williams* (Mont.) 12 Pac. 851; *In re Huttman* (D. C.) 70 Fed. 699; *United States v. City of Moline* (D. C.) 82 Fed. 592; *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 349, 48 L. Ed. 525; *Butte City Water Co. v. Baker* (Mont.) 72 Pac. 617; *Id.*, 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; *Field v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495, 36 L. Ed. 294; *United States v. Reder* (D. C.) 69 Fed. 965; *United States v. Price Trading Co.*, 109 Fed. 239, 48 C. C. A. 331. It is claimed that these cases, either directly or by analogy of reasoning, sustain the contention of the government. Without undertaking to review them at length, or to discuss the applicability of each particular case, it may be remarked with assurance that they do not do so.

It is fundamental that the citizen has the right to rely upon the statutes of the United States for the ascertainment of the acts which constitute an infraction of its laws. This principle was expressed by the Supreme Court in *Re Kollock*, 165 U. S. 533, 17 Sup. Ct. 444, 41 L. Ed. 813, as follows:

"We agree that the courts of the United States, in determining what constitutes an offense against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution."

A citizen desiring to obey the laws would search the acts of Congress in vain to find that grazing sheep upon a forest reserve without the permit of the Secretary of Agriculture is a criminal offense. It has been suggested that the acts under which the indictment is drawn give notice that the Secretary may make rules and regulations, and that the search would not be complete and the inquiry concluded until it be ascertained whether he has made such rules and regulations, the violation of which it is expressly declared shall be a criminal offense. But here we are led back to the delegation of legislative power. The rules prescribed by the heads of the departments are not necessarily promulgated. While they may be procured, they are not as easily available as are the statutes of the United States; nor does our system contemplate an examination of those rules for the ascertainment of that which may or may not be a crime, for the right to prohibit a given thing under penalty belongs to Congress alone.

In *Re Kollock*, *supra*, regulations made by the Secretary of the Treasury relating to packages of oleomargarine to be marked and branded were sustained, because the law in terms prohibited the sale of packages not so marked and branded. An excerpt from that case reads:

"The regulation was in execution of, or supplemental to, but not in conflict with, the law itself, and was specially authorized thereby in effectuation of the legislation which created the offense."

In *Morrill v. Jones*, 106 U. S. 467, 1 Sup. Ct. 423, 27 L. Ed. 267, it was said:

"The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted."

In *United States v. Eaton*, 144 U. S. 677-687, 12 Sup. Ct. 764, 36 L. Ed. 591, a regulation made by the Commissioner of Internal Revenue, and approved by the Secretary of the Treasury, was under discussion. That regulation was, under the act of August 2, 1886, c. 840, 24 Stat. 209 [U. S. Comp. St. 1901, p. 2228], in relation to the sale of oleomargarine, which required wholesale dealers therein to keep a book and make monthly return showing certain prescribed matters. A wholesale dealer in oleomargarine failed to comply with the regulation made by the secretary, and it was decided that he was not held to the penalty imposed by section 18 of the act (24 Stat. 212 [U. S. Comp. St. 1901, p. 2234]), because he did not fail to do a thing required by law in carrying on or conducting his business; that a sufficient statutory authority should exist for declaring any act or omission a criminal offense. The act referred to was not so broad in its terms as the one under consideration. The section considered by the court which prescribed the penalty follows:

"That if any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or willfully omit, neglect or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting or refusing to do, or for doing or causing to be done the thing required or prohibited, he shall pay a penalty," etc.

In discussing the statute the Supreme Court laid down this wholesome doctrine:

"Much more does this principle apply to a case where it is sought substantially to prescribe a criminal offense by the regulation of a department. It is a principle of criminal law that an offense which may be the subject of criminal procedure is an act committed or omitted 'in violation of a public law, either forbidding or commanding it.' 4 American & English Encyclopedia of Law, 642; 4 Bl. Com. 5. It would be a very dangerous principle to hold that a thing prescribed by the Commissioner of Internal Revenue, as a needful regulation under the oleomargarine act, for carrying it into effect, could be considered as a thing 'required by law' in the carrying on or conducting of the business of a wholesale dealer in oleomargarine, in such manner as to become a criminal offense punishable under section 18 of the act. * * * It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense, and we do not think that the statutory authority in the present case is sufficient."

To like effect are *United States v. Maid* (D. C.) 116 Fed. 650, and *United States v. Blasingame* (D. C.) 116 Fed. 654.

Have we here a case involving the delegation of legislative power? That Congress intended to punish by penalty made certain the violation of regulations made by the Secretary of Agriculture, and to declare the same a criminal offense, is beyond controversy. But the grazing of stock upon the forest reserves has not been prohibited by any congressional act. The prohibition rests entirely upon regulations made by the secretary. Regulation No. 9 prescribes, as we

have seen, that all persons before grazing sheep in a forest reserve must secure a permit, and any person responsible for grazing the same without a permit becomes a violator of the law; that is, whoever violates a rule promulgated by the secretary violates a law passed by Congress. The evident embarrassment attending the making of regulation 9, in an attempt to bring it within the act of Congress, is apparent by the language used. Clearly there was a keen appreciation of the necessity of supplying that which Congress had failed to enact, and this was attempted by the use of the words, "is liable to punishment for violation of the law." At times the line is somewhat indistinct between that which constitutes the delegation of legislative power and the delegation of administrative authority.

This case does not fall within the rule so well explained and amplified by the authorities that the executive branch of the government may make proper rules and regulations for carrying into effect the legislative will of Congress. The president may be authorized to declare by proclamation that a law shall go into effect upon the happening of a certain contingency. The Secretary of the Treasury may make rules and regulations for the enforcement of the revenue statutes and the like. So may the heads of all the departments make like regulations, but the authority to do so must be expressly delegated, and the law must be complete in itself. The rules and regulations may only be prescribed for carrying out what Congress has expressly declared to be the law. Such powers do not pertain to the legislative functions, but are referable to administrative duties. Congress cannot leave a statute to be enlarged upon either by the courts or the executive department. It cannot authorize any other branch of the government to define that which is purely legislative, and that is purely legislative which defines rights, permits things to be done, or prohibits the doing thereof. Certainly here, it is the Secretary of Agriculture who has undertaken to enact this law. He it is who has designated that which constitutes the crime. The thing prohibited, the thing for which the party is to be punished, the act which is the offense, is prescribed by the secretary, and not enacted by Congress. As we have seen, this cannot be done.

The objection to the indictment is the absence of a law defining the act therein charged as a criminal offense. Upon that ground the demurrer must be sustained, and the defendant discharged.

HELENA POWER TRANSMISSION CO. v. SPRATT et al.

(Circuit Court, D. Montana. June 20, 1906.)

No. 795.

1. REMOVAL OF CAUSES—SUITS REMOVABLE—PROCEEDING TO CONDEMN LAND.

A proceeding by a corporation to condemn lands under the eminent domain statute of Montana (Code Civ. Proc. tit. 7, pt. 3) is a civil suit, and removable into a federal court, where the requisite diversity of citizenship and value in controversy appear.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 18.]

2. SAME—MOTION TO REMAND—RECORD TO BE CONSIDERED.

A cause removed into a federal court on the ground of diversity of citizenship will be remanded unless the jurisdiction of such court appears from the record, which includes for the purposes of such motion the petition for removal and all pleadings and other papers previously properly filed in the suit in the state court.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 218-220, 227.]

3. SAME—SEPARABLE CONTROVERSY.

Where it appears from the record in a proceeding in a state court to condemn land that the equitable title to the land is in a defendant who is a citizen of the state, while the legal title is in another defendant who is a citizen of another state, there is no separable controversy between the plaintiff and the nonresident defendant, which entitles the latter to remove the cause.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 94, 102.]

Separable controversy, ground for removal of suit to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

On Motion to Remand to State Court.

The plaintiff, a New Jersey corporation, on April 25th last instituted this proceeding in the state courts, under the eminent domain laws of the state of Montana, to condemn certain lands for flooding purposes; it being alleged that it is necessary for it to cover the lands described with water in the operation of its dam and electrical plant. It alleges that five tracts, each of which is separately described, are necessary. No question arises as to any of the tracts except what is called No. 5. Plaintiff alleges that the reputed owners of No. 5 tract are the Eldorado Gold & Gem Company of Montana, Limited, a Michigan corporation, or W. H. Sanborn and ——— Sanborn, his wife, and that if any other persons have any interest in said premises, as owners or otherwise, such persons or owners are unknown to plaintiff. All the tracts, except No. 5, are alleged to be owned by defendants other than Sanborn and wife. The defendants Augustus N. Spratt and Elizabeth B. Spratt, by Messrs. M. S. Gunn and J. B. Clayberg, their attorneys, answered the plaintiff's complaint, denying that the use for which plaintiff was seeking to condemn the land was a public use, and denying upon information and belief that any of the defendants have any right, title, or interest in or to the premises described in the complaint, and alleging that defendant Spratt is the owner, in the possession, and entitled to the possession, of all the property described in the complaint, except the fifth parcel, and as to that tract defendant Spratt alleged that he has an equitable interest therein and title thereto, the legal title being in the defendant W. H. Sanborn. Spratt pleaded that the taking of the property would be in violation of the law and of the fourteenth amendment to the Constitution of the United States. Upon June 9th Messrs. M. S. Gunn and J. B. Clayberg also appeared as counsel in the state court for the defendants W. H. Sanborn, Anna Sanborn, and the Eldorado Gold & Gem Company of Montana, Limited, and demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action or to warrant the relief prayed for therein. Upon the same day the same three defendants, by Mr. J. B. Clayberg, their attorney, filed a petition for removal of the cause to the Circuit Court of the United States. In this petition defendants alleged that the value of the property exceeded \$2,000, and that the suit was to condemn certain lands and premises owned by and belonging to the petitioners. The land described was that which was included in the fifth paragraph of the complaint (tract No. 5), as heretofore referred to. The petitioners alleged that when the suit was commenced and now the controversy between plaintiff and petitioners was and is wholly between citizens of different states, and could be fully determined as between them, and

that petitioners Sanborn and wife were and are citizens of the state of Michigan, and that the Eldorado Gold & Gem Company was and is a citizen of Michigan, and not a resident or citizen of the state of Montana; that the plaintiff is a New Jersey corporation, citizen of New Jersey; that plaintiff seeks to condemn five separate and specific pieces or descriptions of real estate; that the complaint does not allege that any of the defendants other than petitioners are interested in the above-described property of petitioners sought to be condemned, but that it is owned solely by petitioners; that the matter in controversy between petitioners and plaintiff is separate from the matter or matters in controversy between the plaintiff and the other defendants herein, and that none of the other defendants herein are necessary or proper parties to the controversy between plaintiff and petitioners; that a separate action could be maintained by plaintiff against petitioners for the condemnation of the special property alleged to be owned by petitioners without joining as defendants any of the other defendants named in the above-entitled suit; that the Circuit Court of the United States, Ninth Circuit, in and for the District of Montana, has full and complete jurisdiction of such controversy and action, and the same can be fully determined therein; that the time in which petitioners may appear in said suit had not elapsed. The necessary bond on removal was given, and an order of removal was made by the judge of the state district court. The plaintiff in this, the Circuit Court of the United States, has filed a motion to remand, upon the ground that this court has not jurisdiction.

Wallace & Donnelly and Carpenter, Day & Carpenter, for plaintiff.
J. B. Clayberg and M. S. Gunn, for defendants.

HUNT, District Judge (after stating the facts). After a careful examination of the authorities, I have concluded that the proceeding in the state court is a suit or controversy to which the judicial power of the United States extends. *Traction Co. v. Mining Co.*, 196 U. S. 246, 25 Sup. Ct. 251, 49 L. Ed. 462; *South Dakota Central Ry. Co. v. C. M. & St. P. R. Co. (C. C. A.)* 141 Fed. 578. The proceeding under the statutes of the state of Montana must be in court from its initiation. It is therefore to be distinguished from a proceeding purely administrative until report is filed. Title 7, pt. 3, Eminent Domain, Code Civ. Proc. Mont.; *Boom Co. v. Patterson*, 98 U. S. 403, 25 L. Ed. 206; *Upshur Co. v. Rich*, 135 U. S. 457, 477, 10 Sup. Ct. 651, 34 L. Ed. 196. To determine whether there is a separable controversy the court may examine the record as it stood when the petition for removal was granted. The suggestion made by myself during the argument that the case of *Tennessee v. Union Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, seemed to limit the inquiry to an examination of the plaintiff's complaint only was founded upon an impression that the doctrine of that decision went as far as indicated. But after re-examining the case I find that the opinion of Justice Gray discusses the removal of a case where removal is sought solely upon the ground that a federal question is involved; and the decision was that no case can be removed from a state court into a Circuit Court of the United States on the sole ground that it is one arising under the Constitution, laws, or treaties of the United States, unless that appears by plaintiff's statement of his own claim. The same rule was upheld in *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738, 42 L. Ed. 76; *Galveston Railway v. Texas*, 170 U. S. 235, 18 Sup. Ct. 603, 42 L. Ed. 1017; *B. & M. Co.*

v. M. O. P. Co., 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626, and Gableman v. Peoria, etc., Ry. Co., 179 U. S. 335, 21 Sup. Ct. 171, 45 L. Ed. 220; and, if it does not so appear, the want of it cannot be supplied by any statement of the petition for removal or in the subsequent pleadings. *Worthington v. Mitchell* (C. C.) 140 Fed. 947. Where, however, removal is sought upon the grounds of diversity of citizenship, the court will remand to the state court a suit which the face of the record fails to show is within the jurisdiction of the Circuit Court, and by the record are meant pleadings and other papers properly filed in the state court before and at the time the petition for removal is filed, and the petition may be included. In *Traction Co. v. Mining Co.*, 196 U. S. 246, 25 Sup. Ct. 251, 49 L. Ed. 462, the court included the petition for removal as one of the papers constituting the record to be examined. "It is well settled," says Justice Harlan in that case, "that if, upon the face of the record, including the petition for removal, a suit does not appear to be a removable one, then the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made." Among the earlier cases supporting this recent utterance of the court is *Insurance Co. v. Pechner*, 95 U. S. 183, 24 L. Ed. 427, where Chief Justice Waite said:

"This right of removal is statutory. Before a party can avail himself of it, he must show upon the record that his is a case which comes within the provisions of the statute. His petition for removal, when filed, becomes a part of the record in the cause. It should state facts, which, taken in connection with such as already appear, entitle him to the transfer. If he fails in this, he has not, in law, shown to the court that it cannot 'proceed further with the cause.' Having once acquired jurisdiction, the court may proceed until it is judicially informed that its power over the cause has been suspended."

In *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962, Chief Justice Waite repeated the language quoted, and added that the petition must show a right in the petitioner to demand a removal. In *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167, Chief Justice Waite again spoke for the court, and the statements of the petition were considered as part of the record of the case. In *Burlington, etc., Ry. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159, the court, once more speaking through Chief Justice Waite, cites *Railway Co. v. Ramsey*, 22 Wall. (U. S.) 322, 22 L. Ed. 823, to the effect that when a petition for a removal of a cause to the Circuit Court of the United States is filed in a cause pending in a state court, the state courts are at liberty to consider the actual facts, as well as the law arising on the face of the record, after the presentation of the petition for removal. Of course the issues of fact made upon the petition for removal can only be tried in the Circuit Court, but the state court may determine for itself whether on the face of the record removal must be had. "The theory," Chief Justice Waite continues, "on which it [the rule] rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security furnished. It presents then to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record,

which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit." Some of the decisions do not seem to have gone this far, yet they do authorize examination of the pleadings. In *Barney v. Latham*, 103 U. S. 205, 26 L. Ed. 514, the record was considered with relation to the pleadings as they stood when petition for removal was filed.

In *Louisville & Railroad Co. v. Wangelin*, 132 U. S. 601, 10 Sup. Ct. 203, 33 L. Ed. 473, the court said the question was to be determined by "the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court." In *Connell v. Smiley*, 156 U. S. 337, 15 Sup. Ct. 353, 39 L. Ed. 443, complaint, answer, and complaint in intervention subsequently filed were regarded as proper to be considered by the Circuit Court. In the very recent decision of *Alabama Southern Railway v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, the court said the question of removability "depends upon the state of the pleadings and the record at the time of the application for removal." It being the duty of the court, by the latest authority, to look into the record, including the petition, to ascertain whether jurisdiction exists, this condition appears: The Helena Power Transmission Company (plaintiff) alleged that the defendants Sanborn and wife, citizens of the state of Michigan, are the reputed owners of a certain tract of land sought to be condemned. One of the defendants, Spratt, appeared, and, in substance, pleaded that he was the real owner of the tract standing in the name of Sanborn; that he held the equitable title to the property. Thereafter Sanborn and wife appeared, not denying that the equitable title to the property is in Spratt, but alleging that the complaint alleged ownership in them, Sanborn and wife, and setting forth that a separate action could be maintained by plaintiff against them for condemnation without joining as defendants any of the other defendants, and that the same could be fully determined. We therefore have a record disclosing the fact that the equitable title and ownership are in defendant Spratt, a citizen of Montana, with the legal title in Sanborn and wife, citizens of Michigan. There is but one tract involved, with no separate or proportionate interests of each of said defendants in such tract. While the legal title would seem to be of slight consequence where real ownership and equitable title are in another, yet the holder of the legal title is a proper party to a proceeding in eminent domain. The plaintiff doubtless desires to settle all questions involved in this controversy, and to do so it wishes to determine the rights of every person having any interest in the tract sought to be taken, so that a judgment can be had which shall adjudicate their rights. The decree is made more effectual by this procedure, and to enable plaintiff to obtain the relief sought the holder of any legal interest should be brought in as a defendant. So Sanborn and wife are proper parties, rightly joined, and, the object of the suit being to condemn and appropriate to the use sought the single tract, with legal title in Sanborn and wife and

the equitable in Spratt, the controversy is over the condemnation of the whole No. 5 tract, and is not a separable one between petitioning defendant and plaintiff. *Bellaire v. B. & O. R.*, 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910.

The case is not altogether unlike that of *Seattle & M. Ry Co. v. State et al.* (C. C.) 52 Fed. 594. That was a proceeding for condemnation brought by the Seattle & Montana Railway Company against the state of Washington, the Columbia & Puget Sound Railroad Company, Oregon Improvement Company, Farmers' Loan & Trust Company, Northern Pacific & Puget Sound Shore Railroad Company, the Northern Pacific Railroad Company, and King county to secure a right of way. The action was commenced in the state courts of Washington, and removed into the United States Circuit Court by the Northern Pacific & Puget Sound Shore Railroad Company, the Oregon Improvement Company, and Farmers' Loan & Trust Company. A motion to remand was made and granted. It appeared that the several defendants were joined because they respectively claimed interests in the premises. The state of Washington claimed to be the owner of the fee; King county claimed a lien on a portion of the premises for taxes; two of the railroads, corporations within the state of Washington, owned an interest in the property; the Oregon Improvement Company, an Oregon corporation, owned the stock of the Columbia & Puget Sound Company; the Farmers' Loan & Trust Company, a New York corporation, was a mortgagee; and the Northern Pacific Railroad Company appeared to have an interest in the property of the Northern Pacific & Puget Sound Shore Railroad Company. The Northern Pacific Railroad Company sought to remove on the ground that it was a corporation created by act of Congress. The Oregon Improvement Company and the Farmers' Loan and Trust Company claimed the right of removal because there was involved a separable controversy as to each, and that they were corporations of states other than Washington, of which the plaintiff was a citizen. Judge Hanford held that when a number of persons have been joined as defendants in an action, and the nature of the controversy does not appear upon the face of the record, the bare assertion in a petition for removal by one defendant that there is a separable controversy is not sufficient. He regarded the papers as showing sufficiently that the interests of the corporations seeking to remove were so blended with the interests of one of the local corporations that it would not be possible to determine any controversy affecting them without touching the interests of the local corporations. He rested his decision to remand, upon a distinct ground that reasons for removal did not appear to exist, as the record failed to show that there was any controversy involved in the case which could be maintained by either of the foreign corporations without the aid or support of the other defendants, and upon the further ground that the case did not appear to be one arising under the Constitution or laws of the United States.

City of Washington v. Columbus & C. M. R. Co. (C. C.) 53 Fed. 673, was a proceeding commenced in the state courts of Ohio by the city of Washington against the C. & C. M. R. Co. for the appropri-

tion of a right of way for a street. Damages were awarded, and the defendant appealed. Thereafter the Baltimore & Ohio Railway Company and the Central Ohio Railway Company were made parties defendant, and the Baltimore & Ohio petitioned for a removal to the Circuit Court of the United States, which was granted. Judge Sage remanded the cause, relying upon the doctrine of *City of Bellaire v. Baltimore & Ohio R. R. Co.*, supra, holding that in a suit by a city to condemn land occupied by a railroad corporation of another state as lessee of a railroad corporation of the same state, when the main issue is as to the right to condemn, the controversy as to the foreign corporation is not separate, so as to give it a right to remove the cause to a federal court, although the interests of the two defendants and their separate awards of damages must be determined as incidents to the principal controversy.

Sugar Creek, B. P. & P. C. R. Co. v. McKell et al. (C. C.) 75 Fed. 34, was decided upon a motion to remand to the state court. The suit was for condemnation between the applicant and several defendants, some of whom were citizens of the same state as the applicant. The petition disclosed that McKell, one of the defendants, was the only owner of the land, and that he held the title in fee. It was claimed that McKell and wife had executed a lease to one McDonald for a portion of the land proposed to be taken, with power and authority to organize a joint-stock company, to lease the land to said company when so formed. It appeared that McDonald organized under the laws of the state of West Virginia a colliery company, but there was no evidence of any lease to McDonald, or of a lease by McDonald to the company. McDonald and the company were regarded as only tenants at will of the defendant McKell to a very small portion of the land sought to be taken, while McKell was the owner of a large tract, a small portion of which the applicant desired to condemn, as well as a part of that portion leased by McKell to the company. It was held to be apparent that McKell, being the owner in fee to the whole tract, subject only to a lease for a small portion of it to the company, there was a separable controversy as between the applicant and McKell as to the land not leased by him to the company. In distinguishing the case Judge Jackson emphasized the fact that the applicant was seeking to condemn not only the land of McKell, who was a nonresident, but the land of the McDonald company, a citizen of the same state with the applicant. He decided that, as between McKell and the applicant, there was a separable controversy, which could be fully heard and determined in the Circuit Court of the United States. But it was regarded as a separable controversy, because McKell was the exclusive owner in fee of the large tract which was sought to be condemned for the purposes of the railroad, and as to that portion of the land not leased the codefendant had no interest in it. The motion to remand was overruled.

In *Perkins v. Lake Superior & S. E. Ry. Co.* (C. C.) 140 Fed. 906, the question presented was whether in a condemnation proceeding involving a number of distinct tracts of land in several ownerships there was a separable controversy between the owner in severalty of one tract and the corporation, or whether a single controversy existed be-

tween the corporation on the one side and the owners in severalty of all the tracts described in the petition for condemnation. The court, through Judge Sanborn, held that the question of the right of the corporation to take the land should be regarded as presenting a single controversy, in which the railroad company was plaintiff, and all the owners of separate and distinct parcels whom it elected to join were defendants. The decision there turned upon the question of the right of the corporation to take the land desired, and Judge Sanborn was of the opinion that all the parties joined as defendants were jointly interested, and that the mere fact that the petitioners for removal were the owners in severalty of a part of the lots sought to be taken did not create a separable controversy between them and the railroad company. Although the case is favorable to one of the contentions of the plaintiff in the matter at bar, it is not directly to the point upon which I place my decision, inasmuch as Spratt and Sanborn and wife in this case are not owners in severalty of a part of the particular lot sought to be taken.

I need not question the accuracy of the proposition that a single condemnation proceeding, affecting distinct lots of land owned by several persons, presents several distinct controversies, any one of which, in a proper case, may be moved to a federal court independently of the rest. That I understand to be the general principle of the Pacific Railroad Removal Cases, 115 U. S. 2, 5 Sup. Ct. 1113, 29 L. Ed. 319, although it seems not to have been exactly applied in the case of Jarnecke Ditch (C. C.) 69 Fed. 161, and perhaps was not in *Perkins v. Lake Superior et al.*, supra. Here, however, there is one defendant, a nonresident, who holds the legal title to the property involved, and another defendant, a resident, who holds the equitable title. My opinion is that there is no separable controversy as between the nonresident and the plaintiff, and I believe this view to be supported by recent authority.

I have examined the cases cited in the brief of counsel for defendants and many others by my independent search. While it is undoubtedly true that some of the opinions appear to accept as a rule without limitation that upon a motion to remand the court will look only into the plaintiff's complaint (*Harley v. Insurance Company* [C. C.] 125 Fed. 792), nevertheless the explicit language and the actual practice of the Supreme Court of the United States, as used and followed in their very latest opinions, certainly authorize the court to regard the record, including the petition for removal, except where removal is sought upon the ground that a federal question is involved, or the case is one specially provided for. When the discriminations in the rule are kept in mind, many of the cases are distinguishable.

It seems there can be no issue tried on the motion except where fraud or willful evasion is set up, but, where facts appearing in the record are not in conflict, they may be accepted as a basis for the consideration of the question of removability.

Following the recent cases, I therefore think this motion to remand must be granted.

In re J. F. GRANDY & SON.

Ex parte GRANDY.

(District Court, D. South Carolina. July 6, 1906.)

BANKRUPTCY—EQUITABLE LIEN—AGREEMENT TO ASSIGN LIFE INSURANCE POLICIES.

A husband, at a time when he was solvent, made a parol agreement to assign to his wife certain life insurance policies then held by him in consideration of her relinquishment of her dower interest in their residence, which he desired to transfer as security for a loan, and she made such relinquishment. The cash value of the policies was about the same as the value of her dower interest in the property, and the agreement was made in good faith, but through neglect the husband did not formally assign the policies until after he became insolvent, and within four months prior to his bankruptcy. *Held*, that the agreement gave the wife an equitable lien on the policies, and that the assignment should be upheld as against the husband's trustee in bankruptcy.

In Bankruptcy.

Cothran, Dean & Cothran, for the bankrupt.

E. M. Blythe, for the trustee.

BRAWLEY, District Judge. Messrs. J. F. Grandy & Son were contractors of high standing and good credit. In the summer of 1905 they were engaged upon a contract with the Federal Construction Company, from which large profits were expected, and which required them to raise considerable money, but in the autumn and early winter of 1905, owing to unlooked for contingencies, the particulars of which need not be here related, disasters overtook them, and, instead of realizing profits in their undertaking, they suffered such losses that by advice of counsel they filed their petition December 18, 1905, in voluntary bankruptcy, and on January 31, 1906, they were discharged. Certain legal questions arising out of the bankruptcy have been before me, and by universal testimony the conduct of both father and son has been upright and honorable throughout, and their failure is attributed to unmerited disasters, and not to any misconduct on their part. On August 10, 1905, J. F. Grandy borrowed from the City National Bank of Greenville \$5,000, and to secure this money he had to sell his home, and he conveyed the same by deed to the bank, with the condition that the bank would reconvey the premises when he repaid the money. He had at that time two policies of life insurance, and in order to raise the money the bank required from his wife a renunciation of her dower. It was arranged between Grandy and his wife that she would renounce her dower if these policies were assigned to her, and he agreed to do so. No question is made as to the good faith of this transaction, and that the assignment of these policies was the condition and inducement for the renunciation of dower, and the testimony is that from time to time the wife requested the assignment to be made, but, being very busy, and in the hope, probably, of being able to secure a reconveyance of his home by a repayment of the loan, and it being necessary that the formal assignment should be made upon blanks furnished by the insurance companies, he postponed the actual assign-

ment until December, when he wrote for the blanks, and executed them on December 16th, filing his petition in bankruptcy a few days thereafter. There is no doubt that at the date of the actual formal assignment Grandy was insolvent, and that at the date when the agreement was made with Mrs. Grandy he was not insolvent. Mrs. Grandy's testimony is that, when her husband wanted her to sign the papers for the sale of their home, she told him that she ought to have the place or his life insurance, and that she had an agreement with him for the assignment of these policies. It appears that Grandy's residence was worth about \$6,000. Under the law of this state the widow's dower is one-third for life, and by general custom one-sixth of the cash value is generally accepted as a commutation of dower. The testimony shows that the present cash value of the insurance policies is about \$1,000. The trustee's contention is that, inasmuch as the actual transfer of the policies was made a few days prior to the filing of the petition in bankruptcy, when Grandy was insolvent, it is void as a preference under the bankrupt act, and that the policies belong to him as trustee of the bankrupt estate. I had occasion to examine a case of like character in *Wilder v. Watts* (C. C.) 138 Fed. 426, where many of the cases cited by the trustee were considered. In that case Watts borrowed \$1,000 from the National Bank of Newberry for the purchase of a stock of merchandise in August, 1904, and agreed that he would have the merchandise insured, and assign the policy of insurance as collateral to secure the money advanced. The money loaned by the bank was invested in merchandise, as agreed, and the policy of insurance thereon was taken out in Watts' name, and deposited for safe-keeping, it appears, with Bailey & Son. A fire occurred in December, as the result of which Watts became insolvent. After the fire he assigned the policy to the bank, in accordance with the agreement made at the time the money was borrowed. Other creditors thereupon filed a petition in involuntary bankruptcy against Watts, alleging as the act of bankruptcy the transfer of the policy, and that it was a preference under the bankrupt act. The referee held that this transfer was a preference, and constituted an act of bankruptcy, but upon a review of his decision I was of opinion that under the agreement between the bank and Watts, made at the time when Watts was not insolvent, the bank had an equitable lien upon the insurance policy, it having advanced the money for the purchase of the goods on a contract that the goods were to be insured as security for the loan, and that the manual transfer and delivery thereof after the fire was not a preference under the bankrupt act. The case most nearly in point, and which seemed to me to sustain the conclusion I then reached, not, however, without some misgiving, was *McDonald v. Daskam*, 116 Fed. 279, 53 C. C. A. 554, affirming the decree of Judge Seaman, in *Re Wittenberg Veneer & Panel Co.* (D. C.) 108 Fed. 595. That was a case of an agreement to assign certain policies of fire insurance as collateral for a loan. The policies were in the possession of the insurance agent, and were not delivered until after the fire and bankruptcy. The court held that the claimant was entitled to an equitable lien, and the actual delivery of the policies and continuous possession by the

transferee was not indispensable to create and preserve such lien; that an agreement of this nature should not be considered as a common-law pledge, and void, because the policies were not given into the possession of Bascom or the bank; that under the modern rule an equitable interest may be created by parol as well as by deed; that all depends on the intention of the parties, and, if they intended it to be an assignment of the fund, equity will so treat it. There was no appeal in *Wilder v. Watts*, and if the decision there was correct it seems to be conclusive of the case now under consideration; but I am asked by the trustee to reconsider that case in the light of certain cases which he has brought to my attention.

The first is *Mathews v. Hardt*, 9 Am. Bankr. Rep. 373, 80 N. Y. Supp. 462, decided by the Appellate Division, First Department, Supreme Court of New York. In that case one Smith had, prior to September, 1899, been in business, and had failed, and made an assignment for the benefit of creditors, among whom were Hardt & Co. A compromise was effected and a corporation designated "The Smith Company" was formed; Hardt & Co. owning a majority of the stock. Smith was made president of the company, which, having no working capital, made an agreement with Hardt & Co. to advance moneys to the corporation; Hardt & Co. to have a lien upon all of the assets of every kind then owned or which might thereafter be acquired. Hardt & Co. made the advances, and the business was carried on until October, 1900, when they refused to advance any more. Smith resigned as president of the corporation, and abandoned the business, and Hardt & Co. took possession of practically all of the assets of the corporation. The corporation at that time was clearly insolvent, and shortly thereafter creditors filed their petition in involuntary bankruptcy, and the trustee brought its suit against Hardt & Co., and the court held that the trustee could recover the property taken by Hardt & Co. or its value. It is obvious that there is no similarity in the facts of that case to those in the case now under consideration. Hardt & Co. were entirely familiar with the affairs of the reorganized corporation, and with its financial difficulties from its inception. They were themselves large stockholders in the company, and the verbal agreement that they claim was a secret agreement, which did not prevent the company from obtaining credit from others in the conduct of its business, and the court very properly held that the transfer of all the assets after the company became insolvent was a voidable preference.

The next case cited is *In re Sheridan* (D. C.) 98 Fed. 406. The facts are not given in the opinion, which is very short; citing *Ex parte Potts*, Fed. Cas. No. 11,344, where it appeared that the alleged bankrupts when they were admittedly solvent had assigned to a creditor as collateral security for advances several policies of insurance and bills of lading upon vessel and cargo then at sea. Under such circumstances it was correctly held that the transfer was not in fraud of creditors. The court then goes on to say that in that case "no question of preference arose, whereas here the question is one of preference simply. The goods here were never actually pledged until the exceptant for the first time took them into his possession a few days before the petition was

filed. Before that time there was a mere agreement to pledge. The goods were never delivered to the exceptant, nor (assuming for present purposes that this would have been good against the other creditors) were they even set apart and continuously treated as his property. Under the facts proved, the pledge was not completed until the date of removal. This being so, the exceptant's title attached upon that date, and the transfer created a preference in violation of the act."

The next is *In re Hunt* (D. C.) 139 Fed. 283. In that case Hunt gave a mortgage on his real estate to the Delaware National Bank, reciting an indebtedness to the bank of \$5,000, and it was given as security for the payment of all liability or liabilities of Hunt due or to become due or that may be hereafter contracted. This mortgage was executed June 4, 1903, but not recorded until June 10, 1904. Hunt was adjudicated a bankrupt June 17, 1904. Although it appeared in that case that Honeywill, the president of the bank, had failed to disclose that the bank held the mortgage, when inquiry was made as to the standing and financial responsibility of Hunt, and that Hunt had made incorrect and untruthful statements regarding his indebtedness to some of his numerous creditors, the court held that the bank was not estopped from asserting its mortgage. Surely there is nothing in the facts of that case which have any relevancy to this.

The next case cited is *In re Dismal Swamp Co.* (D. C.) 135 Fed. 415. In that case certain parties, none of whom had any funds, had formed a partnership under the name of the Dismal Swamp Contracting Company, and borrowed from the uncle of one of the partners in June, 1903, the sum of \$8,700, and agreed to secure the indebtedness by a mortgage. They invested the money in a stock of merchandise and in a logging business. Nothing was done to consummate this agreement until December, when the deed was executed and recorded. Within less than four months the company became bankrupt. The trustee claimed that the deed was void under the Virginia decisions, in that it covered a stock of merchandise, and reserved to the grantors possession and the power of sale; second, that it was voidable under the bankruptcy act, in that it creates a preference, and that, as it comprised the entire estate and assets of the bankrupt, it was a conveyance with intent to delay and defraud creditors. Judge Waddill, after citing *Pollock v. Jones*, 124 Fed. 163, 61 C. C. A. 555 (a case which was decided by myself in the District Court and affirmed by the Circuit Court of Appeals), wherein Judge Simonton, discussing the question of a parole promise to secure an indebtedness in future, uses this language: "We are of opinion that the bare promise to give security, not expressing, in terms, the character and subject-matter of the security, could not create either an equitable or legal mortgage," says:

"Under the facts of the present case, it cannot be seriously contended that the specific property upon which the security was to have been given, or, as a matter of fact, was subsequently given, was in terms enumerated or known, or could have been known. It was purchased long after the making of the loan, and at the time of the making of the same was known of in a general way only; that is to say, one of the borrowers, knowing that he and his associates were going to embark in the lumber and sawmill business, promised to secure the money borrowed upon the plant, fixtures, appurtenances, and appliances thereof, and a stock of certain mercantile goods to be used in con-

nection therewith, which they subsequently did, and not only conveyed the property purchased with the money borrowed, as aforesaid, but also other property which had not been paid for."

Under the Virginia Statute, deeds of this kind as against creditors do not constitute a lien until duly recorded; and, as the bankruptcy act expressly provides that claims which for want of record or for other reasons would not have been valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate, it was very correctly held that the mortgage could not be sustained.

In *re Ronk* (D. C.) 111 Fed. 154, is cited by the learned judge in support of his conclusion. In that case the bankrupt, who lived in the same house with his mother, borrowed from her \$750, giving his note therefor November 14, 1900. He gave another note for \$350 for moneys to be thereafter advanced. The precise date when it was to be advanced is not stated. At the time when the first loan was made the bankrupt agreed to give his mother a chattel mortgage on all the goods, wares, and merchandise in his store, and also on all his after-acquired goods. A chattel mortgage was executed, and was recorded March 29, 1901, within four months of the bankruptcy, to secure these two notes dated November 14, 1900. Judge Baker, in reviewing the order of the referee which adjudged this mortgage to be valid, refers to the statute of Indiana, which provides that no mortgage of goods shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee and retained by him, unless such mortgage was recorded within 10 days after the execution thereof, and says that:

"If the mortgage had been executed on November 14, 1900, and had not been recorded until March 29, 1901, manifestly it would have been invalid as against creditors. It is difficult to perceive how, in view of this statute, a secret claim or equity can be held to have been created by the verbal agreement, when the mortgage or assignment actually executed by the parties at the time, if unrecorded, would have been invalid as against creditors. It is apparent that it was the purpose of the Legislature to allow no valid claim, lien, or secret equity to be created on goods unless public disclosure was made either by the delivery of the goods to the assignee or mortgagee, and the retention thereof by him, or by recording the assignment or mortgage within ten days. To hold otherwise would be to defeat the beneficial effect of the recording statute. Section 67, cl. a, of the bankruptcy act provides: 'Claims which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.' Act July 1, 1898, c. 541, 30 Stat. 564 [U. S. Comp. St. 1901, p. 3449]. It cannot be successfully maintained that the verbal agreement created a valid lien as against the claims of the creditors, and, if it did not create a valid lien, then by the terms of the bankruptcy act it cannot be enforced as a lien entitled to priority over other claims."

These are the cases chiefly relied upon by the trustee. The opinions therein refer to many other cases, all of which have been examined, and some of them are analyzed in the opinion already filed in *Wilder v. Watts*. In nearly all of them the lien sought to be established is upon property actually and visibly in the possession of the bankrupt—a possession which tends to give the bankrupt credit, and enables him to buy goods or obtain loans from other creditors. In some of them the alleged liens are in terms declared invalid by the recording laws of the

several states. In some the precise property claimed to be covered by the lien is incapable of identification. They are in the nature of secret liens, which are as obnoxious in equity as in law. If they were allowed, as is well observed by Judge Waddill in the case already cited, "the door for fraud would be left wide open, and creditors would never know when they were safe in dealing with the estates of their debtors"; and, as is said by Judge Baker, "it would be a standing invitation to perjury, and would defeat the declared policy and purpose of our state legislation, as well as the policy and purpose of the bankruptcy act."

I am in entire accord with the views thus expressed, and believe that all of these cases were correctly decided, but it does not seem to me that the facts upon which those decisions rest have any analogy to Grandy's Case. If Grandy had borrowed money from his wife, and agreed to give her a lien upon property of which he was in possession, and, remaining in possession and treating the property as his own, obtained credit upon the faith of his title to it, such secret lien would be abhorrent to equity, and invalid under the bankrupt act; but such is not the case here. He obtained from Mrs. Grandy her renunciation of dower for valuable consideration, upon the absolute promise that he would assign to her these policies of insurance, the cash value of which, as admitted by the testimony, was about the same as the value of her dower interest. The contract was absolute. He was not insolvent at the time, and there was no question as to the good faith of the transaction. There is no statute which requires the recording of a transfer of this character, nor was a written agreement necessary. A parol agreement, if properly proved, would be enforceable in equity. His interest in these policies was in the nature of a chose in action. There is no proof that any of the creditors knew of the existence of these policies of insurance. They were not assets or property the possession of which tended to enhance his credit. No creditor can fairly claim that he extended credit to him by reason of his supposed title to or possession of these policies, or that the failure to make the formal assignment was with a view of hindering, delaying, or defrauding creditors. Mrs. Grandy's right and title to these policies accrued at the moment when she signed her renunciation of dower, which was the consideration paid. Equity from that date would have compelled the execution of such formal papers as were necessary to enable her to obtain her own, and in such circumstances the date of the formal assignment does not seem to me material. All transactions between a wife and a husband, who afterwards proves to be in failing circumstances, ought to be subject to the closest scrutiny by the courts, and no claim by her upon his estate, unless sustained by abundant testimony, ought to be allowed; but in this case there is no question of the absolute good faith of this transaction. That she has parted with a valuable property right upon an express agreement that a specific security should be assigned to her, and the neglect of the husband to make the formal assignment—a neglect for which she is not to be blamed, and which did not work to the prejudice of the creditors—ought not to operate to defeat her title.

The trustee has brought to the attention of the court the fact that since the bankruptcy Mrs. Grandy has bought the house and lot from the bank, and that she is now the owner of the same in fee simple, and her dower rights thereby extinguished. I cannot see that this has any bearing on the question. If there is a suspicion that she bought the property with money obtained from her husband, another question might arise; but there is no such suspicion, for it appears that she has raised the money for the purchase by mortgage on the property itself.

It is therefore adjudged that Mrs. Grandy is entitled to the policies of insurance described, and the trustee is directed to turn the same over to her, with leave, however, if he is so advised, to appeal from this order.

THE MYRTLE TUNNEL.

(District Court, D. South Carolina. July 3, 1906.)

1. SALVAGE—CONTRACT TO DELIVER STRANDED VESSEL—FAILURE OF PERFORMANCE.

A tug which was under a written contract to float and deliver a stranded schooner at a stated port, the contract otherwise to be void, but which failed to perform the contract, cannot recover compensation as salvage for services rendered in attempting its performance, as a result of which the schooner was subsequently floated by the wind and tide, and became a derelict, and exposed to greater peril than when on the bank, until rescued by other vessels after her abandonment by the tug.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, § 30.]

2. SALVAGE—AWARD OF COMPENSATION—RULE IN CASE OF DERELICT.

The ancient rule for the allowance of a moiety of the value saved in the salvaging of a derelict to the salvors, while somewhat flexible, and subject to change in extraordinary cases, is a safe and salutary limit upon judicial discretion, and not to be lightly disregarded.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Salvage, §§ 56, 65.

Salvage awards in federal courts, see note to *The Lamington*, 30 C. C. A. 280.]

3. SAME—FACTS CONSIDERED.

A large schooner became stranded on Frying Pan Shoals off the North Carolina coast in March. A contract was made with the owner of tugs to float the schooner and deliver her at a port, but the effort was unsuccessful. Ten days after the stranding, and after she had been abandoned by the master and crew, she was moved off the shoal by a high wind, and one of the tugs attempted to tow her to port, but was unable and abandoned her. Her hull was under water and her masts and rudder gone. Subsequently a tug from Savannah went in search of and found her, about 100 miles from Charleston, which was the nearest port she could enter owing to her draft. After going to Charleston, and obtaining the assistance of two other tugs, she was again found, and the three tugs towed her to that port nearly 10 days after she had gone adrift. Meantime the insurer had sent out a tug, which made a search for her, but not in the locality where she could have been found. She was sold with her cargo for \$24,000. The salvage service was performed with skill, and at considerable trouble and risk, owing to her condition. *Held*, that she was a derelict, and that the salvors were entitled for their services to one-half the proceeds of vessel and cargo after payment of the expenses and costs.

In Admiralty. On libels for salvage.

Thomas Evans, for the *Blanche*.

Bryan & Bryan, for the Propeller Tow Boat Company.

Mitchell & Smith, for the *Protector*.

Miller & Whaley, for claimants.

BRAWLEY, District Judge. The four-masted schooner *Myrtle Tunnel*, of about 1,400 tons burden, laden with cross-ties from the port of Brunswick, Ga., bound for Philadelphia, went ashore on Frying Pan Shoals, N. C., March 6, 1906. The steam tug *Blanche*, of Wilmington, went to her the next day, and offered assistance, but the same was refused by the master of the *Tunnel* until he could communicate with his owners. A telegram was sent by the mate of the *Tunnel* to George A. Tunnel, managing owner, Philadelphia, who immediately went to Wilmington, N. C., arriving there March 11th. W. A. Sanders, general manager of the Wilmington, Southport & Little River Company, owner of the tugboats *Blanche* and *Isabel*, met Tunnel at the railroad station, and arranged to carry him to the wrecked schooner. On March 12th the contract in writing was made by Sanders, representing the company above named, and George A. Tunnel, whereby said company agreed to "float and deliver the schooner *Myrtle Tunnel* to Southport, N. C.," the amount to be paid for such service to be decided by two practical men, one chosen by Tunnel and one by the tugboat company, and, if they did not agree, they were to choose a third, whose decision must be final.

Libels have been filed in behalf of the steam tug *Blanche*, of Wilmington, and in behalf of the steam tugs *McCauley* and *Paulsen*, of Savannah, and the steam tug *Protector*, of Charleston, which by order of the court were consolidated and heard together.

First will be considered the claims of the *Blanche*. After the signing of the contract referred to, which was made an exhibit to the libel, the *Blanche* went down to the schooner March 13th, carrying, in addition to her crew, about 17 men to assist in lightening the vessel. On their arrival it was found that all of the deck cargo of the *Myrtle Tunnel* had been jettisoned by the crew of the vessel, aided by the crew of the revenue cutter *Seminole*. The hands from the *Blanche* went to work, and jettisoned the cross-ties that were stowed between decks, and at high water on the afternoon of that day the *Blanche*, with a small tug, *Isabel*, owned by the same company, and the revenue cutter *Seminole* pulled on the schooner, but failed to move her off the shoal, and the *Blanche* and the *Isabel* returned to Southport. The revenue cutter *Seminole* took off the crew of the *Myrtle Tunnel*, her sails, ropes, and all of the personal effects of the crew, and carried them to Southport. Nothing further was done by the *Blanche* or *Isabel* until the 16th, when it appears that a high wind moved the *Myrtle Tunnel* off the shoal. The *Blanche* took hold of her about 11 o'clock that night, and pulled on her until 6 o'clock the next morning, when, according to the testimony of her master, it was blowing a gale of wind, and the schooner was carrying him off shore, when he cut adrift from her. The weather reports of Wil-

mington show that the greatest velocity of the wind on March 16th was 15 miles, and the master of the Isabel testifies that there was no storm on the 16th, not more than a 20-mile breeze; that "it might not have been that much—might not have been over 15, or somewhere along there." The master of the Blanche testifies that he cruised around for the next day or two, looking for her, but it also appears that the tug was engaged in her ordinary avocation of towing vessels. The Blanche is about 94 feet long, but the witnesses did not know her horse power. She is allowed about 125 pounds steam. "Salvage services," says the Supreme Court in the *Elfrida*, 172 U. S. 192, 19 Sup. Ct. 148, 43 L. Ed. 413, "are either (1) voluntary, wherein the compensation is dependent upon success; (2) rendered under a contract for a per diem or a per horam wage, payable at all events; (3) under a contract for a compensation payable only in case of success." Under the written contract, libelants agreed to "float and deliver the schooner Myrtle Tunnel, now ashore on Frying Pan Shoals, to Southport, N. C." There is a supplemental stipulation that, if the schooner Myrtle Tunnel fails to float, this contract is null and void. That libelants failed to deliver the schooner at Southport in accordance with their contract is plain, and although courts of admiralty have a wide discretion in the awarding of compensation for salvage services, yet when parties entirely free to do so have made a contract, they are bound by its terms, and the case does not differ from that of any other contract wherein one party agrees to do something, for the doing of which the other party agrees to pay something. In all such contracts the party who is to pay is not compelled to do so until the thing to be done is performed. In *Bondies v. Sherwood et al.*, 22 How. 214, 16 L. Ed. 238, it was held that when libelants by their own showing cannot recover under the contract, they cannot repudiate it, and libel the vessel for salvage. Here the libelants, although setting forth the contract which they have admittedly not performed, claim for a salvage service that in lightening the cargo they enabled the vessel to float, and inasmuch as being afloat she was afterwards saved by others, their services should be rewarded. The first effect of the lightening of the cargo, the wind being in the quarter where it was, would have been to move the schooner higher upon the shoal. The Blanche and Isabel were evidently tugs of no great power, not equipped with kedges or heaving cables, or other apparatus suitable for wrecking purposes, and, assisted as they were by the revenue cutter *Seminole*, their efforts to get the vessel off the shoal were ineffectual, and after pulling upon her for about an hour they left her, and returned to Southport. The vessel got off the shoal by reason of a change in the direction of the wind and of an increase in its velocity. After she was afloat, the Blanche took hold of her about 11 o'clock on the night of the 15th, and remained with her until the next morning, when she cut adrift, leaving the schooner without a crew, without sails, and without a rudder, to the mercy of the winds and waves. Thus adrift she was in greater danger than when on the shoal, a helpless derelict, at great risk of becoming a total loss, and a terror to all seafarers. It is of the very essence of a salvage service

that it has contributed to the rescue of the property in peril at sea.

Success is an essential ingredient, and however meritorious the service, or benevolent the intentions, or arduous the labor, if it is not attended by beneficial results no reward can be given. Failure may be the result of conditions which may relieve the party from any moral blame therefor, and it may well be that in order to save themselves from being carried out to sea the master and crew of the *Blanche* were justified in cutting adrift and abandoning the schooner; but abandonment of the enterprise, from whatever cause, forfeits every claim to salvage. Even if it should be held that libelants are not estopped by their contract, and that they did some service in the nature of salvage which entitled them to compensation, it would be difficult to find any principle upon which such claim can rest in a case like this; for the salvors here who picked up the vessel after she became derelict and brought her safely into port did not do so in co-operation with, or in furtherance of, the first undertaking. Theirs was an entirely new enterprise, undertaken after the first was entirely abandoned; for I must hold upon the proofs that the *Blanche* abandoned the Myrtle Tunnel because she was unable to handle her—she had not sufficient power. As will hereafter appear, the steam tug *McCauley*, of incomparably greater power, was unable alone successfully to accomplish it. It was not the velocity of the wind, which according to the weather reports was 16 miles an hour, and according to the testimony of St. George, the master of the *Isabel*, “not more than a 20-mile breeze,” but the deficiency in power, which led the *Blanche* to cut her adrift; but, whatever may have been the cause, the enterprise was abandoned *sine animo revertendi*. The cases are numerous and clear that the right to compensation as co-salvor or joint salvor applies only where the efforts of the second salvors are in connection with, and continuation of, the efforts of the first salvors—where it is one and the same enterprise—and there is no such right where the first salvors have abandoned their efforts. *The India*, 1 W. Rob. 409; *The Henry Ewbank*, Fed. Cas. No. 6,376. The libel of the *Blanche* must therefore be dismissed.

As already stated, the schooner was turned adrift on the morning of March 17th. On the next day Capt. Avery, managing owner of the steam tug *McCauley*, of Savannah, having learned from passing steamers that there was a water-logged schooner in their path somewhere south of Frying Pan Shoals, left Savannah in the teeth of a severe Northeast gale, going up the coast in search of the schooner. The weather continuing severe, he went into the port of Georgetown Monday afternoon, remaining there until the storm abated, going out about daylight Wednesday morning, March 21st, to continue his search, and sighted the schooner at 4:30 Wednesday afternoon, March 21st, about 30 miles southeast of Frying Pan Light. She had drifted outside of the path of passing vessels, and nearer to the Gulf Stream. None of the passing steamers had undertaken to assist her. She was at a point on the south Atlantic coast where there are long barren stretches of shore and few harbors. The only haven south of Hatteras possible for her, with her 30 feet draft, was

Charleston, about 100 miles distant, at a season of the year when high winds prevail, invisible in the nighttime, and visible only at short range in the day, for her hull was submerged and all her sails gone, apparently a helpless waif upon the ocean, abandoned by her crew, and abandoned by those who had undertaken to save her at Wilmington, through the exhaustion of their resources. At the time she was found by Capt. Avery, the weather had become moderate, and he made fast to her, putting two of his men aboard, for although all of the midships of the schooner were under water, the stern and bow were a few feet out. He pulled on her until the next day, making some headway towards Charleston. On Thursday the revenue cutter Seminole came up and offered assistance, but it appears that he did not have a hawser sufficiently long to render any effectual aid, and as the weather at that time became threatening, and the schooner had been brought within the path of passing steamers, the master of the McCauley became despondent as to saving her, and, certain that he could not do so without assistance, which was not at hand, there was some talk of blowing her up; but as the Seminole had no explosives, nothing was done, so he took his men from the schooner, and proceeded towards Charleston to seek assistance. Meanwhile Capt. Igoe, master of the Protector, of Charleston, having received a message from the Seminole that the McCauley had found the schooner and needed assistance, after getting some extra men and an extra supply of coal, put to sea about 11 o'clock the night of March 22d. Failing to find the schooner, the weather being very heavy and raining, and it being impossible in those conditions to make a successful search, he put back to Charleston, arriving there about noon of March 24th, where he found the tug McCauley and the tug Paulsen, also of Savannah, belonging to the same owners, and after conference and necessary preparations the three tugs put to sea about 2 o'clock on the morning of March 25th, and about noon of that day they found the Myrtle Tunnel, which had drifted considerably since she had been left by the McCauley. It was a problem of no little difficulty to handle this schooner, water-logged and rudderless as she was, and required a high degree of skill and seamanship. She was towed by the Protector and the Paulsen stern foremost, the tug McCauley going astern and backing, and acting as a rudder, thus producing an equilibrium of forces, and was brought safely to this port. Not the least difficult or dangerous part of the undertaking was the steering her safely through the narrow channel, drawing, as she did, 30 feet of water, the greatest draft that has ever crossed the bar, and putting her upon a shoal where she could safely lie. It is unnecessary to give at greater length the details of these operations. Much praise is due to Capt. Avery and his associates for the enterprise, skill, and seamanship displayed, and for the modest and straightforward way in which it has been related. The schooner has been sold by order of court and by consent of all parties, and brought \$18,000, and the cargo brought \$6,000, and all that remains is to award suitable salvage remuneration.

Some question has been made as to whether the Myrtle Tunnel was a derelict. It appears in the testimony that the managing owner

notified the Insurance Company of North America, which company, it seems, had some interest in the schooner, and the tug North America, belonging to a company controlled by the insurance company, was sent down to look for the wrecked schooner. It does not appear from the testimony that she was employed by the schooner Myrtle Tunnel for that purpose, and the master of the tug North America says that "it was stated in a letter that the vessel would be found somewhere between Hatteras and Frying Pan and Lookout." It appears from this testimony that on March 23d he was "54 miles east of Frying Pan Shoals lightship. It was then dark, commencing to rain and storm. I could not see anything, and went into Lookout Bight. The wind blew 40 to 50 miles an hour." While at Lookout Bight he heard that the McCauley had found the schooner, and returned to Philadelphia. As he made search for the vessel at no point further south than on a line east of Frying Pan lightship, and looked for her only at points north of that line, and as the Myrtle Tunnel had never been north of that point, the North America would never have found her. That the master and crew of the Myrtle Tunnel abandoned her, *sine animo revertendi*, is not disputed. That there was a *spes recuperandi* on the part of the owners is probably not contested. No vessel was ever lost at sea without some hope lingering in the mind of the owners that she may be recovered. It is perhaps not important to determine whether or not the Myrtle Tunnel was technically a derelict. Mr. Justice Story defines a derelict as "a boat or vessel found deserted or abandoned on the seas, whether it arose from accident or necessity or voluntary dereliction." Another definition from high authority is this: "Derelicts are boats or other vessels forsaken or found on the seas without any person in them." Measured by this standard, the Myrtle Tunnel was a derelict. A temporary abandonment of a vessel for the purpose of providing more effectual means of saving it does not constitute a derelict, and so it cannot be held that the abandonment of the ship by the master and crew while she was lying on the shoals of Frying Pan, and her owners had made a contract for saving her, constituted her a derelict; but when those efforts failed, and she was turned adrift without a crew, without sails, and completely at the mercy of the winds and waves, she was to all intents and purposes a derelict.

In *Rowe v. The Brig*, Fed. Cas. No. 12,093, Judge Story says:

"There is no dispute in respect to the facts of this case, and upon these facts it is clearly a case of derelict in the sense of the maritime law, for to constitute a derelict in that law it is sufficient that the thing is found deserted or abandoned upon the seas, whether it arose from accident or necessity or voluntary dereliction. Sir Walter Scott has declared that a legal derelict is properly where there has been an abandonment at sea by the master and crew without hope of recovery. The *Aquila*, 1 C. Rob. Adm. 37. With the view for which the words 'without hope of recovery' are introduced, viz., to distinguish a temporary absence from a permanent abandonment, it might perhaps have been more accurate to have said, an abandonment without an intention to return, since the *spes recuperandi* might exist even though the abandonment were without such intention. Sir Leoline Jenkins has given a true definition in its most broad and accurate sense, when he says: 'Derelicts are boats or other vessels forsaken or found on the seas without any person in them.'"

In *The Laura*, 14 Wall. 336, 20 L. Ed. 813, the Supreme Court, citing the English and American cases, says:

"In the case of *The Esperance*, 1 Dod. 46, the claimants received a letter from the master, who, with the crew, had left the vessel, advising them of the fact, and immediately sent proper persons to take charge of her and her cargo, but before they arrived other salvors had taken the vessel, and finally brought her in and libeled her. Sir Walter Scott said it was a clear case of derelict. There was first the chance of the party sent by the claimants not finding her; and, secondly, that if found she would be a complete wreck."

In the case of *The John Gilpin*, Olcott, 78, Fed. Cas. No. 7,345, Judge Betts, in considering a question of derelict somewhat analogous, said that:

"She was apparently abandoned, and if her crew might have been absent to procure assistance from other vessels and more force, their ability to return to the wreck, or the chance of affording any aid after the lapse of a few hours, must, in the then condition of things, have been most dubious contingencies."

In *The Coromandel*, 1 Swab. 208, Dr. Lushington, in speaking of a case very similar to this, remarks:

"It may be perfectly true that the master and these fifteen men, when they had got on board the *Young Frederick*, and were sailing away to Yarmouth, intended, if possible, to employ steamers to go and rescue the vessel, which was at no great distance. But is not that the case every day? A master and crew abandon a vessel for the safety of their lives. He does not contemplate returning to use his own exertions, but the master hardly ever abandons a vessel on the coast without the intention, if he can obtain assistance, to save his vessel. That does not take away from the legal character of derelict."

In *Rowe v. The Brig*, above cited, Judge Story cites the rule as to the compensation most favored in derelict cases, and says that:

"It was the ancient rule of the admiralty to give the salvors a moiety of the property saved. This is very distinctly articulated in the *Black Book* of the admiralty as a known and settled rule of division, and it continued in practice at least to the close of the reign of Charles the 2d, for there is an express decree in 1683 recognizing its existence. *The Aquila*, 1 C. Rob. Adm. 37. I incline to believe that it was originally borrowed from the civil law, by analogy to the case of treasure found in some public place, in which case, by a decree of the Emperor Adrian, one moiety was given to the finder and one moiety to the public, which was precisely the mode of distribution in the admiralty where no owner appeared; for then one moiety was, under the grant of the crown, considered a droit of the admiralty. * * * At the argument I intimated an opinion that in cases of derelict the old rule ought still to be considered as a subsisting but flexible rule, and that *prima facie* the salvors were entitled to a moiety, and that it was incumbent upon the claimant to establish that, under the special circumstances of the case, a different measure ought to be applied; and the opinion was given with reference to the fact that a moiety still continues the favorite proportion of judicial tribunals, if we can trust to the accuracy of reports. Upon subsequent reflection, I feel not the slightest inclination to change that opinion, and, as a limit upon judicial discretion in ordinary cases, I think it a safe and salutary rule. When I say, however, that the rule is flexible, I do not mean that it bends to every slight change of circumstance, but cases may occur of such extraordinary peril and difficulty, of such exalted virtue and enterprise, that a moiety even of a very valuable property might be too small a proportion."

In the later case of *The Henry Ewbank*, Fed. Cas. No. 6,376, Judge Story says:

"The District Court allowed, as we have seen, one moiety. The insurance company have acquiesced in this allowance, and so have the owners, officers, and crew of the Hope. The amount is contested by the other parties appellant, who ask for an increase of salvage, asserting that it is not sufficient to compensate them for their labors, or in proportion to the merits of the salvage service. At the argument I intimated a strong inclination to change the amount of salvage, and upon the most mature reflection I adhere to that opinion. This is a clear case of derelict, for there was an abandonment of the property *animo non revertendi*. In such cases the habit of courts of admiralty has been to decree one moiety to the salvors, and by the old law no more than that was ever decreed. That rule, however, has been somewhat relaxed in modern times, but still a moiety continues to be the favored, if not favorite, proportion allowed by courts of admiralty in ordinary cases. * * * It is not, however, an inflexible rule, but it yields to extraordinary circumstances, greatly diminishing or enhancing the perils and gallantry and personal sacrifices of the salvage service. But the court on all occasions has great reluctance in deviating from a moiety, and expects a very strong case to be made out, in which, upon other principles, there would be a very great disproportion between the services and the compensation, so great, indeed, as in a moral and legal view to constrain the court to deviate from it. And there is great wisdom in thus adhering to the rule, for nothing can be more inconvenient in the administration of justice, and especially of international justice, *ex æquo et bono*, than to leave every case open to the mere exercise of an unlimited discretion. Certainty in this case, as in many other cases, is far more important than mere theoretical propriety. * * * Treated as a mere question of compensation for labor and services, measured by any common standard on land or at sea, the salvage of one moiety is far too high. But, treated as it should be, as a mixed question of public policy and private right, equally important to all commercial nations, and equally encouraged by all, a moiety is no more than may justly be awarded."

In *Post v. Jones*, 19 How. 161, 15 L. Ed. 618, the Supreme Court of the United States says:

"The case before us is properly one of derelict. In such cases it has frequently been asserted as a general rule that the compensation should not be more than one-half nor less than one-third of the property saved. But we agree with Dr. Lushington (*The Florence*, 20 E. L. & C. R. 622), that the reward in derelict cases should be governed by the same principle as other salvage cases, viz., danger to property, value, risk of life, skill, labor, and the duration of the service, and that no valid reason can be assigned for fixing a reward for salvaging derelict property at a moiety or any given proportion, and that the true principle is, adequate reward according to the circumstances of the case."

Since that opinion was delivered in 1856 there have been numerous cases in our courts. In *The Agnes Manning* (D. C.) 59 Fed. 481, the value of the property salvaged was \$29,000. A moiety was awarded. In *The Theta* (D. C.) 135 Fed. 129, decided in 1905, a steamship bound from Norfolk to Boston, of the value of about \$275,000, picked up off the coast of Delaware a lumber laden schooner, which had been seriously injured in a collision, and abandoned by her crew, and towed her to the port of New York. The schooner's main deck was under water, and with strong winds the towing was slow and difficult, requiring two and one-half days and considerable expense. The schooner and cargo was of the value of about \$10,000. One-half was allowed as salvage.

The salvage services in this case were most meritorious; they were rendered promptly, efficiently, and skillfully, and in removing this

dangerous wreck from the pathway of commerce the salvors have performed a great public service. Authority can be found for awarding more than a moiety in extraordinary circumstances, where great danger has been encountered and great heroism displayed, and where one-half of the amount saved is an inadequate reward. While the services in this case were not unattended by certain perils, the danger was not so great nor the circumstances so extraordinary, nor is the amount to be awarded so small, as to justify a departure from the ancient rule, which is to award a moiety; for, as is admirably said by Mr. Justice Story in the case already cited:

"There is great wisdom in adhering to the rule, for nothing can be more inconvenient in the administration of justice, and especially of international justice, *ex æquo et bono*, than to leave every case open to the mere exercise of an unlimited discretion."

Although the rule is somewhat flexible, and may be bent by extraordinary circumstances, it is a safe and salutary limit upon judicial discretion, and not to be lightly disregarded. A court, moved by admiration for the skill and courage of salvors, and desiring to reward their services with a liberal hand, cannot in justice shut its eyes upon the rights of the claimants, who by unmerited and unremediable misfortune have already suffered such heavy losses, and should not by its decree deprive them of the small remnant that the sea has spared.

Let a decree be entered for the payment of the costs and expenses, and dividing the remainder between the claimants and the libelants—one moiety to each.

If necessary, a reference may be had to properly apportion the award among those entitled to salvage, and to fix the amount properly chargeable as expenses.

HARTFORD PRINTING CO. v. HARTFORD DIRECTORY & PUBLISHING CO.

(Circuit Court, D. Connecticut. July 3, 1906.)

No. 1,193.

1. COPYRIGHT—INFRINGEMENT—USE OF DIRECTORY.

The compiler and publisher of a directory, while he may not copy and reprint matter from a prior copyrighted directory as his own, may use the same for checking up his own canvass, independently made; and where discrepancies are found, after an honest and personal investigation of the same, may publish the result as so verified as his own.

2. SAME—EVIDENCE OF INFRINGEMENT—COPYING OF ERRORS.

Where, on a comparison of a copyrighted directory and an alleged infringing publication, it appears that a large proportion of the errors in the former are also found in the latter, such evidence is sufficient to refute the testimony of defendant's witnesses that the accuracy of all items in its directory was personally verified, and to show that direct copying had been done.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 76.]

3. SAME—SUIT FOR INFRINGEMENT—DAMAGES.

Where the infringing parts of a directory are intermingled with other parts about which there is no evidence, and defendant makes no effort to

separate them, it must account for all profits made on the entire sales, which is the only effective relief that can be granted when complainant's directory has been superseded by a later publication.

In Equity. Suit for infringement of copyright.

Ralph O. Wells, Esq., for complainant.

Chas. E. Perkins, Esq., and Augustine Lonergan, Esq., for defendant.

PLATT, District Judge. This case does not stir the conscience very much, and after analysis the reason for such a condition of things unfolds itself. Under the Constitution, the Congress may pass laws which will "tend to promote the useful arts and sciences." For that purpose the present copyright law was enacted. The plaintiff invokes the law because he was the owner, proprietor, and compiler of a book. In so far as he may have used his brains to get up an artistic book in the way of grouping, classifying, and setting forth the facts which it contains, there would be reason in his claim; but in so far as he merely records accurately the names of residents, with their occupations, and where to find them at home and in business, it is impossible to discover wherein the useful arts and sciences are promoted. The labor involved therein is purely mechanical, and to protect the copyright affords a certain measure of monopoly in the right to make such a use of labor and money. Copyrights upon directories have, however, been cared for by the courts so many times that it would be presumptuous for me, without solicitation, to attempt a practical expression of my own views. The complainant's lawful copyright is therefore assumed, and, sternly repressing such tendencies as these suggestions would lead us toward, it will be my purpose to decide the matter upon the case presented.

Complainant issued and copyrighted its 1904 directory. Defendant came to Hartford, and made an independent canvass for a 1905 directory, which it insists was thorough, and about which I will express no opinion, except as the facts throw light thereon. Undoubtedly a strong showing at a canvass was made. After completing a canvass of such a nature, it took up the complainant's 1904 directory, and, after comparing the alleged original canvass therewith, found something like 10,000 discrepancies. Thereupon the defendant claims that it sent the canvassers over the ground again to find the reason for such differences, and to make the needed corrections, and, after doing so, published its directory. The facts, as this opinion indicates, lead me otherwise, but if upon them I could find that the defendant, unaided by the copyrighted matter, made an original, thorough, house to house canvass, and then, after comparison with said matter, made a careful, thorough search to find the reason for the discrepancies which such comparison revealed, the case would go with the defendant, because it is believed that the law permits such a use of a copyrighted directory. The complainant seriously insists that the law is not so, but the reasoning in support of the contention is not persuasive.

Complainant admits that the defendant may compare its work with the copyright, and can check to see whether the canvass has been

thorough, but insists that if it shall find that it has made mistakes they cannot be corrected, because to do so would be an indirect mode of copying. Such a construction of the law would make the complainant's copyright a substantial monopoly, and by repeating annually the registration it could prevent everybody from using its directory for the purpose which is admitted to be lawful. *Moffatt v. Gill*, 86 Law Times Rep. 465, expresses the rule in directory cases which has been sanctioned by the Circuit Court of Appeals for the Second Circuit. It is true that it was obiter in both cases, but it is such a reasonable rule that I am bound to conclude that it will become the law of this circuit, if it has not formally become so already. The judge who wrote in *Moffatt v. Gill* plainly agreed with counsel that the cases relating to directories say that you cannot take another man's sheets and re-print them as your own, but you may take his sheets with you, and ascertain by personal investigation whether they are correct, and if you find that they are you may publish the result as your own. In my opinion, the cases, both English and American, all come to this: You must not bodily transmit the results of another's labor from his sheets to your own; but, having made an honest canvass, you may use his work for the purpose of checking and revising your own, if you will do so honestly, independently, and thoroughly, and, having done so, you may publish the final result. If you use another's copyrighted directory without thorough verification, you are, to the extent that you fail to carefully verify, guilty of the pure, unadulterated labor-saving device of copying. If you use it only for comparison, and then positively verify at the cost of your own exertion, you have not done wrong, because you have only used the copyrighted matter as a guide to the facts, which is the exact use to which the compiler has dedicated his book.

Bearing this state of the law in mind, it behooves us to see how far the facts in this suit relieve the defendant from wrongdoing. Copied errors are, as many learned judges have said, one of the surest tests of copying. If we take from a published directory 1,000 cases in which names and addresses appear, and find that 990 of them are correct and 10 incorrect, and then look up the same 1,000 cases in the alleged infringing book, and find the same 990 correct as in the copyright and the same 10 incorrect as in the copyright, the rule of coincidences ought not to be invoked. There is only one way to account for such a number of errors. One is convinced that the compiler of the alleged infringement must have copied, a greater or less amount, as the case may have been, of the original matter. If the errors in the copyright had been made purposely, it would be immaterial. In the suit at bar, when defendant's witnesses testify that their work in the start was original, that by comparing they found many discrepancies, and that after verifying they O. K.'d the copied errors as well as the correct addresses, their entire testimony becomes tainted, and hardly worthy of serious consideration.

Defendant's "location of streets and avenues" is substantially a direct unverified copy from complainant's corresponding list. His list contains every name in complainant's list, but 59 of them represent catch names and nonexistent streets, which he could have discovered to be incorrect by simply glancing at his own map, which is confessedly

correct. Defendant's general directory, upon its own admissions, contains such a large number of copied errors as to destroy the force of its contention that it really verified the discrepancies. Defendant's directory of residents by streets, having been compiled from the general directory slips, is also not sustained by proof of real verification. The defendant, after full hearing on affidavits, was enjoined, *pendente lite*, by Judge Coxe from continuing the publication of its business directory, and no attempt has since been made to disprove infringement.

The relief ought to apply to the entire publication, because the parts which are obviously copied are inextricably interwoven with the parts about which no positive proof of copying is presented, and the defendant has made no effort to separate the same. Probably, if it wished to do so, it could not.

It is not important at this stage of the case to discuss how much the complainant was damaged by the unfair use of the copyright. The use was obviously unfair, and a court of equity could not administer impartial justice without endeavoring to right the wrong.

As I approach the end, let me say that, for the reasons set down in the early part of this opinion, I do, in a certain way, sympathize with the defendant, even as I chide and punish. My notion of the complainant's rights under the copyright law does not, however, excuse the defendant for having indulged in what seems to me to have been a very perfunctory verification and uncertain original canvass. It will be remembered that defendant was not unwilling to be deprived of the services of such canvassers as returned a minimum of O. K.'d slips per diem. Rapidity in verification and speed in publication seem to have been defendant's business watchwords.

Defendant argues that the sale of its 1905 directory could not, in the nature of things, affect the sale of complainant's copyrighted 1904 directory. This may be so, but such sales were nevertheless injurious to the complainant, because defendant availed itself of the labor expended by complainant on the copyright, and has, by such unfair use, lessened its own labor, and since we cannot know how extensive the piracy was, it is only ordinarily fair that defendant should account to the complainant for any profits which it made.

The complainant, of course, cannot recover, under paragraph 7 of its complaint, for the injury to its 1905 directory, which was in preparation when the bill was filed, and I must treat those allegations as surplusage.

Looking upon the copyright, as I am bound to do if I follow other judges learned in the law, the complainant's property rights in the 1904 directory have been invaded by the defendant's acts. It is not perceived how defendant materially injured the sale of the 1904 directory, but it took advantage of complainant's work on the 1904 directory to compile its 1905 directory, and that device ought to be accounted for. The rights secured to the complainant by its copyright lost all substantial value after defendant had invaded them for the advantage of its 1905 directory. New directories are produced annually, and, of course, as soon as a 1906 directory is on the market, no one cares for that of 1905. That being so, injunctive relief at this late day would be of no avail.

The parties now stand in the precise situation which confronts litigants in patent causes when the patent has been held valid on the merits and infringed, but happens to have expired during the hearing. In such cases it is settled that a decree may be entered for an accounting, with costs.

Let that be done here, and let a master be appointed to assess the profits resulting from the sales of its 1905 directories which the defendant shall be found to have made.

IN RE HOOKS SMELTING CO.

(District Court, E. D. Pennsylvania. July 14, 1906.)

No. 1,995.

BANKRUPTCY—FAILURE TO OBEY ORDER TO TURN OVER MONEY—PENDING INDICTMENT FOR EMBEZZLEMENT.

A motion to commit the treasurer of a bankrupt corporation for contempt for failure to obey an order of the referee requiring him to turn over money to the trustee will not be considered where he is under bail to appear and answer to indictments in the state courts for the embezzlement of such money from the corporation until after such indictments are disposed of.

In Bankruptcy. On certificate from referee.
See 138 Fed. 954.

Henry J. Scott, for trustee.

William H. Peace, for William S. Tryon.

HOLLAND, District Judge. In this case, William S. Tryon, treasurer of the bankrupt, was directed by the referee on April 25, 1905, to pay over to the trustee the sum of \$35,019.12 within five days thereafter. Counsel has been delayed in every step taken in his behalf by reason of the fact that Tryon has paid no attention at all to the order of the referee and proceedings in this court. He does not even permit his own counsel to know his whereabouts, and counsel for the trustee has been unable to serve notice upon him. He cannot be found for the purpose of examination before the referee at all times, and his presence before the referee can be secured only through his counsel, and when he (Tryon) sees fit to attend. His defense has been technical, and he has at all times shown a disposition to avoid meeting the issues in the case, and having them disposed of on their merits. He is now under indictment in the local courts for embezzlement of the funds which he is said now to have in his possession and control. He is under bail to appear there and answer those charges. Without intimating any opinion as to the sufficiency of the evidence to sustain the referee's finding, the Court is of opinion that no order in this case should be made until Tryon is tried on the indictment in the state court. When this has been done, the motion here can be renewed.

Motion to commit for contempt is refused, with right of petitioner to renew motion at proper time, when such order will be made as the circumstances may warrant.

GUARDIAN TRUST CO. v. KANSAS CITY SOUTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. May 31, 1906.)

No. 2,329.

1. COURTS—FEDERAL COURTS—EQUITY PRACTICE—DEPENDENT SUIT MAINTAINABLE TO ENFORCE DECREE AND PROTECT TITLE THEREUNDER BY INJUNCTION.

A federal court sitting in equity may by means of a dependent suit and by the use of injunctions or writs of assistance enforce its decrees and protect titles made thereunder against the re-litigation in state or other courts of issues it has determined and against the litigation of questions of which it has lawfully acquired and retained exclusive jurisdiction.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 799, 801, 1355-1358.

Enjoining proceedings in state courts, see note to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; *Copeland v. Bruning*, 63 C. C. A. 437.]

2. SAME—DEPENDENT BILL—ACTION IN PERSONAM WILL NOT SUSTAIN.

The pendency in a state or other court of an action in personam which involves no issue of which the federal court has acquired exclusive jurisdiction, no claim to, or lien upon specific property in the possession or under the dominion of a federal court of equity, presents no ground to sustain a dependent bill to stay the action.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1355-1358, 1418-1430.]

3. MORTGAGES—FORECLOSURE—SUBJECT MORTGAGED PROPERTY, OBJECT APPLICATION OF THIS SPECIFIC PROPERTY TO MORTGAGE DEBT—PERSONAL LIABILITIES OTHERWISE IMMATERIAL.

The subject of a suit to foreclose a mortgage is the specific property mortgaged. Its object is the subjection of all liens thereon to that of the mortgage and the application of the specific property to the payment of the mortgage debt.

The personal liabilities of the parties and of the purchaser at the sale in such a suit are immaterial save as they condition the accomplishment of this object.

4. SAME—FORECLOSURE—ACTION IN PERSONAM ON LIABILITY OF PURCHASER FOR MORTGAGOR'S DEBT UNDER REORGANIZATION SCHEME NO GROUND FOR DEPENDENT BILL OR INJUNCTION WHERE NOT LITIGATED IN FORECLOSURE SUIT.

An action against the purchaser at a foreclosure sale upon its alleged liability to pay a debt of the mortgagor founded on the execution of a plan of reorganization under which the purchaser was organized and pursuant to which it bought the property, is not an invasion of the exclusive jurisdiction of the court which rendered the decree, usually reserved, to determine the priority and superiority of other liens to the lien of the mortgage, nor an impeachment of the decree or of the title thereunder, in a case in which the question of the purchaser's liability for such a debt has not been litigated in the foreclosure suit.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Harry S. McCartney (Jules C. Rosenberger, on the brief), for appellant.

S. W. Moore, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from an order which prohibited the defendant below, the Guardian Trust Company, from prosecuting two actions at law which it had instituted in the Circuit Court of Jackson County in the state of Missouri against the complainant, the Kansas City Southern Railway Company, to recover a personal judgment against the latter for about \$500,000, which the Trust Company claimed that the Kansas City Suburban Belt Railroad Company originally owed it and the Southern Company had assumed and agreed to pay. These alleged facts are disclosed by the record: In 1899 the Kansas City, Pittsburgh & Gulf Railroad Company owned or controlled a line of railroad from Port Arthur in the State of Texas to Belt Junction in Jackson County in the State of Missouri, and the Belt Company owned a line of railroad from that point into Kansas City, so that the two companies controlled a continuous line of railroad from Port Arthur into Kansas City. The railroads of both companies were incumbered by mortgages under which receivers were appointed and foreclosure sales were made by direction of the court below. After a foreclosure suit had been commenced against the Gulf Company and in March, 1900, the Southern Company was incorporated to purchase the properties of the Gulf Company and the Belt Company, pursuant to a plan of reorganization, under which the stockholders of the Gulf Company received a share of stock in the Southern Company for \$10 and one share of stock of the Gulf Company and the stockholders of the Belt Company received a share of stock of the Southern Company for each share of stock of the Belt Company, while the unsecured creditors of the latter company received nothing. Under this plan the committee of reorganization was authorized to agree to pay and to pay such unsecured debts of the Belt Company as it selected. At the foreclosure sale of the property of the Gulf Company in March, 1900, the committee caused that property to be purchased and conveyed to the Southern Company, which assumed the obligations of the committee. In September, 1900, four suits to foreclose mortgages upon the property of the Belt Company were commenced. Receivers were appointed, the suits were consolidated, a decree of foreclosure was rendered on November 6, 1900, a sale of the mortgaged property was made there under on January 31, 1901, and was confirmed on January 2, 1902, to the Southern Company. By means of the sale of bonds of the latter company secured upon the property derived from the Gulf Company and from the Belt Company and by the sale of the stock of the Southern Company the committee of reorganization raised and expended a large amount of money and after paying all their expenses turned over to the Southern Company an amount of money far in excess of the aggregate of the unsecured debts of the Belt Company. Each of the decrees of foreclosure contained the usual provisions that the purchaser should pay the costs of foreclosure, the receivers' liabilities and such claims as should be adjudged "prior in lien or superior in equity to the mortgage foreclosed herein upon the property sold," that the preferential character of such claims might be litigated in that suit before the master and the court in a manner therein prescribed, and that for the purpose of enforcing the provisions of the decree the court retained jurisdiction.

The trust company under its former name, State Trust Company, commenced a suit in the circuit court of Jackson county to obtain a decree that certain indebtedness of the Gulf Company to it was prior in lien and superior in equity to that of the mortgage foreclosed in the court below and that court properly enjoined its prosecution because the consideration and adjudication of that question was expressly retained within its exclusive jurisdiction. *State Trust Co. v. Kansas City, Pittsburgh & Gulf R. Co.* (C. C.) 110 Fed. 10, 16. The trust company was not originally a party to the foreclosure suits against the Belt Company, but upon a motion of the complainant and upon an amendment of its bill to the effect that it was important to have established by judicial decree the fact that the trust company was removed as a trustee under the mortgages sought to be foreclosed, it was made a party. Thereupon it answered and in its answer it set forth the indebtedness of the Belt Company to it, and the reorganization plan whereby the stockholders of the Belt Company became the stockholders of the Southern Company while the unsecured creditors were to receive nothing and the latter company was to become a purchaser of the mortgaged property, and alleged that the effect of this proceeding would be to deprive the unsecured creditors of the Belt Company of its property for the benefit of its stockholders by means of this collusive arrangement between the mortgagor and the mortgagee in violation of the rule announced in *Railroad Co. v. Howard*, 7 Wall. 392, 394, 409, 415, 19 L. Ed. 117, and *Louisville Trust Co. v. Louisville, etc., R. Co.*, 174 U. S. 674, 683, 19 Sup. Ct. 827, 43 L. Ed. 1130. The court below sustained exceptions to the portions of the answer which set forth these facts and this claim and thereupon the trust company presented an amended and supplemental answer in the consolidated cause which set forth in more detail these alleged facts, reiterated this claim and prayed adequate relief in that suit and it asked leave to file the answer. The court refused this request on condition that the complainant should, as it then did, make and file a written stipulation in the suit, which is embodied in the decree of foreclosure, in these words:

"This decree is entered on the express condition to which the complainant has assented, that it shall be without prejudice to, and shall not bar the right of the Guardian Trust Company, or its receiver, to plead and insist in any litigation now pending or hereafter brought, that the Kansas City Southern Railway Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably liable for and bound to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company, either in full or to pay them to the extent of the value of any property heretofore acquired by it from the Kansas City Suburban Belt Railroad Company, or that may be hereafter acquired by it from said company by virtue of these foreclosure proceedings, and without prejudice to the right of said Guardian Trust Company or its receiver, to plead and insist, in any pending litigation, or litigation hereafter brought, that the members of the reorganization committee of the Kansas City, Pittsburgh & Gulf Railroad Company assumed to pay and are liable to pay the unsecured debts of the Kansas City Suburban Belt Railroad Company existing at the time the alleged reorganization was undertaken."

It was in this state of the case that the trust company commenced the actions at law in the state court which form the subject of this suit and set forth in its petitions three alleged grounds of action: (1) That

by the execution of the scheme of reorganization and the purchase by the Southern Company of the property of the Belt Company a promise by the Southern Company to pay the debt of the Belt Company was conclusively implied by the law; (2) that the committee of reorganization expressly agreed with the trust company to pay this debt and that the Southern Company subsequently assumed and promised to pay all the obligations of the committee, including this one; and (3) that the execution of the reorganization plan was in legal effect a consolidation of the Gulf Company and the Belt Company into the Southern Company, so that the latter became liable to pay the debts of each of its constituent companies. Rev. St. Mo. 1899, § 1059. The Southern Company has filed a supplemental bill in the foreclosure suit against the Belt Company upon which it has secured an injunction against the prosecution of these actions at law on the ground that the court below has retained exclusive jurisdiction in the foreclosure suit of the adjudication of such claims as are set forth in the actions of the trust company in the state court and that their presentation to that court is an attack upon the regularity, validity and integrity of the foreclosure proceedings. Much has been said in argument regarding the legal sufficiency of the facts alleged in the petitions in the actions at law to constitute causes of action against the Southern Company. This question, however, is not here for our consideration, and the only issue presented for our determination is the question whether or not the court below rightfully issued the injunction to restrain the prosecution of the actions at law in the state court.

A federal court of equity may by means of a dependent suit and the use of injunctions or writs of assistance enforce its decrees and protect the title conveyed thereunder against the re-litigation in state or other courts of issues that it has determined and against the litigation therein of questions of which it has lawfully acquired and retained exclusive jurisdiction. *Julian v. Central Trust Co.*, 193 U. S. 93, 24 Sup. Ct. 399, 48 L. Ed. 629; *Riverdale Mills v. Manufacturing Co.*, 198 U. S. 188, 195, 25 Sup. Ct. 629, 49 L. Ed. 1008; *Campbell v. Golden Cycle Min. Co. (C. C. A.)* 141 Fed. 610; *Freeman v. Howe*, 24 How. 450, 460, 16 L. Ed. 749. But the pendency in a state or other court of an action in personam which involves no claim to or lien upon specific property in the possession or under the dominion of a federal court of equity and no issue of which it has acquired exclusive jurisdiction presents no ground for a dependent bill to stay it. *Stanton v. Embrey*, 93 U. S. 548, 554, 23 L. Ed. 983; *Standley v. Roberts*, 59 Fed. 836, 844, 8 C. C. A. 305, 314; *Barber Asphalt Pav. Co. v. Morris*, 66 C. C. A. 55, 58, 132 Fed. 945, 948, 67 L. R. A. 761; *Merritt v. Barge Co.*, 79 Fed. 228, 233, 24 C. C. A. 530, 535; *Green v. Underwood*, 86 Fed. 427, 429, 30 C. C. A. 162, 164; *Hughes v. Green*, 28 C. C. A. 537, 539, 84 Fed. 833, 835; *Hubinger v. Central Trust Co.*, 36 C. C. A. 494, 496, 94 Fed. 788, 790; *City of Ogden v. Weaver*, 108 Fed. 564, 568, 47 C. C. A. 485, 492; *B. & O. Ry. Co. v. Wabash R. Co.*, 57 C. C. A. 322, 324, 119 Fed. 678, 680; *Ball v. Tompkins (C. C.)* 41 Fed. 486, 490.

The subject of a suit to foreclose a mortgage is the specific property mortgaged. The object of such a suit is to enforce the lien of the mortgage, to subject all other liens thereto and to apply the specific property described in it to the payment of the debt it secures. While the proceeding is not strictly in rem, its subject and its object involve specific property only and the personal obligations of the parties are immaterial to it save as they condition the accomplishment of its purpose. It was for this reason that in the decree in the suit against the Belt Company by means of which the court applied the mortgaged property to the payment of the mortgage debts it required the purchaser to pay only the costs, the receivers' liabilities and such claims as should be adjudged "prior in lien and superior in equity to the lien of the mortgage," reserved jurisdiction to determine the question of the superiority of such liens and made no provision or reservation whatever regarding the litigation or the payment of those claims which were not secured by any lien upon the mortgaged property. The actions at law are founded upon no lien and upon no claim of lien upon any of the property mortgaged and sold under the decree of the court below. They rest upon the single claim that the Southern Company has both impliedly and expressly promised to pay the claims which they disclose to the trust company and the only relief which the latter seeks in them is a general judgment that it may recover the amount of these claims from the Southern Company. How, then, can these actions in any way invade the exclusive jurisdiction, or impeach the decree of the court below or the title of the Southern Company thereunder?

Counsel answers that they do so because the effect of the decree was that the purchaser should take the property free from all demands against the mortgagor company except the obligation to pay the costs of the suit, the liabilities of the receivers and the preferential claims. But these were only parts of the purchase price which it was required to pay to the court for the property. The decree did not undertake to determine, nor did it adjudicate the liabilities of the purchaser to other parties for other debts. Its effect was not to forever exempt the property in the hands of the purchaser from its other promises, debts and obligations, and the ground of the actions at law here is, not the obligation of the mortgagor, but the promise of the Southern Company to pay the former's debt. He says that it was a part of the contract between the court and the purchaser evidenced by the decree that the court should retain jurisdiction of the cause for the purpose of determining what claims or demands against the mortgagor should be paid by the Southern Company, that this reserved jurisdiction is exclusive of any other court and that these actions invade it. But the limit of the jurisdiction over this subject reserved by the decree was to determine what claims were secured by liens upon the mortgaged property prior in time or superior in equity to the lien of the mortgage and the only claims the purchaser was required to pay were these preferential claims, the costs and the receivers' debts. As the trust company claims in its actions no lien prior in right or superior in equity to that of the mortgage, but relies exclusively upon the personal obligation

of the Southern Company, its actions do not in any way impinge upon the exclusive jurisdiction of the court below.

Counsel meets this reply with the argument that while the trust company asserts no specific lien, it will, when it obtains its judgments, levy upon the very property described in the decree and will in that way assert a lien for any unsecured debt of the mortgagor and make it superior to that of the mortgage, and he cites *Julian v. Central Trust Co.*, 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629, to the proposition that this is an impeachment of the decree and of the title thereunder. But the levy enjoined in the *Julian Case* was based upon a judgment in an action against the mortgagor to which the purchaser was not a party, an action founded upon the debt of the mortgagor alone and not upon any independent promise or obligation of the purchaser. The actions at law here under consideration are against the purchaser, and they rest upon its independent liability, not upon that of the mortgagor, and the lien of the levies under the judgments, if any should be rendered therein, will be neither prior in right nor superior in equity to the lien of the mortgage, but will be effective only because the debtor, the Southern Company, has acquired the title to the property and has thereby made it liable for its personal obligations. When a judgment debtor takes title to property which he buys at a foreclosure sale or otherwise the judgment against him immediately settles upon it. When a debtor buys such property it becomes liable to be seized under any judgment that may be subsequently rendered against him. The liens, of such judgments, however, are not effective because superior to that of the foreclosed mortgage, but because the lien of the mortgage was superior to them and the title thereunder vested in him who owed the debts evidenced by the judgments. Such will be the effect and the reason for the effect of the judgments and levies in the actions at law in this case if such should be rendered or made.

Counsel contends that the actions at law constitute an attack upon the regularity and integrity of the decree because the trust company asserts therein that under the principles announced in *Railroad Co. v. Howard*, 7 Wall. 392, 394, 409, 415, 19 L. Ed. 117, and *Louisville Trust Co. v. Louisville, etc., R. Co.*, 174 U. S. 674, 683, 19 Sup. Ct. 827, 43 L. Ed. 1130, and under the law of the consolidation of corporations, the execution of the plan of reorganization and the purchase of the property by the Southern Company at the foreclosure sale charged it with a legal liability to pay the debts of the Belt Company. But the ascertainment and adjudication of the debts and obligations of the Southern Company to others than the court, the holders of the preferential claims, and the receivers for the purchase price of the property, were neither necessary to the determination of the issues presented in the foreclosure suit, nor were they actually litigated or decided therein. It seems that the court below had no jurisdiction to adjudicate them in that suit. *United States Trust Co. v. Western Contract Co.*, 26 C. C. A. 472, 81 Fed. 454; *Tod v. Kentucky Union Ry. Co.*, 52 Fed. 241, 3 C. C. A. 60, 18 L. R. A. 305; *State Trust Co. v. Kansas City, Pittsburgh & Gulf R. Co.* (C. C.) 120 Fed. 398, 407.

On the other hand, the complainant stipulated and the court provided in its decree that the suit and the adjudication should not bar the right of the trust company to insist in any litigation then pending or thereafter brought that the Southern Company by virtue of the manner in which it was organized, or for any other reason, is legally or equitably bound to pay the unsecured debts of the Belt Company. The result is that the facts disclosed in this suit are insufficient to sustain a dependent bill to enjoin the prosecution of the Trust company's actions at law. Our conclusion is that the order for a temporary injunction herein was improvidently granted because an action for a personal judgment against the purchaser at a foreclosure sale upon its alleged liability to pay a debt of the mortgagor founded on the execution of a plan of reorganization under which the purchaser was incorporated and under which it bought the property is not an invasion of the exclusive jurisdiction of the court which rendered the decree, usually reserved, to determine the priority and superiority of other liens to the lien of the mortgage nor an impeachment of the decree or of the title thereunder in a case in which the question of the purchaser's liability has not been litigated in the foreclosure suit, and because the stipulation of the complainant and the decree in the foreclosure suit, which conditioned the rights of the purchaser here, expressly provide that the foreclosure suit and the adjudication therein shall be no bar to such an action.

The order for the injunction must be reversed, and it is so ordered.

TOY TONG et al. v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. June 18, 1906.)

No. 30.

1. ALIENS—CHINESE—EXCLUSION—PROCEEDINGS—JURISDICTION—STATUTES.

Chinese Exclusion Act March 3, 1901, c. 845, § 3, 31 Stat. 1093 [U. S. Comp. St. 1901, p. 1328], declares that no warrant of arrest for violation of the Chinese exclusion laws shall be issued by United States commissioners except on the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal or deputy, or a Chinese inspector, unless the issuance of the warrant shall be first approved or requested in writing by the United States district attorney of the district in which it is issued. *Held*, that the official titles used in describing the persons entitled to make the complaint were mere descriptio personæ, and hence, where a complaint was made by a Chinese inspector, it was immaterial that it was filed with a United States commissioner outside the inspector's official district.

[Ed. Notes.—Citizenship of Chinese, see note to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

2. SAME.

Since no formal complaint or pleadings are required in Chinese deportation proceedings, where certain Chinese persons proceeded against were before the commissioner and before the District Court on appeal, objections to the validity of the process of arrest were not available to oust the court of jurisdiction.

3. SAME—NATURE OF PROCEEDINGS—REVIEW.

Proceedings to enforce the Chinese exclusion acts, being administrative, rather than judicial, the decision of a Chinese inspector refusing permission to a Chinese person to land is not reviewable by the courts.

4. SAME—BURDEN OF PROOF.

Where a Chinese person is brought before a United States commissioner or judge charged with being in the country illegally, the burden is on him to establish his right to remain, and unless he sustains the same his deportation follows by the terms of the statute.

5. JURY—TRIAL BY JURY—CHINESE DEPORTATION PROCEEDINGS.

Proceedings for the deportation of Chinese persons are not "causes," within Rev. St. § 566 [U. S. Comp. St. 1901, p. 461], declaring that the trial of issues of fact in the United States District Courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, etc., shall be by jury.

6. ALIENS—CHINESE DEPORTATION PROCEEDINGS—OBJECTION—RIGHT TO URGE—RULES—INVALIDITY.

Where, in proceedings for the deportation of certain Chinese persons, none of them were alleged to have ever had any certificate entitling them to remain in the United States, or that any such certificates had been taken from them, pursuant to Chinese Regulation Rule 23, the invalidity of such rule was immaterial.

Appeal from the District Court of the United States for the District of New Jersey.

Max J. Kohler, for appellants.

John B. Vreeland, for appellee.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. This is an appeal from the judgments and orders of the United States District Court for the District of New Jersey, affirming orders made by United States Commissioner Russ, of Hoboken, for the deportation to China of the four appellants. Though one complaint originally included all the defendants, the government conceded before the commissioner that they were entitled, on their demand, to separate trials, and the cases were tried separately, though much evidence common to all the cases was stipulated into the several records. In the District Court evidence common to all four cases was also taken on behalf of the government, though separate orders of deportation were entered, but for convenience on this appeal, the cases were thereafter consolidated on consent, as in the case of *U. S. v. Mrs. Gue Lim*, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544.

The cases were brought under section 12 of the Act of July 5, 1884 (chapter 220, 23 Stat. 117, 1 Supp. Rev. St. pp. 460, 461 [U. S. Comp. St. 1901, p. 1310]), as in the case of *U. S. v. Lee Yen Tai*, 185 U. S. 213, 22 Sup. Ct. 629, 46 L. Ed. 878; but section 13 of the act of September 13, 1888 (chapter 1015, 25 Stat. 479, 2 Supp. Rev. St. p. 144 [U. S. Comp. St. 1901, p. 1317]) is also relied upon by the government, as conferring jurisdiction on the United States Commissioner. The complaint verified by Inspector Sisson on April 20, 1904, charges an unlawful entry into the United States by defendants without "certificates entitling them to admission into the United States, as required by the Chinese exclusion acts and by law." The evidence adduced by the govern-

ment tended to show that these defendants were in a railroad train in Canada, on April 15, 1904, with tickets reading "from Hamilton to Wind Mill Point." They changed cars, according to this witness, at Caledonia, about 50 miles from the Niagara frontier, and the Chinese inspectors at Buffalo were duly warned to "head them off." On April 20, 1904, six men, claimed by the government to be the same, were arrested at Hoboken by Inspector Sisson, four of them being these appellants. Defendants offered no evidence before either the Commissioner or the District Court, other than what was brought out on cross-examination of the government witnesses and matters noticed judicially by the court at their request. From the order of deportation made by the commissioner in each case, appeal was taken to the District Court for the District of New Jersey, where the said orders of the commissioner were affirmed and orders issued by the District Court, directing the deportation of the respondents. With these orders of deportation, the following memorandum was filed by the learned judge of the District Court:

"On June 28, 1904, United States Commissioner Edward Russ made an order adjudging Toy Tong to be a Chinese person and to be unlawfully within the United States, and not lawfully entitled to be and remain in the United States, and ordering him to be removed from the United States to China at the cost of the United States. Similar orders were made in the cases of the other three respondents. Appeals from these orders are now pending before this court. Numerous objections to the proceedings have been made by the counsel for the respondents, several of which were disposed of in memorandum opinions filed on September 17, 1904, and October 31, 1904. The appeals have now been heard by this court upon the proofs taken before Commissioner Russ and additional proofs taken in this court. Neither before Commissioner Russ nor in this court has any of the respondents offered himself as a witness. On the authority of the late case of *United States v. Hung Chang*, decided by the Circuit Court of Appeals of the Sixth Circuit (134 Fed. 19, 67 C. C. A. 93) as well as of the other cases construing the law concerning the deportation of Chinese persons, and on the evidence taken in this case, I think the findings and orders of the commissioner should be affirmed, and that orders should be made in this court directing the deportation of the respondents.

"[Sgd]

W. M. Lanning, Judge."

The provisions of the United States Chinese exclusion acts, brought under consideration, are the following:

Section 12 of the act of July 5, 1884 (23 Stat. 117, c. 220 [U. S. Comp. St. 1901, p. 1310]):

"Sec. 12. That no Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several states and territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is

amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers."

Section 13 of the act of September 13, 1888:

"Sec. 13. That any Chinese person or person of Chinese descent found unlawfully in the United States or its territories may be arrested upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted upon a hearing and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district."

Section 3 of the act of March 3, 1901 (31 Stat. 1093, c. 845 [U. S. Comp. St. 1901, p. 1328]):

"Sec. 3. That no warrant of arrest for violations of the Chinese exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued."

The first point made by appellants' counsel, is that "appellants should all be discharged for want of jurisdiction, because these causes were instituted by New York officers having no authority in New Jersey." The admitted facts are, that the complaint was sworn to before a United States Commissioner, at Hoboken, N. J., by Chinese Inspector Sisson, who is a resident in New York City, and is a deputy of F. W. Berkshire, whose official station and jurisdiction is stated by authority of the Commissioner of Commerce and Labor to be the state of New York. The contention is made that, inasmuch as section 3 of the act of March 3, 1901, provides that no arrests for violation of the Chinese exclusion laws shall be made, excepting upon the sworn complaint of certain designated officials, the warrant issued on the complaint of Chinese Inspector Sisson was void, for the reason that he was not authorized to act as such inspector outside of the state of New York. The same objection, of course, could be made had the complaint been sworn to by any of the officials named who were appointed such for a given territory or district, other than that in which the complaint was made.

The objection, however, is without merit, for the reason that the statute, in enumerating those who may make complaint, uses the official title as descriptio personæ. The act of making a sworn complaint can ordinarily be performed by any person, and the official character of the affiant adds nothing per se to its force and effect. Such a complaint, in the ordinary administration of criminal law, furnishes the ground for official action, but the affiant is not performing an official act. Section 3 of the act of March 3, 1901, takes away the authority theretofore resting in the commissioner, to issue a warrant of arrest

upon the sworn complaint of any one who chooses to make it, and limits it to complaints made by certain persons holding office under the United States. A complaint made by a United States district attorney for the Southern District of New York, before a commissioner in the state of New Jersey, is still a complaint made by a United States district attorney. Such an act is not official, except that, holding such office, the commissioner is authorized to receive his sworn complaint in the premises. He has nothing to do, on account of such action, with the prosecution of the case, any more than would the private citizen who made such complaint before the passage of the act referred to. A fortiori this applies to the complaint made by a Chinese inspector, whose duties are in a measure undefined and may be extended over any territory whatever in the discretion of his official superior. The complaint made by Sisson, in Hoboken, was a complaint made by a Chinese inspector, and was therefore made by a person designated in section 3 of the act referred to.

But the sufficient answer to appellants' point is, that the defendants were before the commissioner and before the court, and objections to the validity of the process of arrest were not available to oust the jurisdiction. "No formal complaint or pleadings are required, and the want of them does not affect the authority of the judge, or the validity of the statute."

The second point made by counsel for appellants is, that the District Court erroneously denied appellants' demand for a jury trial. It is not claimed that the right to a jury trial is constitutional, but that it is conferred by a statute. Reference is made to the following section of the United States Revised Statutes:

"Sec. 566. The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury." [U. S. Comp. St. 1901, p. 461.]

The contention is that, inasmuch as it has been decided that these appeals under section 13 of the act of September 13, 1888 (chapter 1015, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]), are in the District Court, and not before the district judge individually (U. S. Petitioners, 194 U. S. 194, 24 Sup. Ct. 629, 48 L. Ed. 931), and are properly to be heard de novo in that court; they come within the purview of section 566 of the Revised Statutes, above quoted.

The trouble with the appellants' conclusion, founded upon these premises, is that these appeals are not "causes," in the proper sense of that word, as used in section 566 of the Revised Statutes.

The proceedings to enforce the Chinese exclusion act are administrative rather than judicial. With certain specific exceptions, no Chinese person is allowed to land in the United States, and the decision of an inspector refusing permission to a Chinese person to land, is not reviewable in the courts. *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 12 Sup. Ct. 336, 35 L. Ed. 1146. Under the provisions of these acts, no Chinese person is allowed to remain within the United States, unless he can show a certificate from the proper officer of the port at which he landed, that he has lawfully entered the United States. Chinese per-

sons found unlawfully in the United States are to be deported, and any person without, or unable to produce, the certificate above mentioned, is deemed to be unlawfully in the country and must be deported. When brought before a commissioner or judge, the burden to establish his right to remain in the country is upon him, and unless it is so shown, his deportation follows, by virtue of the statute in that behalf. This ascertainment of the right of the person arrested to remain in the country, by the commissioner or District Court, does not constitute a criminal prosecution or a suit at common law, to which the constitutional right of trial by jury attaches.

Fong Yue Ting v. U. S., 149 U. S. 698, 13 Sup. Ct. 1016, 37 L. Ed. 905, reviews certain habeas corpus proceedings in the Circuit Court of the United States for the Southern District of New York. In one of these cases, the petitioner represented that he had been arrested by a United States marshal as being a Chinese laborer, found within the jurisdiction of the United States without a certificate of residence, that he was taken by said marshal before the district judge of the United States, and that "the said United States judge, without any hearing of any kind thereupon ordered that your petitioner be remanded to the custody of the marshal * * * and deported forthwith from the United States, as is provided in said act of May 5, 1892," and that he was detained by virtue of the marshal's claim of authority and the judge's order.

Section 6 of the act of May 5, 1892 (chapter 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320]), here referred to, provided that all Chinese laborers within the United States at the time of the passage of the act entitled to remain therein, shall, within one year, apply to the collector of internal revenue of their respective districts, for a certificate of residence, and that any Chinese laborer within the limits of the United States who, after one year from the passage hereof, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by certain officials, including a United States marshal or his deputies, and taken before a United States judge, "whose duty it shall be to order that he be deported from the United States as hereinbefore provided, unless he shall establish clearly to the satisfaction of said judge, that, by reason of accident, sickness or other unavoidable cause, he has been unable to procure his certificate, and to the satisfaction of the court, by at least one credible white witness, that he was a resident of the United States at the time of the passage of this act."

In delivering the opinion of the Supreme Court, Mr. Justice Gray uses this language:

"The proceeding before a United States judge, as provided for in section 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which Congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the condi-

tions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application."

We think this characterization by the Supreme Court, of the proceeding provided for in section 6 of the act of 1892, is applicable in a general way to the proceedings referred to in section 12 of the act of 1884 and section 13 of the act of 1888, with which we are here concerned. In the exercise of the sovereign right to determine what classes of aliens shall be prohibited from entering the United States, or from remaining therein, Congress has been compelled, in order to make such prohibition effective, to resort to drastic measures, and has relied upon administrative officers to execute its will, and has provided for the ascertainment by summary proceedings, of the facts, with reference to which its will is to be carried into execution. Such alien cannot be heard to complain that the proceedings connected with his exclusion or deportation are summary in their character, and that the review upon appeal in the District Court of the action of the commissioner, is not held to be such a cause as entitles him to a trial by jury. The hearing before the district judge is *de novo*, in the sense that testimony is taken before such judge *de novo*, there being no provision that the matter should be heard upon the testimony taken before the commissioner. It is still an appeal from the commissioner, and partakes of the character of the proceeding before that official. If the constitutional provision of trial by jury cannot be invoked in this case, on the ground that it is not a criminal prosecution or a suit at common law, it would seem clear that such right cannot be invoked on the ground that it is a "cause" in the District Court, within the meaning of section 566 of the Revised Statutes, since, not being a suit at common law, it can only be such a "cause" by being a criminal prosecution.

The case of *In re Chow Goo Pooi* (C. C.) 25 Fed. 77, was a habeas corpus case, heard by the Circuit Court for the District of California before three judges. The petitioner had been arrested under the provisions of the twelfth section of the act of May 6, 1882 (chapter 126, 22 Stat. 61 [U. S. Comp. St. 1901, p. 1310]), which was afterwards amended and made to read as in the twelfth section of the act of July 5, 1884. The twelfth section of the original act provided that any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States, and found to be one not lawfully entitled to be or remain in the United States.

To the objection of the petitioner, that he had not been accorded a trial by jury, the Circuit Court said:

"We are also of opinion that the person thus brought before the magistrate has no right to a trial by jury. He is not brought before him as a

criminal. No punishment as such is inflicted upon him. The consequence of his being unlawfully here is that he will be sent back to the country from whence he came. The power conferred and exercised is essentially a police power."

It is not without significance that, neither in this case nor in the case in the Supreme Court, just quoted from, is the requirement of section 566 referred to.

The next point of appellants meriting attention, is that "the District Court erred in applying section 6 of the act of July 5, 1884 (chapter 220, 23 Stat. 116 [U. S. Comp. St. 1901, p. 1307]), against defendants, notwithstanding the fact that under illegal regulations, carried into practice by the government, Chinese arriving in the United States are unlawfully deprived of their certificates under an illegal regulation (rule 23 of the Chinese regulations of 1903) requiring the administrative officials to impound them." The section referred to provides that the certificate given to a Chinese person at the port at which he is allowed to land should be afterwards produced to the proper authorities of the United States, whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same, to establish a right of entry into the United States. Rule 23 of the regulations promulgated by the Commissioner General of Immigration, with the approval of the Secretary of Commerce and Labor, in 1903, reads as follows:

"Rule 23. All certificates, or other evidence, offered by Chinese persons to establish their right of admission to the United States, other than laborers' registration certificates, shall be retained by the officers in charge of the administration of the Chinese exclusion laws at ports of entry; the immunity from arrest of the Chinese persons admitted thereon resting upon their exclusive occupation in the pursuits for which their certificates, or other evidence, claim that they respectively seek admission to the United States."

This rule was in force at the date of the alleged entry in April, 1904, although it was afterwards amended in May, 1905, by the Secretary of Commerce and Labor, by excepting the certificates provided for in Section 6 of the Act of July 5, 1884. Undoubtedly the promulgation of such a rule was inconsistent with the provisions in regard to certificates contained in the acts of Congress, and contravened the rights conferred upon Chinese in respect to such certificates, and the rule could not be legally enforced. No hardship is made to appear, however, in these cases from the enforcement of this rule in the cases before us. None of the appellants has alleged that he was in possession of such a certificate, or that such a certificate was taken from him, pursuant to the requirement of this rule, nor is there any evidence adduced to that effect. The criticism of the rule, however just under other circumstances, has no relevancy in the present case.

The other points raised by the so-called assignments of error are without merit, and need not be discussed. We find no warrant, therefore, for the interference of this court in the judgments, orders and decisions of the United States District Court for the District of New Jersey in the said causes, and the same are affirmed.

MOSS NAT. BANK OF SANDUSKY et al. v. AREND.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1906.)

No. 1,516.

BANKRUPTCY—ACT OF BANKRUPTCY—APPOINTMENT OF RECEIVER—SURVIVING PARTNER.

Rev. St. Ohio 1906, § 3167, declares that, when a partner dies, the surviving partner or partners shall make application to the probate court and have an inventory and appraisement of the assets of the partnership and a schedule of its debts and liabilities made, which shall be filed in the probate court. Section 3167 declares that, if the surviving partner neglects to have such appraisement made, the administrator or executor must do so, and section 3169 authorizes the surviving partner to take the interest of the deceased partner at the appraised value, and, if he does not within 30 days from the filing of the inventory and appraisement, the executor or administrator shall apply to a court of competent jurisdiction for a receiver of the partnership to wind up its affairs and dispose of its assets. *Held*, that where, on the death of a member of an insolvent firm, the surviving partner applied for an appraisement, and after it was made elected not to take the deceased partner's interest, whereupon the administrator applied for the appointment of a receiver, the fact that such surviving partner joined in the administrator's application did not constitute an act of bankruptcy on his part.

Appeal from the District Court of the United States for the Northern District of Ohio.

H. L. Peeke, for appellants.

George C. Beis, for appellee.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This is an appeal from the order and judgment of the court below sustaining exceptions to the report of the special master and refusing to adjudge the appellee a bankrupt. The facts found by the master are as follows:

"(1) For a number of years before August 1, 1903, Charles H. Arend, August H. Arend, and William G. Arend, had been conducting a hardware business at Sandusky, Ohio, as a partnership under the firm name of Arend Bros. On said August 1, 1903, August H. Arend died, and thereafter the business of said Arend Brothers was continued by Charles H. Arend and William G. Arend until August 18, 1904, at which time said Charles H. Arend died, leaving William G. Arend the sole survivor of said partnership. Thereafter said William G. Arend, as such surviving partner, made application under and pursuant to the laws of Ohio to have appraisers appointed to make an inventory of the assets and liabilities of said firm of Arend Bros., and appraisers were appointed, who made a report showing the assets of said firm to be \$9,329.75, the liabilities \$29,399.95. On September 29, 1904, Arthur C. Arend, administrator of the estate of said Charles H. Arend, deceased, made application to the probate court of Erie county, Ohio, for a receiver to wind up said partnership and dispose of the assets thereof. On the same day said William G. Arend filed in the probate court a paper writing in which he waived the time of thirty days in which to elect whether he would take the interests of the deceased partner and partners of said firm, and elected not to take the interests of said deceased partner and joined in the application of Arthur G. Arend, for the appointment of a receiver. On the 30th day of September, 1904, one, George Arend was appointed receiver for said partnership, and on

the same day duly qualified as such receiver. Said receiver was not appointed because of the insolvency of said Arend Bros. and Wm. G. Arend, surviving partner, but because said surviving partner failed to elect to take under the statutes of Ohio. On September 29, 1904, and October 13, 1904, the assets of said firm were \$9,329.75, and the liabilities, \$29,399.95. The assets of said William G. Arend, individually and as surviving partner, on said September 29, 1904, and October 13, 1904, were insufficient to pay the debts of said partnership."

As conclusions of law from these facts the master found that the firm of Arend Bros. and William G. Arend, as surviving partner, and as an individual, were insolvent, and that the latter, as surviving partner, by joining in the application for the appointment of a receiver, committed an act of bankruptcy. The court below was unable to concur in these conclusions, and, holding that the surviving partner had not applied for a receiver, declined to adjudge him a bankrupt.

By the amendment of February 5, 1903 (chapter 487, § 2, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 683]) to clause 4 of section 3 of chapter 3 of the Bankruptcy Act (Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 [U. S. Comp. St. 1901, p. 3422]), the following were made acts of bankruptcy:

"Being insolvent, applied for a receiver or trustee for his property, or because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state, or of a territory, or of the United States."

The application for the appointment of a receiver was made by the administrator of the deceased partner, under the provisions of sections 3167 to 3170, inclusive, of the Revised Statutes of Ohio of 1906, regulating the duties and rights of surviving partners. Under these provisions, when a partner dies, the surviving partner or partners shall make application to the probate court and have an inventory and appraisement of the assets of the partnership and a schedule of its debts and liabilities made, which shall be filed in the probate court. Section 3167. If the surviving partner neglect to have this appraisement made, the administrator or executor must. Section 3167. The surviving partner is given the right, upon certain conditions, to take the interest of the deceased partner at the appraised value, and, if he do not within 30 days from the filing of the inventory and appraisement, the executor or administrator "shall forthwith apply to a court of competent jurisdiction for the appointment of a receiver for said partnership, who shall thereupon proceed to wind up the partnership and dispose of the assets thereof." Section 3169.

On the day of the filing of the inventory and appraisement, the surviving partner filed the following waiver:

"Now comes William G. Arend, surviving partner of Arend Bros., and waives the time of thirty days within which to elect as to whether he will take interests of the deceased partner and partners of said firm, and he hereby elects not to take said interests of said deceased partner and joins in the application of Arthur G. Arend for the appointment by this court of a receiver at this time."

On the next day, because the surviving partner "had neglected or refused to take the interest of the deceased partner in the partnership

assets," the receiver was appointed, upon the application of the administrator, "to wind up said partnership and dispose of the assets thereof."

It is conceded that this was not a case where "because of insolvency a receiver has been put in charge of property," because clearly the receiver was not appointed because of insolvency, but because of the death of a partner and to wind up the partnership. In *re* Douglass Coal & Coke Co. (D. C.) 131 Fed. 769, 779; *Blue Mountain Iron & Steel Co. v. Portner*, 65 C. C. A. 295, 131 Fed. 57, 61; In *re* Spalding (C. C. A.) 139 Fed. 244. But it is submitted that, since the firm and the surviving partner were insolvent and the latter joined in the application, he "being insolvent applied for a receiver or trustee for his property," and therefore committed an act of bankruptcy. But, as held by the court below, the surviving partner never really applied for a receiver. He had no power under the Ohio statute to apply for a receiver. He had the option of taking the interest of the deceased partner at the appraisement. He had 30 days in which to exercise this option. He did not want the interest at the appraisement, so he waived the 30 days and immediately declared his intention of not exercising the option. When he had done this, he had exhausted the power conferred upon him by the statute. It then became the positive duty of the administrator to apply for the appointment of a receiver to wind up the business. This duty was discharged and the receiver was appointed on the application of the administrator and for the purpose of winding up the partnership.

Judgment affirmed.

NOTE.—The District Court (per Taylor, District Judge), after stating the facts as found by the special master, said:

"The master found, as his conclusions of law from these facts, that Arend Bros. and William G. Arend, as surviving partner and as an individual, were insolvent on September 29, 1904, and October 13, 1904, and that William G. Arend, as surviving partner of the firm of Arend Bros., by joining in the application for the appointment of a receiver on September 29, 1904, committed an act of bankruptcy. The sole question therefore for the consideration of the court is as to whether the act of William G. Arend, in joining in the application for the appointment of a receiver, constituted an act of bankruptcy. The portion of the bankruptcy law by virtue of which the master came to this conclusion is paragraph 4 of section 3 of chapter 3, in which it is declared that it shall be an act of bankruptcy if the alleged bankrupt shall have made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property, or, because of insolvency, a receiver or trustee has been put in charge of his property under the laws of a state or territory, or of the United States."

"It seems clear to me that the joining, by the alleged bankrupt, in the application for the appointment of a receiver by the probate court for the partnership assets belonging to a firm which has become dissolved on account of the death of one of the partners, is not an act contemplated or described by the provisions of the bankruptcy law which I have just quoted. The proceedings in the probate court were had in consequence of the law of Ohio which provides what shall be done when one member of a partnership dies. That law provides that an appraisement shall be made, and that, if the surviving partner or partners are willing to take the assets of the partnership at the appraisement, and give a satisfactory bond conditioned that the debts of the partnership will be fully paid, the surviving partner or partners may, on payment of the appraised value, take over the property. Now, a failure or refusal by the surviving partner to thus take the assets of the

partnership may be due to one of several different facts. It may be, as in this case, that the assets are not equal to the debts; or it may be that he is not willing to pay for the assets the sum at which they have been appraised; or it may be that the surviving partner, for business or temperamental reasons, or for want of experience, may not care to manage the business, or buy the property at any price. So that the reason for the appointment of a receiver for the partnership assets by the probate courts of Ohio, on the death of one of the partners, is not at all based upon the question of solvency or insolvency; nor can the act of any person, in undertaking to give effect to that law, be construed to be an act of bankruptcy. It is true that, in the case of William G. Arend, the surviving partner joined in the application for the appointment of a receiver; and the master says, in his report, that, if this had not been done by the surviving partner, it is clear that no act of bankruptcy would have been committed. But I am unable to see how this affects the question. I think the master has attached an undue and unjustified importance to this act of the surviving partner. His act did not facilitate, on any ground of alleged insolvency, the appointment of a receiver by the probate court; nor did it change the character of the receivership, or enlarge the reasons for which it could be done. The fact is that the act of William G. Arend was absolutely nugatory, and was wholly unnecessary. It was doubtless done, as often occurs, in order that it might be understood that the orderly procession of legal events in the administration of such an estate was not going to be interfered with by him, and his act, in thus joining in that application, is not to be enlarged in its scope or its consequences by saying that it changed, in any respect, the quality or effect of the proceedings in the probate court in Ohio, whereby a receiver is appointed to take charge of the assets of a partnership where one of the partners dies. If the assets of the concern had been \$50,000, and its debts \$5,000, and, either because the assets were overvalued, or for some other reason, the surviving partner did not want to take them, and therefore the case became ripe for the appointment of a receiver by the probate court, can it be contended that, if a surviving partner joined with others in asking for the appointment of that kind of a receiver in the probate court, he thereby committed an act of bankruptcy? And yet that is precisely, in principle, what occurred in this case.

"The exceptions to the report of the special master are sustained."

G. & C. MERRIAM CO. v. UNITED DICTIONARY CO.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906.)

No. 1,234.

1. COPYRIGHTS—BOOKS PUBLISHED ABROAD—STATUTES.

Rev. St. § 4956 [U. S. Comp. St. 1901, p. 3407], provides that during the existence of a copyright the importation into the United States of any book so copyrighted or any edition thereof, or any plates of the same not made from type set, etc., within the limits of the United States, shall be prohibited, except in certain cases, etc. *Held*, that such provision was not intended to do more than prohibit the producing abroad of copyrighted books designed for sale in the United States, and had no application to the reproduction in the United States of a book copyrighted in Great Britain which contained no notice of copyright in the United States of a similar book intended for publication in the United States.

2. SAME—WAIVER OF COPYRIGHT.

Rev. St. § 4956 [U. S. Comp. St. 1901, p. 3407], provides that no person shall be entitled to a copyright, unless, on or before the day of publication in the United States or any foreign country, he shall deliver to the librarian of Congress a printed copy of the title of the book and two copies of the book not later than the day of publication in the United States or any foreign country, and section 4962 provides for the insertion of the

copyright notice in the several copies of every edition published, etc. Plaintiff simultaneously published and copyrighted a dictionary in Great Britain and the United States, neither being intended to compete with the other; the English book containing no reference to the American copyright, but fully complying with the copyright laws of Great Britain, as did also the American book with the copyright laws of the United States. *Held*, that complainant's failure to insert a notice of the American copyright in the English work did not constitute a waiver of its American copyright.

3. SAME—COPYRIGHT NOTICE—INSERTION—DIFFERENT BOOKS.

Where the title in the first 3 and last 34 pages of the copyrighted English edition of a dictionary was different from the copyrighted domestic edition, the publisher of the English edition was prohibited by Rev. St. § 4963 [U. S. Comp. St. 1901, p. 3412], from inserting therein a notice of the domestic copyright.

4. SAME—INFRINGEMENT—PUBLICATION—USE OF PART.

An infringement of a copyright may result in the wrongful use of a part as well as the whole of a copyrighted publication.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, §§ 52-54.]

5. SAME.

Where complainant simultaneously published and copyrighted a dictionary in England and the United States, the English book being somewhat different from the domestic, the publication in the United States of a photographic reprint of the English edition imported for that purpose constituted an infringement of complainant's copyright.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

For opinion below, see 140 Fed. 768.

This is an appeal from a final decree of the United States Circuit Court for the Northern District of Illinois, dismissing the bill of complaint of the appellant for want of equity, the case having been heard upon the pleadings and an agreed statement of facts. The bill was filed to restrain infringement of copyright in the book entitled "Webster's High School Dictionary." The facts briefly stated are as follows:

Appellant, before the publication in this or any foreign country, was the owner of the literary property in and the right to copyright the book "Webster's High School Dictionary," and on August 9, 1892, published and copyrighted the same simultaneously in Great Britain and the United States. Thereafter appellant continued to publish and sell this book in the United States, complying with all the requirements of the statutes and printing the statutory notice of copyright in every copy published or sold in this country. The book under the name "Webster's Brief International Dictionary" was subsequently published commercially in England under an agreement between appellant and George Bell & Sons entered into on July 18, 1894. This contract expressly provides that George Bell & Sons will not either directly or indirectly sell in or import the book into the United States or sell to others for the purpose of importation, and George Bell & Sons agree to use all reasonable means to prevent such importation by others. Under this contract the book has been published and sold in England. The copies so published and sold in England by George Bell & Sons have not borne the notice of the American copyright, but have been in full compliance with all the provisions of the English copyright law, and appellant has in England a valid and subsisting copyright in the book. No copies of the English book have ever been imported into or sold in the United States either by appellant or George Bell & Sons, or any one acting for or on behalf of either. The appellee, United Dictionary Company, is an Illinois corporation organized in June, 1904, with a capital stock of \$1,500. George W. Ogilvie, who was the organizer of defendant corporation, in January, 1905, caused a newsdealer in Chicago to

cable to England and procure for him a copy of Webster's Brief International Dictionary. This book was received in due course and turned over to Ogilvie. This and another copy subsequently imported by Ogilvie are the only copies of Webster's Brief International Dictionary, as far as the record shows, that ever came into this country. Upon receipt of the first copy, the appellee, United Dictionary Company, of which Ogilvie is director and principal stockholder, had the pages of Webster's Brief International Dictionary photographed and reproduced verbatim and had plates made which completely reproduced that book and which also reproduced Webster's High School Dictionary except the first 3 and the last 34 pages; the remainder of the two books being identical. This reproduction was with full knowledge of the American copyright and of the identity of the books. It is expressly stipulated that "said Ogilvie obtained said copy of said 'Webster's Brief International Dictionary,' not for the purpose of selling said individual copy, but for the purpose and intent of having the United Dictionary Company reprint and republish said book without the consent of either complainant or George Bell & Sons."

Appellee advertised the intended publication of its book in the Publishers' Weekly and has circulated pamphlets and printed matter in which this announcement is made. The book has not yet been published, but will be, unless its publication is restrained. And, if published, will constitute an infringement of appellant's copyright in the book "Webster's High School Dictionary," if that copyright be valid.

The question chiefly argued in this court is whether the failure, under the circumstances of this case, to insert in the books published in England, the copyright notice required by the United States copyright law, works a forfeiture of the United States copyright, notwithstanding an exact and literal compliance with the United States statute in regard to all books published or circulated by or with the consent of appellant in the United States.

Charles N. Judson, Wm. B. Hale, Frank F. Reed, and Edward S. Rogers, for appellant.

Geo. P. Fisher, for appellee.

Stephen H. Olin, *amicus curiæ*.

Before GROSSCUP and BAKER, Circuit Judges, and WRIGHT, District Judge.

WRIGHT, District Judge. Appellant's copyright of Webster's High School Dictionary was in strict conformity to law, and is unassailable in the United States unless the publication in Great Britain omitting notice of copyright as required by section 4962, Rev. St., deprives it of the right to maintain an action for infringement. Appellee imported two copies of the British publication of the book for its use; that is, to reprint and republish it in this country for sale. The importation and publication is sought to be justified by appellee because the publication in England was printed from type set or plates made within the limits of the United States, and more particularly appellee's insistence is that the publication is justified because of the failure of appellant to insert in the books published in England the copyright notice required by the United States copyright law.

In support of these contentions it is argued that the only prohibition contained in the law is against the importation of books not made from plates from type set in the United States during the life of the copyright, and that the books in question having been made from plates from type set in the United States, there exists no law against the importation of them, and having been lawfully imported, and being thus properly in the United States, and containing no no-

tice therein of a United States copyright they were legally subject to be produced by reprint or publication by any person, notwithstanding the copyright of the United States edition of the book. The prohibition against importation found in section 4956, Rev. St., we think was not intended to do more than its plain terms import, considered with the context of the whole section. Manifestly the object of that prohibition is to prevent from being done abroad, the work of producing copyright books designed for sale in the United States. The prohibition of that section has no application to the facts in this case.

The publication of the book in Great Britain was not intended for sale in the United States. Appellant had already provided another edition of the book for sale in the United States by obtaining copyright according to law, and which was duly protected thereby. However, in the ultimate view we entertain of the question involved, we do not consider the absence of a specific prohibition in the statute against the importation of a book in the situation of appellant's English publication, as of controlling effect. The vital question is whether protection can be afforded against infringement of the copyright appellant obtained from the United States, or whether the facts stated constitute an infringement. If the importations of the British book were in large numbers designed for sale in the United States in competition with the domestic copyright, then the question would be not only of illegal importation, but of infringement of the domestic copyright, as well, as the same now is of infringement by reproducing in this country the foreign publication.

It has been argued with force that because section 4956, Rev. St., provides that no person shall be entitled to a copyright unless he shall, on or before the day of publication in this or any foreign country, deliver to the librarian of Congress a printed copy of the title of the book, and also two copies of the book not later than the day of publication thereof in this or any foreign country, that therefore, the publication of the book being, as contended, thereby authorized, the provision in section 4962 for the insertion of the copyright notice in the several copies of every edition published, has reference to the several copies of every edition wherever published, in this or any foreign country.

Appellant did comply with these requirements in obtaining its domestic copyright. The law does not require this to be done in both countries; the requirement being that the copies be delivered before or on the day of publication in this or any foreign country. Appellant having fulfilled this requirement before the day of publication in this country, it had done all the law demanded in this regard. Other than this the provisions of this section relative to the deposit of copies of a publication in a foreign country, the demand for copies to be delivered to the librarian is but supplementary to the provisions of section 4952, amended by Act March 3, 1891, c. 565, 26 Stat. 1110 [U. S. Comp. St. 1901, pp. 3406, 3417], and should be limited to the purposes of that section, which enables authors or proprietors of a book in a foreign language to obtain copyright in this country. No provision is made in that section for a case like the one we are consider-

ing. The only reference in that section to a case like this is contained in the proviso:

"That this act shall only apply to a citizen or subject of a foreign state or nation, when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens."

By other legislation it is provided that existence of the conditions described in the proviso shall be determined by the President of the United States by proclamation from time to time, as the purposes of the law may require. So, in the case of a domestic owner of a literary production, which is also of domestic origin and in our own language, which is the case of appellant, we find no special provision in the law for copyright abroad, but do find, in the proviso quoted, that such a case has been anticipated by legislative recognition or sanction, confirmed by executive proclamation, thus pointing out the way, if not creating the right, to citizens of the United States to obtain from foreign nations copyright benefits. Congress did not assume to give to citizens of this country the right to a foreign copyright, but doubtless did all they could do, encouraged foreign nations, who alone could grant the benefits, to do so, and in legal effect authorized citizens of this country to seek copyright benefits in foreign countries upon the conditions provided for them.

Under these circumstances appellant obtained from Great Britain a copyright of the book in question, and was thus induced to publish it in England, which enabled appellee to obtain a copy for its use. So far as appears, the copyright granted by the English government was in strict conformity to the laws of that nation. Indeed, if at all, it had to be as prescribed by the law of England, for Congress had no authority to define the conditions upon which a copyright might be granted by a foreign nation. The Congress by their legislation did not assume such authority, but merely as an act of amity provided that when a foreign state or nation permits to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, then a citizen or subject of such foreign state or nation should have the privileges relative to copyright as conferred by law upon citizens of this country. The law of England does permit to citizens of this country the benefit of copyright on substantially the same basis as to its own subjects, as evidenced by the proclamation of the President of the United States.

It is true that the book so copyrighted and published in the foreign country contains no notice that a copyright exists in the United States. The law of England does not require that it should contain such notice, nor such a notice of its own copyright. The English copyright is valid in that country. It was obtained by appellant, a citizen of the United States, with both the legislative and executive invitation and sanction of its own country. Shall it now be held by the courts of the United States that, because of such invitation and sanction, appellant was induced to and did obtain a valid copyright in a foreign nation, it thereby invalidated the one it had obtained in its own country? We do not believe the Congress intended to have their

enactments interpreted to an absurdity such as that would be. It was never intended that the notice of copyright in this country should be inserted in foreign copyright editions of the same book not designed for sale in the United States. In the case of England, if such conditions were held to have been imposed, the effect would be to burden citizens of the United States with conditions that nation had not cast on its own subjects, and this would be inconsistent with the terms of the proviso of the statute hereinbefore quoted, by means of which these reciprocal rights were effected, to the purpose that if foreign nations should permit citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, then the latter should have like benefits in this country. If appellant had inserted a notice of the American copyright in the English editions of the book, would it have been true? It is plain that it would not. There can be no just pretense that the identical matter of the English edition had ever been submitted to the forms of law essential to a copyright in the United States. The title and the first 3 and last 34 pages of the English edition were different from the domestic edition. This being true, is it not evident that to have inserted such notice would have been a violation of section 4963, Rev. St. [U. S. Comp. St. 1901, p. 3412], subjecting the offender to a penalty of \$100? It is not to be imagined the law demanded a violation of itself.

An infringement may result in the wrongful use of a part as well as the whole of a publication protected by copyright. Appellant rightfully published its book in England in conformity to the laws of that country, with the approval of the law of its own sovereignty, at the same time having a copyright in the United States entitled to the protection of its laws from illegal infringement. The publication by appellee of the book imported from England would be an infringement of appellant's copyright, and should be enjoined.

The decree of the Circuit Court is reversed, and the cause remanded for further proceedings not inconsistent with the views herein expressed.

STANDARD LUMBER CO. v. BUTLER ICE CO.

(Circuit Court of Appeals, Third Circuit. June 20, 1906.)

No. 45.

CONTRACTS—ILLEGALITY—ENFORCEMENT.

Defendant corporation, being about to construct an ice plant, procured a bid for the work from plaintiff, after which plaintiff's manager, with the knowledge of its directing and executive authorities, entered into a corrupt bargain with defendant's president to add more than 50 per cent. to the original bid, with the understanding that the amount by which the bid was thus increased should when paid by defendant company be divided between the conspirators. *Held* that, as such act constituted a crime, the illegality permeated the entire contract, and precluded the maintenance of any action on the contract either to recover the contract price or the amount originally bid.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 521-530, 701-712.]

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. M. Hall, Jr., for plaintiff in error.

T. C. Campbell, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

GRAY, Circuit Judge. In the court below, the plaintiff in error, the Standard Lumber Company, a corporation of the state of Pennsylvania, brought an action ex contractu against the defendant, the Butler Ice Company, a corporation of the state of Delaware. The statement of claim sets forth a certain contract in writing between plaintiff and defendant, whereby the plaintiff undertook to provide the materials and do all the work mentioned and shown in specifications and drawings, referred to in said contract, for the erection and completion of an ice plant, with certain exceptions therein stated; and in consideration thereof, the defendant agreed to pay plaintiff the sum of \$10,808. It was also agreed that there should be paid \$6.50 per perch for extra stonework, above that shown in said plans, and 50 cents per yard for extra excavating, subject to additions and deductions as in said contract provided. It is then alleged that plaintiff had provided all the materials, and had performed all the work stipulated for in said contract, in accordance with the terms thereof, and that defendant had accepted the same; that plaintiff had also done extra work under the contract, amounting to \$2,838, so that the \$10,808 agreed to be paid for the completion of the work specified in the contract, and the amount to be paid for the extra work, at the rate stipulated for therein, amounted to \$13,646. Against this sum, the plaintiff allows defendants credits to the amount of \$11,624, leaving a balance of \$2,022 claimed as due from defendant to plaintiff.

The written contract, as set out in the statement of claim and produced at the trial, was executed by the plaintiff, the Standard Lumber Company, under its seal and the signature of J. M. Wetherill, manager, and on the part of the Butler Ice Company, under the seal of said company and the signatures of Peter F. McCool, its president, and S. B. Hermes, its secretary. The affidavit of defense set out, and it was proved at the trial, that the plaintiff company, by a letter addressed to P. F. McCool, then president of the defendant company, and signed by the Standard Lumber Company, "Per F. E. Brotherton," agent of the plaintiff company, duly authorized in that behalf, proposed to build the ice plant for defendant company, according to the plans and specifications submitted, for the sum of \$6,309.50; that the plans and specifications referred to in said bid, were the plans and specifications referred to in, and made part of, the contract between plaintiff and defendant companies, upon which suit was brought in the court below, and in which the consideration named for the work included in this bid was \$10,808, and that the bid for \$6,309.50 was full price for said work. Subsequent to the making of said bid, by agreement between Peter F. McCool, president of the defendant company, and the plaintiff company, acting through its manager, Wetherill, the said bid for said work was

increased to the sum of \$10,808, and the contract upon which suit was brought was then entered into upon that consideration to be paid by the defendant company, it being understood by the said officers of the two companies, that when the consideration was paid by the defendant company, \$2,000 of the difference between the original bid and the contract price, was to be paid to the said Peter F. McCool, and that the balance was to be divided between the said Wetherill and the said plaintiff company. The testimony as to this corrupt understanding and contract was uncontradicted, and it was not denied that the consideration of the written contracts was thus corruptly increased, or that the president of the defendant company conspired with the plaintiff company and its manager, Wetherill, to defraud the said defendant company for his own benefit.

The facts thus summarized not being denied, counsel for plaintiff contends that the defendant is bound by the action of its president and secretary, and that, inasmuch as the corporate seal was attached, as well as the signatures of the last-named officers, defendant cannot now avoid the obligation of the contract thus formally executed, and that plaintiff had a right to rely upon the signed contract under the corporate seal. The cases relied upon by plaintiff seem to be those in which corporate obligations duly executed have come into the hands of innocent third persons, where it is held that, inasmuch as there is a presumption that the seal was affixed by the proper authority, it is not to be overcome by the mere fact that no vote of the directors authorizing it is shown. We are not, however, dealing with a case of the innocent holder of such a contract, the undisputed facts being that the manager of the plaintiff corporation, with the knowledge of its directing and executive authorities, entered into a corrupt bargain with the president of the defendant company, to add more than 50 per cent. to the original bid, with the understanding that the amount by which the bid was thus increased should, when paid by the defendant company, be divided between the conspirators. It is too mild a characterization of such a transaction to say that it was fraudulent. It was a gross scheme for the abstraction of more than \$4,000 from the treasury of the defendant company, to be converted to the use of the conspirators, the larger share of it to the defendant's own president. The acts and conduct thus described are clearly in violation of two statutes of Pennsylvania, which provide as follows: Act of March 31, 1860:

"If any two or more persons shall falsely and maliciously conspire and agree to cheat and defraud any person or body corporate, of his or their moneys, goods, chattels or other property, or to do any other dishonest, malicious and unlawful act, to the prejudice of another, they shall be guilty of a misdemeanor, and on conviction, be sentenced to pay a fine, not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years." P. L. 413, § 128.

Act of June 12, 1878:

"Sec. 1. If any person, being an officer, director, superintendent, manager, receiver, employé, agent, attorney, broker, or member of any bank or other body corporate, or public company, municipal or quasi municipal corporation,

shall fraudulently take, convert, or apply to his own use, or the use of any other person, any of the money or other property of such bank, body corporate, or company, municipal or quasi municipal corporation or association, or belonging to any person or persons, corporation or association, and deposited therein, or in possession thereof, he shall be guilty of a misdemeanor."

"Sec. 5. That every person found guilty of a misdemeanor under any or either of the preceding sections of this title, wherein the nature and extent of the punishment is not specified, shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by separate or solitary confinement at labor not exceeding six years." P. L. 196, 197.

The contract was not only immoral, but it was illegal and criminal, and therefore void. No court would be justified in enforcing the whole or any part of such a contract. From an origin so flagitious, no right of action can arise. The maxim "*ex turpi causa, non oritur actio*," founded as it is on sound morals, has been long recognized by courts in the practical administration of justice. *Petrie v. Hannay*, 3 T. R. 422; *Collins v. Blantern*, 2 Wils. 341. A contract otherwise void, as being founded upon an immoral consideration, cannot be rendered valid by the mere ceremony of attaching a seal thereto. *Gaslight & Coke Co. v. Turner*, 5 B. N. C. 675.

The defendant, however, contends that the contract, as to the payment of \$10,808, which included the amount to be stolen from defendant, was executed, and that the balance sued for referred to the extra work under the stipulations of the contract, and had no relation to the fraudulent part thereof. The evidence will not permit a serious consideration of this contention. There was no appropriation of the payments made from time to time to any particular part of the contract, and plaintiff cannot now make that appropriation for his own benefit. The poison of the immoral consideration infects the contract as a whole, and the court below were right in refusing to lend its aid to the enforcement of any part thereof.

Nor is the principle invoked by the defendant, that no one may show his own turpitude, applicable here. The real defendant is the company. It was the victim, not a perpetrator of the fraud. Its president conspired with plaintiff to take from it a large sum of money, by falsehood and deception practiced through the medium of the contract here sued upon. But, even if the defendant could by any possibility have been shown to have been a party to its own spoliation, by the dishonest conduct of its president, it could still have alleged the illegal consideration as a defense. Where the contract on which the action is founded is *contra bonos mores*, or forbidden by express law, the defendant may plead its invalidity, even though he be a participator in the wrong. In such a case, the courts refuse to enforce the contract on grounds of public policy, and not as a matter of private interest.

In *Holman v. Johnson*, Cowp. 343, Lord Mansfield says:

"The objection that a contract is immoral or illegal, as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed, but it is founded in general principles of policy. * * * No court will lend its aid to a man who founds his action upon an immoral or an illegal act. If from the plaintiff's own stating, or otherwise, the cause of action appear to arise

ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

It is objected that in such cases, fraud is always a question for the jury, and that the court erred in giving binding instructions to find in favor of the defendant. We see no reason, and none has been shown where the facts constituting such a defense are undisputed, why the court may not, as in other cases, direct a verdict in accordance with such facts, if it would feel compelled, upon the rendition of a contrary verdict, to set the same aside. That this was such a case, we have no doubt. It must not, however, pass without notice, that each side requested the court to give peremptory instructions for a verdict in its favor, and the record discloses the fact that, after the testimony was closed on both sides, it was agreed by counsel for both the plaintiff and defendant, that the question was a question of law for the court, and the judge opened his charge to the jury with the statement:

"It is agreed on both sides that this is a question for the court to dispose of under the evidence; and therefore, it becomes my duty to direct the character of the verdict which you are to render."

As was said by the Supreme Court of Pennsylvania in a similar case:

"It would be unfair to the court and to the defendant to sustain an assignment of error, based upon the failure to submit the question to the jury." *Life Ass'n v. Weigle*, 128 Pa. 577, 18 Atl. 393.

The judgment of the court below is therefore affirmed.

REMINGTON & SHERMAN CO. v. BLAZOSSECK.

(Circuit Court of Appeals, Third Circuit. June 29, 1906.)

No. 38.

MASTER AND SERVANT—ACTION FOR INJURY TO SERVANT—QUESTIONS FOR JURY.

Where plaintiff, an unskilled and practically inexperienced man who had been employed as a laborer in defendant's shops for some three months, was directed to assist in unlacing a belt which had been thrown off the pulleys but hung upon the revolving main shaft, was injured by the catching and winding up of the belt on such shaft, and there was evidence tending to show that such catching was due to a set screw on the shaft which projected to an unusual length, the question of defendant's negligence, either in allowing the screw to so project or in permitting plaintiff to undertake the unlacing of the belt without further instruction or caution, was one for the jury.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 1017.]

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

See 141 Fed. 1022.

Frank P. Prichard, for plaintiff in error.

George Demming, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. Thomas Blazosseck, the defendant in error and plaintiff below, brought an action of trespass against the Remington & Sherman Company, the defendant below, to recover damages for injuries alleged to have been sustained by him, by reason of the negligence of the defendant, while he was employed by it as a laborer. Plaintiff had been originally employed as a helper in the carpenter shop, and in that capacity had been in defendant's service for nearly a year, when, two or three months before the accident in question, he was transferred to the machine shop, where his duties were those of an ordinary laborer up to the time of the accident. In the machine shop where plaintiff worked, there was a main shaft and counter-shafting, and belts ran from one to the other. They revolved around the pulleys on the shafts, thereby communicating motion to the machinery connected with the counter-shafting. When the shafting or machinery connected with it was being repaired, or the belts themselves were being laced or unlaced, the belts were thrown off the pulleys, and in consequence hung loosely on the revolving shafts. The belt here in question was what was called a "small" one, about two inches in width and three-eighths of an inch in thickness, and extended from the pulley on the main shaft to a pulley on the counter-shaft, 14 feet away. The belt itself, when looped around the pulleys on the two shafts, stretched for a distance of 16 feet, the total length of the belt being 32 feet. Plaintiff had, on more than one occasion, assisted in lacing or unlacing the belts, when thrown off the pulleys and loosely held by the revolving shafts. The first time that he assisted in this work, he spoke to the boss about having the machinery stopped. The boss, however, refused to stop it, told him there was no danger, and, placing a heavy piece of iron on the belt lying on the floor, proceeded to take the lacing out and the belt down. The plaintiff says, however, that the boss told him the next time not to put the iron on the belt as it lay on the floor. This particular belt ran over a pulley on the counter-shafting, at one end thereof and outside the support, so that when the belt was thrown off of the pulley on that side, there was no shaft for it to fall upon, and it fell upon the floor. At the time of the accident, the belt had been so thrown off of the pulley on the counter-shaft, and was resting in its doubled shape for about six feet on the floor. It hung on the main shaft, which was revolving, which caused the belt to move around the shaft irregularly. The plaintiff had been assisting the machinist on this occasion in removing the belt from the pulleys, and, approaching the portion of the belt extending to the floor, took hold of it with one hand to stop its motion, for the purpose of unlacing it, at the same time reaching backwards with his other hand for a piece of iron to place on the bight that lay upon the floor. While in this position, the belt was in some way caught on the shaft, and becoming entangled with the plaintiff's legs, whirled him against the shaft, whereby the injuries complained of were inflicted.

On the main shaft, which was high above the floor, there was a coupling, the nearest end of which was 17 inches from the pulley on which the belt, when in normal position, revolved. The coupling was a cylindrical iron sleeve over the shaft, to which it was tightened by two screws which ran parallel with the shaft, and when screwed up tight, projected only about a quarter of an inch from the end of the sleeve along the shaft. It was in evidence that one of the screws in this particular sleeve projected three quarters of an inch instead of a quarter of an inch, and the theory, founded upon the facts of the case, is that when plaintiff took hold of the belt, towards its lower end, and holding it with one hand reached down for the piece of iron on the floor back of him, the belt slid along the shaft the 14 or 15 inches that separated the nearest edge of the belt from the projecting screw, the head of which was about five-eighths of an inch from the shaft, and became jammed thereunder, and that the swiftly revolving shaft wound up the belt and whirled the plaintiff, who had become entangled therein, from the floor.

The defendant proved that the shafting and couplings were furnished by a reputable firm and were, in material and structure, up to the highest standards in the trade; that the coupling in particular was of an improved kind, and that the shafting and pulleys had been properly and carefully set. It was however proved that one of the two set screws in the end of the coupling, as described, had been put in by a carpenter and not by a machinist, and instead of being fully screwed in until the head only projected a quarter of an inch, it projected three-quarters of an inch, parallel to the shaft and a half to five-eighths of an inch therefrom. There was evidence to go to the jury that, in lacing and unlacing and adjusting these "small" belts, the rule of the shop was not to stop the machinery, but to throw the belts off the pulleys, allowing them to hang on the swiftly revolving shafts.

We have thus summarized the salient and material parts of the testimony. Counsel for defendant moved the court to instruct the jury that, under all the evidence, they should find a verdict for the defendant, and after the verdict in favor of the plaintiff, moved for judgment in its favor, non obstante veredicto on the point reserved. On the refusal of these motions, the two assignments of error are based.

In submitting the case to the jury, the learned judge of the court below discussed the question of contributory negligence, and submitted the same to the jury for its determination. In this, we think the learned trial judge was clearly right. The evidence on this point was not of a character to justify the court in deciding as a matter of law that the plaintiff was guilty of contributory negligence, and counsel for plaintiff in error do not urge that it should have done so. Their contention, on the other hand, is, to quote their own language, that:

"This case resolves itself into a single question, namely, whether the defendants below, the Remington & Sherman Company, were in any way responsible for the act of the plaintiff, their employé, in seizing the end of a revolving

belt and holding on to it with his left hand while he was reaching about and looking for a weight to put on it."

The only question, however, raised by the assignments, is the primary one—was there any evidence in the case which would warrant the jury in finding that the injuries complained of by the plaintiff were caused by the negligence of the defendant? In discussing this question, we must eliminate all consideration of contributory negligence by the plaintiff, which seems to be involved in the phrasing of plaintiff's point, as quoted above. It is not, whether defendant was in any way responsible for the act of the plaintiff in seizing the end of the revolving belt and reaching for the iron. In determining the question in that form, we are liable to be embarrassed, by considering whether the plaintiff's conduct contributed to the accident,—a question which, as we have seen, was properly submitted to the jury for decision in case primary negligence of defendant was found. The question then recurs, was there any evidence upon which such primary negligence could be predicated? On this question of defendant's negligence, the learned trial judge said:

"As far as I understand the case, the only negligence upon which the plaintiff's case can rest, is concerning this set screw. Did it project to a dangerous degree or distance beyond this collar? If it did, was that the cause of the accident? And if so, if the defendant was negligent in that respect, and if the negligence of the defendant caused the plaintiff's injuries, the plaintiff may recover."

We think this view of what might constitute negligence on the part of the defendant in the premises was unduly narrow, and that the jury were justified, on broader grounds, in finding a verdict of guilty against the defendant. Not only was the question, whether negligence could be imputed to defendant from the fact that the set screw, projecting as it did, made the danger possible, properly before the jury, but also the question whether the defendant was guilty of negligence in permitting a somewhat inexperienced and unskilled laborer, without more instruction or caution or supervision than seems to have been bestowed upon him, to undertake the unlacing of a belt hanging loosely upon a rapidly revolving shaft, under the circumstances testified to in the case. While the question was a close one, it was not beyond the scope of legitimate inquiry by the jury, whether the defendant had discharged its whole duty to such an employé, under the circumstances detailed in the testimony, in enforcing the rule that the belts were to be unlaced, repaired or adjusted while the shafts and pulleys were in motion. This question, with all the attendant circumstances, such as the inexperience of the plaintiff, his grade of service as a laborer, and the scant instruction given him, was before the jury, and was for their consideration. Having been determined by them, we are not able to convince ourselves that the verdict should have been set aside, and therefore we cannot agree that the jury should have been given binding instructions in favor of the defendant.

The judgment below is therefore affirmed.

AMERICAN BRIDGE CO. OF NEW YORK v. BAINUM.

(Circuit Court of Appeals, Third Circuit. June 29, 1906.)

No. 35.

1. MASTER AND SERVANT—INJURY OF SERVANT—NEGLIGENCE OF MASTER.

Plaintiff, who was 16 years old, and was employed by defendant as a tool boy for a gang of workmen, was sent by the foreman to bring some tools from an island which was reached by a bridge passing over the island at a height of about 60 feet, from which a stairway had been built down to the ground. The island and stairway were owned by a third party. There had been some ice on the stairway in the morning, but it had melted off, except where shaded by the bridge on the upper part. Plaintiff was told to hurry, and had obtained the tools, and climbed a little more than half way up the stairs, when he slipped, and, having both arms occupied in carrying the tools, was unable to catch the railing, and fell under it to the ground and was seriously injured. *Held*, that no negligence could be imputed to defendant or its foreman which would render it liable for the injury, either because plaintiff was not warned of the danger, or because he was required to carry too great a load; it appearing that he was strong and intelligent, and that he was not given any direction that he must bring all of the tools at one time, but that the injury was the result of an accident, the risk of which was incident to the employment.

2. SAME—SAFE PLACE TO WORK—LIMIT OF MASTER'S DUTY.

The duty of a master to provide a reasonably safe place in which his servant shall work does not extend to safeguarding the route of every journey the servant may be required to make in fetching and carrying, whether messages or portable articles.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

See 141 Fed. 179.

Samuel McClay, for plaintiff in error.

Ward Bonsall, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and BRADFORD, District Judge.

GRAY, Circuit Judge. In November, 1902, the defendant in error and plaintiff below, Frank E. Bainum, was employed by the plaintiff in error and defendant below, the American Bridge Company of New York, as a tool boy, to take care of the tools and carry them to the different workmen engaged in the structural work of the company. Plaintiff was then a minor of 16 years and 10 months of age. The defendant was a construction company at that time, and was engaged in steel structure work. On the 29th of November, 1902, defendant was engaged in doing some construction work on the main land of the Ohio river, at the south end of the Ohio Connecting Bridge. This bridge crosses the Ohio river a few miles below Pittsburgh, at Brunot's Island, and runs over the island at a height of about 60 feet. From the bridge down to the island, there was a stairway, in two flights, at an angle of about 45 degrees. The bridge was owned by the Pittsburgh Railways Company, and the stairs had been erected and were owned by the Philadelphia Company, which owned Brunot's Island. The

defendant company, sometime prior to the 29th of November, 1902, had been engaged in construction work on said island, and on the date last mentioned still kept tools in a chest on the island, at the foot of these steps. From the point where the defendant was at that time at work on the main land, at the south end of the bridge, to these steps, was a distance of between half and three-quarters of a mile. On the said 29th of November, one Riddle, a foreman of the defendant company, at about 11 o'clock in the forenoon, ordered the plaintiff to go from the work at the south end of the Ohio Connecting Bridge to the tool chest on the island, and bring back certain tools, to wit, a crosscut saw, a foot adze, a spirit level, an auger, a carpenter's square, and about two dozen wire nails, and the foreman's lunch box. As a number of workmen were waiting for these tools, the foreman told him to hurry up. The plaintiff started upon his errand, and crossed the bridge which spanned the Ohio river, to the stairs which led down to Brunot's Island. He descended these, went to the tool chest and got the tools for which he was sent. The stairs were a wooden structure, erected by the Philadelphia Company for its own purposes, and consisted of two flights; the first, leading from the ground, terminated at a small platform about 27 feet from the ground, at which commenced another flight at right angles to the first, which led to the top of the bridge. As far as appears from the testimony, these stairs were well constructed and were furnished with a wooden hand rail on one side. After loading himself with the tools, the plaintiff started to return by these stairs which he had just descended, and had taken one or two steps on the second flight, when his foot slipped on some ice on the tread of the step, and, rolling under the hand rail, he fell to the ground below, causing the serious injuries complained of. One of the witnesses called by the plaintiff, one of defendant's workmen, testified that at seven o'clock on that morning, the stairs were "a little bit slick—a little icy." It had thawed that day, and at the time of the accident this slippery condition had disappeared, except where the steps of the second flight were shaded by the bridge. The foreman, on cross-examination, testified that he had been down and up these stairs about eight o'clock that morning, but he was not asked and did not say anything as to their condition, and there is no other testimony from which any inference as to the existence of a dangerous condition from ice on these steps could be inferred, or that their condition was in any respect such as to impress either the foreman or the witness who ascended them an hour before, that they were especially dangerous.

In the suit brought by the plaintiff, it is charged that the defendant had erected the steps in question for the use of its employes, and had carelessly constructed them, in that they were without sufficiently secure balusters or railing, and were consequently in a dangerous condition. It also charges negligence, in that the slippery condition of said steps being known to defendant and unknown to plaintiff, the defendant, in violation of its duty to plaintiff, "did negligently, carelessly and wrongfully compel plaintiff to ascend said steps, with neither hand free for protecting himself, as defendant did not give plaintiff sufficient time to make two trips, but required undue haste from plaintiff in get-

ting all the articles from Brunot's Island to the western end of the bridge," whereby plaintiff was thrown from the steps and suffered the injury complained of. The only evidence to support this allegation is, as already stated, that the foreman, in giving the plaintiff the order to fetch the tools from Brunot's Island, told him to "hurry up," the reason for so telling him being that certain of the work under the foreman's charge would be delayed until the tools were brought. The trial resulted in a verdict and judgment for the plaintiff, and the case is here brought upon a writ of error sued out by the defendant.

The assignments of error raise a question as to the propriety of certain amendments to the record allowed by the court upon the petition of the plaintiff before and at the trial. They also allege objections to certain portions of the charge of the court to the jury, brought up in the record upon exceptions thereto duly signed, and they also allege that the court improperly refused peremptory instructions to the jury, upon the whole evidence, to render a verdict for the defendant.

The view taken by this court of the last-mentioned assignment of error, renders it unnecessary to consider the questions raised by the others. We therefore confine ourselves to the consideration of this last-mentioned assignment. The negligence averred in the declaration is the failure of the corporation defendant, in performing its primary duty as master, to sufficiently safeguard the place in which, and the conditions under which, the plaintiff, as its employé, worked. There is an entire absence of conflict in the testimony sent up in the record, as to material facts. Neither these facts nor any legitimate inference to be drawn from them, seem to us to justify a finding by the jury, that the plaintiff suffered the injuries complained of, by reason of any negligence of any primary duty of the defendant, as master and employer, to the plaintiff, as servant or employé. The premises where the accident happened were not the property of nor controlled by the defendant, as alleged in the declaration. That defendant's employés had, with others, the right accorded them of using the bridge and the stairs as a means of access to the island, did not render the defendant responsible for conditions that might exist between the island and the structure which it was engaged in erecting. The plaintiff, though a minor, was not of tender age, he being 16 years and 10 months old at the time of the accident. There is no testimony showing that he was otherwise than as active and strong as boys of that age, living in the open air and accustomed to work, are apt to be. His weight was 130 pounds, indicating average size and strength for his age, and the rate of his wages, \$2.25 a day, tends to show that he was not regarded by his employers as inferior in bodily strength or intelligence. There was nothing unusual about the errand upon which he was sent on the morning of the accident, or the occasion for it. Nothing appears in the circumstances testified to, to render the order of the foreman to "hurry" an improper one. A boy of plaintiff's age, accustomed to the work in which he was employed, was as capable of taking care of himself in his progress to and from the island, a distance of a half or three-quarters of a mile, as were any of the adult workmen of defendant, or as the foreman him-

self. Indeed, it would not be unreasonable to expect that such an errand would be better and more safely performed by a boy of the intelligence and activity belonging to his age, than by an older person. He had covered the entire route in going to the island, and must have observed the condition of the stairs, if they were dangerous enough to attract his attention, and it can hardly be said that he was exposed to any special danger in ascending the steps on his return. He had been there more than once before on the same kind of an errand. That he undertook to carry all the articles for which he had been sent, at once, cannot be imputed to the defendant as negligence, even if he so understood the order of the foreman. His own judgment seems to have been that he was able to do so, from the fact of his having undertaken to do it, and having safely ascended the first flight of the stairs. The plaintiff seems to have been an active and willing lad, and to have performed the errand upon which he was sent with zealous alacrity. The deplorable consequences of his slipping with his unwieldy load were the result of one of those accidents, the possibility of which attends every one in his progress from place to place, whether on business or on pleasure. One undertaking employment of the character of that undertaken by the plaintiff, undertakes the ordinary risks incident thereto. He must needs go from place to place outside of and away from the particular locality where the employer's work is being carried on. Indeed, when leaving the premises of his employer, such a person can hardly be said to have a definite "place to work in," within the meaning of the rule as to the duty of the master to render reasonably safe the place in which the servant is to work. It is absurd to suppose that the master's duty to provide a reasonably safe place in which his servant shall work, extends to safeguarding the route of every journey he may be required to make in fetching and carrying, whether messages or portable articles.

There is no evidence that the foreman knew what the condition of the stairs was, as to being icy on any part of them. But even if we are to assume that he had the same knowledge as the one witness who testified that at 7 o'clock that morning, when he used them, they were a "little bit slick—a little icy," it cannot be imputed as negligence to the defendant, that he, the foreman, did not admonish the plaintiff in regard to their condition. It was not a permanent condition, much less one due in anywise to any dereliction on the part of the defendant. It was a casual condition, due to constantly recurring states of temperature, conditions that were observable by the most ordinary intelligence, and at such seasons requiring everywhere and at all times to be guarded against, and demanding only the most ordinary care to avoid their danger. In this case, it was a danger of which the servant was better cognizant than the master, and one which the admonition of the master would not have rendered less. It was clearly not a danger as to which there was a duty of instruction by the employer. The case has no analogy to one where an inexperienced person, or a boy of tender years, is placed at work with or near dangerous machinery, without special instruction and caution as to

the danger incurred, nor is it a case, as we have seen, in which the rule that a master must use ordinary care to provide a safe place in which the servant shall work, is applicable. The injury complained of, sad and deplorable as it undoubtedly is, resulted from an accident incident to everyday life, and no more capable of being foreseen by the defendant than by the plaintiff.

From what has been said, we think it must be apparent that no inference of negligence imputable to the defendant can be drawn from the undisputed facts testified to before the jury. Even if Riddle, the foreman, stood in the relation of vice principal to the master, in giving the order to the plaintiff testified to, there was nothing in the physical situation, the circumstances surrounding it, or the mutual relations of the parties, from which a conclusion could be reasonably drawn, that it was his duty at the time of giving the order, to have instructed the plaintiff as to the existence of ice on the steps. In what other way he could have protected the plaintiff, is not suggested. It is true, that it is contended by the appellee, that from the facts of the case, as above recited, an inference of negligence on the part of the defendant can legitimately be drawn, in that the plaintiff was not required by the foreman to make two trips instead of one, in bringing the tools. It is also alleged in the declaration, that plaintiff was under compulsion to bring the tools at once, and thus overload himself, and also to proceed with undue haste. There is absolutely no evidence of such compulsion on the part of the foreman, and none can be inferred from the simple order to bring the tools and to hurry. The compelling motive, so far as it can be inferred from the evidence, seems to have been a commendable zeal on the part of the plaintiff to perform the work he had undertaken promptly and to the satisfaction of the foreman.

In the view that there was no evidence of negligence on the part of either the master or of the foreman, it is unnecessary here to discuss any question of the relation of fellow servant between the foreman and the plaintiff, or the assignments of error as to certain parts of the charge of the court to the jury.

For the reasons stated, we are constrained to the conclusion that the court erred in refusing the defendant's request to charge the jury, that under the evidence in the case the verdict must be for the defendant, and the judgment below is therefore reversed.

SPARKS v. TERRITORY OF OKLAHOMA.

(Circuit Court of Appeals, Eighth Circuit. June 7, 1906.)

No. 2,347.

1. LARCENY—EVIDENCE—RELEVANCY—FACTS—DECISION.

Upon a trial for larceny, the question was whether the defendant stole some cattle or bought them of one Read without notice that they had been stolen. There was evidence which tended to show that the defendant paid Read for the cattle \$250 in currency, and gave him a draft for \$710 on a commission company, payable to Read's order, and that the lat-

ter sent the draft to the company in a letter, wherein he directed them to place its proceeds in a certain bank to his credit. The territory produced three bankers, who testified, over the defendant's objection that their testimony was incompetent, irrelevant, and immaterial, that there was no method known to banking institutions whereby such a draft could be paid without the indorsement of the payee. *Held*, this evidence was irrelevant and immaterial, and its admission was error.

2. CRIMINAL LAW—EVIDENCE—ADMISSION OF IMMATERIAL OR IRRELEVANT TESTIMONY FATAL.

The admission of irrelevant or immaterial evidence is a fatal error, because it tends to withdraw the attention of the jury from the actual issues in the case, to lead them to decide it upon extraneous questions, and thus to violate the right of the parties to a trial of the case upon the law and evidence applicable to the real issues it involves, and upon those only.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Criminal Law, § 3137.]

3. SAME—EVIDENCE—GENERAL OBJECTION, WHEN AVAILABLE.

The general objection that evidence is incompetent, irrelevant, and immaterial is sufficient when the reason for the objection is readily discernible. But where the ground of the objection is not suggested thereby, it will not avail in an appellate court.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1633-1637.]

(Syllabus by the Court.)

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 83 Pac. 712.

Louis C. Boyle (W. F. Guthrie and A. F. Smith, on the brief) for plaintiff in error.

Don C. Smith (W. O. Cromwell, on the brief) for the territory of Oklahoma.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. The defendant below was tried and convicted of larceny of 32 steers in the territory of Oklahoma about September 1, 1902. There was evidence at the trial that these steers were the cattle of one George Storm; that they were in a pasture about 17 miles from the town of Woodward, in Oklahoma; that they disappeared from this pasture about August 25, 1902; that the defendant put them in a pasture within three miles of Woodward on that day; that he shipped them from the station of Woodward to Ben L. Welch & Co., commission merchants at Kansas City, on August 27, 1902; and that Storm found them there on the next day, and recovered them. The defendant testified that he had been engaged in purchasing cattle for many years; that on August 25, 1902, he had been out hunting, and was returning toward Woodward when he overtook two men driving these cattle toward that town; that one of them informed him that his name was F. E. Read; and that the cattle were for sale; that he bought them of Read, took a bill of sale of them, which he produced at the trial and paid him \$250 in cash, and gave him a draft for \$710 on Ben L. Welch & Co., to whom he shipped the cattle. The draft was received by Welch & Co., in a letter which reads in this way:

"Woodward, O. T. Aug. 25, 1902.

"Ben Welch Commission Co., Kansas City, Mo.—Dear Sir: Inclosed please find draft on your firm for seven hundred and ten dollars, given to me by A. G. Sparks in part payment on 32 head of steers. Please send amount of same to my credit at Woods County Bank, Alva, Okla.

"Yours truly,

F. E. Read."

Here is a copy of the draft:

"The Gerlach Bank.

"Woodward, Okla., Aug. 25, 1902.

"At sight pay to the order of F. E. Read \$710.00, seven hundred and ten dollars, part payment on thirty-two steers.

A. G. Sparks.

"To Ben L. Welch & Co., Stock Yards, Kansas City, Mo."

Welch & Co. were seasonably notified that the cattle had been stolen, and they never paid the draft. Counsel for the territory produced three bankers, and asked each of them if there was any method known to banking institutions whereby this draft could be paid without an indorsement by the payee, Read. Counsel for the defendant objected to this question, on the ground that it was incompetent, irrelevant, and immaterial. The objection was overruled, and an exception was noted. The first witness answered: "No, there is none. Sometimes, by an oversight, they are; but they should be indorsed." The second said: "Why, if it pass through the bank's hands, you are always required to indorse it." But on cross-examination he testified that if the draft was attached to the letter of instructions he expected the bank would take it. The third replied that it would be irregular if the draft was cashed without the indorsement of the payee.

Every litigant has the legal right to a fair and impartial trial of the issues which his case presents according to the law and the evidence applicable to those issues alone. The submission to the jury for their consideration of extraneous issues, or of evidence which is neither relevant nor material to the questions upon trial, is a violation of this right, and it constitutes a fatal error, because it tends to withdraw the attention of the jury from the issues actually involved, and to lead them to decide the case upon false issues, and in that way to reach an erroneous result. *Northwestern Mutual Life Ins. Co. v. Stevens*, 18 C. C. A. 107, 112, 71 Fed. 258, 263; *Railroad Co. v. Houston*, 95 U. S. 703, 24 L. Ed. 542; *Railroad Co. v. Blessing*, 14 C. C. A. 394, 398, 67 Fed. 277, 281; *Union Pac. R. Co. v. Field*, 137 Fed. 14, 15, 17, 69 C. C. A. 536; *Frizzell v. Omaha St. Ry. Co.*, 59 C. C. A. 382, 384, 124 Fed. 176, 178; *Equitable Life Assur. Co. v. McElroy*, 28 C. C. A. 365, 376, 83 Fed. 631, 642. The only issue in this case was whether the defendant stole the cattle or purchased them from Read. The draft payable to Read was drawn on Welch & Co., and it was sent directly to the drawee in a letter which purported to be signed by the payee of the draft, and which contained a request to the drawee to place its proceeds to his credit in the bank at Alva. If the signature to the letter was the genuine signature of Read, the payee of the draft, that letter gave ample authority to the drawee to comply with the request it contained, and in that way to take up and discharge its obligation upon the draft. The drawee undoubtedly had the option to act

upon this request, or to insist upon further assurance of the genuineness of the signature of the payee of the draft upon the letter. But this draft was not drawn upon any bank, was not presented to any bank, and no bank was ever requested to pay it or to collect it; so that the issue whether or not there was any method known to banking institutions whereby such a draft could be paid without an indorsement by the payee was as immaterial and irrelevant to the issues in this case as the method which bankers adopt to protest commercial paper. The grave admission in evidence by the court and submission to the jury of the testimony of these three bankers, doubtless men of standing and influence in their community, on behalf of the territory, upon this immaterial issue, over the objection and against the protest of the defendant, could hardly fail to impress the jury with the view that here was an important issue, and it may well have turned the scales in favor of the territory. The evidence was plainly irrelevant and immaterial, and its admission is fatal to the verdict.

The fact that the objection to this testimony was general, and the decisions of this court to the effect that such an objection is unavailing when it fails to suggest the true reason for it (*Minchen v. Hart*, 72 Fed. 294, 18 C. C. A. 570; *Eli Min. & Land Co. v. Carleton*, 108 Fed. 24, 47 C. C. A. 166; *Shandrew v. Chicago, St. P. M. & O. Ry. Co.* [C. C. A.] 142 Fed. 320; *Davidson Steamship Co. v. U. S.* [C. C. A.] 142 Fed. 315), have not escaped attention. But the rule of the Supreme Court and of this court is not that the general objection is never sufficient, but that it is insufficient in cases in which it fails to suggest to court and counsel the real ground of the objection. The objection that evidence is incompetent, irrelevant, and immaterial is sufficient when the reason for the objection is readily discernible, and when it is not so it is insufficient. *Sparf v. U. S.*, 156 U. S. 51, 57, 15 Sup. Ct. 273, 39 L. Ed. 343; *People v. Beach*, 87 N. Y. 508, 513; *Burlington Ins. Co. v. Miller*, 8 C. C. A. 612, 614, 60 Fed. 254, 256; *Guaranty Co. v. Phenix Ins. Co.*, 124 Fed. 170, 175, 59 C. C. A. 376, 381.

Where evidence has no relevancy or materiality to the issues in the case, no specification or elaboration of reasons for its rejection can more clearly or emphatically call this fact to the attention of court or counsel than the fitting objection that it is irrelevant and immaterial. The evidence of bankers about the method of payment of a draft in banking institutions could not have been material or relevant under any view of this case, and the general objection to its admission was ample to suggest this fact. The judgments of the courts below must be reversed, and the case must be remanded to the District Court with instructions to grant a new trial; and it is so ordered.

AMERICAN TOBACCO CO. v. WERCKMEISTER.

(Circuit Court of Appeals, Second Circuit. April 4, 1906.)

No. 105.

1. COPYRIGHT—PAINTING—COPYRIGHT BY "ASSIGN" OF OWNER OR AUTHOR.

Under Rev. St. § 4952, as amended by Act March 3, 1891, c. 565, 26 Stat. 1106 [U. S. Comp. St. 1901, p. 3406], which authorizes the proprietor of any painting, etc., "or assigns of any such person," to obtain a copyright thereon, the owner of a painting may transfer to another by assignment the right of copyright, although the assignee does not become the owner of the painting.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 22.]

2. SAME—NOTICE OF COPYRIGHT.

Act June 18, 1874, 18 Stat. 78 [U. S. Comp. St. 1901, p. 3411], relating to notice of copyright, does not require such notice to be placed upon the original of a copyrighted painting or upon its mount, but only upon the copies thereof.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Copyrights, § 29.]

3. SAME—ACTION FOR FORFEITURE OF COPIES.

An action by the owner of the copyright of a painting, brought under Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], for a forfeiture of the plates and copies of an infringing publication, is not the statutory action of replevin, and the right to maintain it does not depend on plaintiff's ownership or previous right of possession.

In Error to the Circuit Court of the United States for the Southern District of New York.

See 138 Fed. 162.

This cause comes here upon a writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error, who was plaintiff below. The court adjudged that "plaintiff have and retain, and is entitled to the possession of, 1,195 sheets, each containing copy of plaintiff's copyrighted picture Chorus, found in the possession of defendant, and replevied by the U. S. Marshal; said sheets having been made in violation of plaintiff's copyright, and that the same are forfeited to the plaintiff, and are of the value of \$1,010," and awarding judgment for costs. Mr. Sadler, an English artist, painted the picture, and on April 2, 1894, delivered to the plaintiff, a German citizen, the following paper: "I hereby transfer the copyright in my picture Chorus to the Photographische Gesellschaft, Berlin, for the sum of £200." Prior to that he had loaned the picture to plaintiff, who is the Photographische Gesellschaft, for the purpose of preparing a photogravure thereof. Upon the return of the painting, it was exhibited without notice of copyright in the exhibition of the Royal Academy, London, May to August, 1894. We have held that such exhibition was not a publication, because the rules and practice of the Academy prohibited the making of any copies of pictures there exhibited. *Werckmeister v. Am. Lith. Co.* (C. C. A.) 134 Fed. 321, 68 L. R. A. 591. On April 16, 1894, plaintiff took out a copyright in this country, and began the publication of the painting in this country and in foreign countries by the sale of photographic or photogravure copies thereof. Sadler retained possession of the painting until October, 1899, when he sold it to a Mr. Cotterell, residing in London, and at the time of the taking of testimony in this cause it was hanging in his dining room. Sadler told Cotterell before effecting the sale of the painting that he had already sold the copyright to the Berlin company, but at no time, so far as the evidence shows, was there inscribed upon some visible portion of the

painting, or on the substance upon which it was mounted, or on the frame thereof, any notice of copyright.

Wm. A. Jenner, for plaintiff in error.

Antonio Knauth, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. It is contended that plaintiff had no legal right to take a copyright, that he was not, within the meaning of section 4952 [U. S. Comp. St. 1901, p. 3406], an "assign" of the author, and that no one but the author or proprietor of the original painting is entitled to take a copyright. This point has been fully discussed by Judge Putnam in *Werckmeister v. Pierce & Bushnell Co.* (C. C.) 63 Fed. 455, and by Judge Holt in *Werckmeister v. Am. Lithographic Co.* (C. C.) 142 Fed. 827. We concur in their conclusions, and are of the opinion that plaintiff secured a statutory copyright.

It is next contended that plaintiff has no right to maintain the action because of omission to give the notice of copyright prescribed by section 4962 [U. S. Comp. St. 1901, p. 3411] on the original painting or its mount. That point also is discussed in the cases last-above cited, and we concur in the conclusions therein expressed, although a majority of the Circuit Court of Appeals in the First Circuit reached a different conclusion. *Pierce & Bushnell Mfg. Co. v. Werckmeister*, 72 Fed. 54, 18 C. C. A. 431.

It is next contended that this action cannot be maintained because plaintiff did not have the right of property or possession before commencing the action. This is on the theory that the proceeding is an ordinary action of replevin under the New York Code. It is, however, a direct proceeding to secure condemnation and forfeiture of the goods, as the complaint and judgment shows. It is the "action in the nature of replevin for seizure of plates and copies," which is referred to in *Bolles v. Outing Co.*, 175 U. S. 266, 20 Sup. Ct. 95, 44 L. Ed. 156, although the penalty for each copy seized or found in defendant's possession is not included in the same action, as this court intimated that it might be. *Bolles v. Outing Co.*, 77 Fed. 966, 23 C. C. A. 594. The marshal seizes them to await the judgment of the court, under a writ which is most analogous to a writ of replevin, but which the Circuit Court issues, not solely under section 914 [U. S. Comp. St. 1901, p. 684], but under the broad grant of power in section 716 [U. S. Comp. St. 1901, p. 580]. There have been a great number of decisions upon this vexed question as to how the relief accorded by section 4965 [U. S. Comp. St. 1901, p. 3414] shall be secured, and they are not altogether harmonious. It will not be profitable to discuss them. The question can be decided only by the Supreme Court, and, even if we were of the opinion that the action and the writ were of more doubtful validity than we are inclined to attribute to them, it would seem to be the wiser course to affirm, and thus secure a final determination of the question, since upon all the other propositions in the case we are satisfied that no error was committed by the trial court.

Other points raised (that defendant's constitutional rights have been invaded by execution of the writ, and that information procured un-

der it could not be lawfully used against defendant under the fourth and fifth amendments to the Constitution) seem to be disposed of by the recent decision in *Hale v. Henkel* (U. S. Sup. Ct. March 12, 1906), 26 Sup. Ct. 370, 50 L. Ed. 652.

The judgment is affirmed.

AMERICAN LITHOGRAPHIC CO. v. WERCKMEISTER.

(Circuit Court of Appeals, Second Circuit. April 4, 1906. On Motion to Amend Mandate April 24, 1906.)

No. 106.

COPYRIGHT—PENALTY FOR INFRINGEMENT—PAINTING.

Under Rev. St. § 4965 [U. S. Comp. St. 1901, p. 3414], providing the penalties recoverable for infringement of a copyright, and that the infringer "in case of a painting * * * shall forfeit ten dollars for every copy of the same in his possession or by him sold or exposed for sale," it is not necessary that the infringing copies of a painting shall be found in defendant's possession to authorize the recovery of the penalty named, as in case of a book or photograph, but it is sufficient if they were either so found or have been sold or offered for sale by defendant.

In Error to the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of defendant in error for \$10,000, penalties for violation of section 4965, Rev. St. [U. S. Comp. St. 1901, p. 3414], one-half to plaintiff and one-half to the United States.

Wm. A. Jenner, for plaintiff in error.

Antonio Knauth, for defendant in error.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The copyright in question relates to the picture Chorus, which was the subject of the litigation covered by our decision in *American Tobacco Company v. Werckmeister* (filed to-day) 146 Fed. 375. Reference may be had thereto for the disposition of several of the points (assignment of copyright, requirements as to giving notice, etc.) which are urged upon the present appeal.

The complainant alleges a sale of 30,100 copies of the copyrighted painting. None of these were found in the possession of defendant at the time of beginning action, under any process or otherwise. Defendant insists that for that reason the plaintiff failed to show facts sufficient to sustain recovery. Reliance is had on the decisions in *Thorn-ton v. Schreiber*, 124 U. S. 612, 8 Sup. Ct. 618, 31 L. Ed. 577, and *Bolles v. Outing Co.*, 175 U. S. 262, 20 Sup. Ct. 94, 44 L. Ed. 156. In both those cases the copyrighted article was a photograph. Defendant's counsel suggests that there is no reason apparent why there should be one measure of damages in the case of a book or photograph and another in the case of a painting; but it is a sufficient answer to such suggestion to note that the statute makes just such a distinction. In

the case of a book or photograph the offending person shall forfeit "one dollar for every sheet found in his possession, either printing, printed, copied, published, imported, or exposed for sale." In the case of a painting he shall forfeit "for every copy of the same in his possession, or by him sold or exposed for sale." In the one case it will be noted that there is to be no penalty for any copy "sold"; in the other case a penalty for every copy "by him sold" is to be exacted. The structure of the sentence is conformed to this distinction. In the earlier quotation the words "found in his possession" qualify every subsequent word in the clause; in the later quotation the words "in his possession" are cut off from the next succeeding words "by him sold" by the use of the word "or." It is not necessary to inquire why this distinction is made; it is sufficient to say that it is made, in language so plain that to eliminate it would be judicial legislation.

We are satisfied, however, that there was not sufficient evidence to warrant the jury in finding as they did that the defendant had sold 1,000 copies or over to the American Tobacco Company. The representatives of both these corporations, and every individual officer and employé who was called to the stand, claimed privilege under the fifth amendment to the Constitution. So far as any privilege personal to the witness was concerned, there was no merit in such contention. No claim was made that there had been any sale or purchase by him, but only by the corporation in whose employ he was. In some instances the court required the witness to answer, but as to most of the questions and as to the books and papers of both corporations it sustained the objections. Apparently this was error. The Supreme Court has since held that corporations are not under the protection of the fifth amendment. *Hale v. Henkel* (U. S. Sup. Ct. March 12, 1906), 26 Sup. Ct. 370, 50 L. Ed. 652. But the result of such ruling has been to denude the case of sufficient positive evidence to sustain the verdict. It appears that over 1,000 copies of the picture were found in the possession of the tobacco company; that a design, the same as that of the copies, was submitted to one of the employés of the tobacco company by the lithographic company, and approved by him; that dealings between the two companies are frequent, and checks are signed almost daily by the tobacco company for the lithographic company; and that all kinds of printing and lithographic supplies were got from the one company by the other. But, although the very objections availed of are persuasive to the belief that the defendant made and sold all the copies which were found in the possession of the tobacco company, there is not in the record competent legal evidence to support such a finding.

The judgment is reversed.

PER CURIAM. This is a motion to amend a mandate which reversed a judgment of the Circuit Court by adding thereto a provision that a new trial be granted. Such an amendment is unnecessary. The action was one at law. The reversal did not finally dispose of the cause, but returned it to the Circuit Court with the issues undisposed of. It is entirely within the power of that court to set them for trial.

Motion denied.

ALBERT LORSCH & CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 9, 1906.)

No. 45.

CUSTOMS DUTIES — MEASUREMENT — IMITATION PRECIOUS STONES — "DIMENSIONS."

The provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule N, par. 435, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], for imitation precious stones not exceeding an inch in "dimensions" does not exclude stones exceeding an inch in a single dimension. To be excluded they must exceed an inch in more than one direction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Appeal by the importers from a judgment of the Circuit Court for the Southern District of New York (135 Fed. 214), which affirmed a decision of the Board of General Appraisers (G. A. 5,661, T. D. 25,251), sustaining the collector in assessing a duty of 45 per cent. ad valorem upon the imported merchandise.

Comstock & Washburn (Albert H. Washburn, of counsel), for importers.

Henry L. Burnett, U. S. Atty., and Charles Duane Baker, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. The merchandise in question is composed of glass or paste made to imitate jade, a semiprecious stone. The sample in evidence, taken from the importation, represents an oval cameo about 1 1-5 inches in length, 3-5 of an inch wide and 1-16 of an inch thick. The collector imposed an ad valorem duty of 45 per centum, under Act July 24, 1897, c. 11, § 1, schedule N, par. 112, 30 Stat. 192 [U. S. Comp. St. 1901, p. 1676], classifying the merchandise as "manufactures of glass or paste." The importers protested, insisting that it should have been assessed under paragraph 435 of the same act; the relevant parts thereof being as follows:

"Imitations of diamonds or other precious stones, composed of glass or paste, not exceeding an inch in dimensions, not engraved, painted, or otherwise ornamented or decorated, and not mounted or set, 20 per centum ad valorem."

The sole question to be determined is whether the importations are within the language last quoted, or, in other words, does an oval stone, which is less than an inch wide, less than an eighth of an inch thick and which is more than an inch in the one particular of length only, exceed an inch in dimensions? We think it does not. The contrary conclusion is reached by substituting the word "dimension" for the word "dimensions" as found in the law, and this upon the theory that Congress intended to use the former and adopted the latter in order to make the sentence grammatical. We see nothing ungrammatical in the paragraph as written, and are convinced that when the dimensions of an object are to be ascertained measurement must be taken, at least, in more than one direction. In common parlance no business man would think of using the word "dimensions"

as synonymous with length. A person about to charter a ship or lease a house would hardly deem his inquiry for dimensions answered by the information that the ship was 280 feet in length, or that the house was 25 feet front. An order for building stones over a foot in dimensions would not be filled by the delivery of stones 13 inches long, two inches wide, and one inch thick, and an order for cloth a yard in dimensions would not be filled by a piece of tape a yard in length. If we turn to the dictionaries we find the word "dimensions" defined as including length, breadth, and thickness, implying the presence of all three of these characteristics—a body having extent, size, and magnitude in at least two directions. In commercial transactions the word usually relates to capacity or bulk and implies cubic rather than superficial proportions. At least there must be measurement in more than one direction; mere length will not do; a straight line has no dimensions.

The appellee construes the paragraph as if it read "not exceeding an inch in length." If this had been the intention of Congress it would have been easy to say so, as was done in several instances in the same act where duty is regulated by the length, width, or thickness of the article. We think the paragraph entirely clear. But concede that it is doubtful, the concession leaves the appellee in no better position, for the property of the citizen may not be taken under an ambiguous law. If there be doubt it should be resolved in favor of the importer.

The judgment, so far as it relates to the merchandise in question, should be reversed, and duty should be levied under paragraph 435.

CEBALLOS v. UNITED STATES.

LEE TAI LUNG v. SAME.

(Circuit Court of Appeals, Second Circuit. March 23, 1906.)

Nos. 66 and 267.

CUSTOMS DUTIES—MEASUREMENT—OLIVES—"GALLON."

Under Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651], imposing a duty at various rates "per gallon," according to condition, the duty should be assessed on the basis of the wine or liquid gallon and not the dry gallon, regardless of whether the olives are imported dried or in brine.

Appeals from the Circuit Court of the United States for the Southern District of New York.

For decision below in the Ceballos Case, see 139 Fed. 705. In the Lee Tai Lung Case there was no opinion. The decisions covered by these appeals affirmed two decisions of the Board of United States General Appraisers, G. A. 5,701 (T. D. 25,359) and G. A. 6,221 (T. D. 26,888), which had affirmed the assessment of duty by the collector of customs at the port of New York. The opinion of the Board in the former case is set forth in the report of the Circuit Court decision in the Ceballos Case (C. C.) 139 Fed. 705, *supra*. The opinion of the Board in the latter case is as follows:

WAITE, General Appraiser. The importation in this case consists of five boxes of dried olives imported from China. They were assessed for duty at 15 cents per gallon, under the following provision in Tariff Act July 24, 1897, c. 11, § 1, Schedule G, par. 264, 30 Stat. 171 [U. S. Comp. St. 1901, p. 1651]:

"(264) * * * Olives, green or prepared, in bottles, jars, or similar packages, twenty-five cents per gallon; in casks or otherwise than in bottles, jars, or similar packages, fifteen cents per gallon."

There appears to be no dispute that the goods were correctly classified under paragraph 264, the only question raised relating to whether they should be assessed upon the basis of the gallon of liquid measure, containing 231 cubic inches, which was used by the customs officers, or the gallon of dry measure, presumably that containing 268.8 cubic inches, which the importer claims should be applied. Additional information derived from the record in this case and from other sources confirms the opinion expressed by the board in the Ceballos Case (G. A. 5,701, T. D. 25,359), affirmed by the Circuit Court in *Ceballos v. U. S.* (C. C.) 139 Fed. 705 (T. D. 25,879), namely, that the customs gallon of the United States is the wine gallon of 231 cubic inches, if, indeed, that is not the only gallon in general use in the commerce of this country. While it appears that Congress, under its constitutional authority to "fix the standard of weights and measures" (article 1, § 8, Const.), has never in terms formulated a system of standard weights and measures for the United States, there has been practically a legislative adoption of certain standards in use, including the wine gallon of 231 cubic inches, but not, so far as we are informed, the dry gallon. The history of this legislation and the related facts are summarized in a compilation issued by the Bureau of Standards of the Department of Commerce and Labor, entitled "Laws concerning the weights and measures of the United States," from which we quote (page vii): "At the time of the American Revolution the weights and measures in common use were of English origin. Most of them had been procured from time to time by the colonies from Great Britain, and although it was well known that there were variations in the weights and measures of the same denomination throughout the states, it was not until 1830 that the matter received attention from Congress. At this time an investigation of the weights and measures in use in the various custom houses was ordered by a resolution of the Senate. As a result of this investigation, the avoirdupois pound, the English yard, the wine gallon of 231 cubic inches, and bushel of 2,150.42 cubic inches were adopted by the Treasury Department, and the construction of copies of the standards thus established was immediately undertaken, in order to supply the custom houses with uniform weights and measures. In 1836 a joint resolution of Congress directed the Secretary of the Treasury to deliver to the governor of each state in the Union a complete set of all the weights and measures adopted as standards by the department, to the end that a uniform standard of weights and measures might be established throughout the United States. Nearly all of the states have been supplied with complete sets of standards, in accordance with the resolution mentioned, and in many cases they have been adopted by legislative action as the standards of the state." The joint resolution of 1836 referred to is found in 5 Stat. 133, and reads as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is directed to cause a complete set of all the weights and measures adopted as standards and now either made or in the progress of manufacture for the use of the several custom-houses, and for other purposes, to be delivered to the Governor of each state in the Union, or such person as he may appoint, for the use of the states respectively, to the end that a uniform standard of weights and measures may be established throughout the United States.

"Approved June 14, 1836."

This statute appears to be a legislative recognition of the standards adopted in the investigation of 1830. A later act (that of August 18, 1894, c. 301, 28 Stat. 383 [U. S. Comp. St. 1901, p. 2382]), directs the Secretary of the Treasury, who then had supervision of such matters, "to furnish precise

copies of standard weights and measures to * * * any state, territory, or institution not heretofore furnished with the same, upon application in writing," etc. By act of March 3, 1901, c. 872, 31 Stat. 1449 [U. S. Comp. St. 1901, p. 2383], Congress created the National Bureau of Standards, section 2 of which provides, among other things, "that the functions of the bureau shall consist in the custody of the standards, the comparison of the standards used in scientific investigations, engineering, manufacturing, commerce, and educational institutions with the standards adopted or recognized by the government; the construction, when necessary, of standards, their multiples and subdivisions; * * * the solution of problems which arise in connection with standards. * * * The Board has before it a certificate, under the signature of the director of the Bureau of Standards, and the seal of the Bureau, containing a list of standard weights and measures adopted by the Treasury Department, copies of which have, from time to time, been transmitted to the Governors of the several states of the Union, pursuant to the joint resolution of June 14, 1836, and the act of August 18, 1894. The only gallon mentioned in this schedule is the gallon of 231 cubic inches capacity. The state statutes printed in the compilation above quoted show that at least 38 out of the 45 states in the Union have by law expressly adopted the weights and measures prescribed by the federal government. In many instances these statutes specifically include the wine gallon, but in only three states, apparently, is there any legislative reference to such a unit of measure as the dry gallon. These states are Connecticut and Wisconsin, which provide for a dry gallon of 282 cubic inches capacity, and Minnesota, which provides for a dry gallon of 268.8 cubic inches capacity.

From the foregoing review of legislation and official action upon this subject, it is apparent that the only gallon which has ever been "adopted or recognized" as a standard by the federal government is the wine gallon of 231 cubic inches. We are clearly of the opinion that this is the gallon referred to in paragraph 264. It is not shown that there is any such objection to measuring a dry substance like the goods in controversy by the liquid gallon as would make the construction of paragraph 264, adopted by the customs officers, unjust, unreasonable, or absurd. It is true the term "gallon" imports a liquid measure, and the commodity in question is of such a nature that it might be measured by dry measure. Still, as no measure is designated by the tariff in connection with the importation of olives except the gallon, and it has always been the practice of the custom house to measure dry olives by the liquid gallon, we think that practice should maintain. The construction placed upon the law by the officers who administer it frequently influences the construction given it by the courts. *Robertson v. Downing*, 127 U. S. 607, 8 Sup. Ct. 1328, 32 L. Ed. 269. It is improbable that the word "gallon," as used in paragraph 264, means one unit of quantity when the olives are dried, and quite another when they are in brine or liquid. *Ceballos v. U. S.*, supra.

We hold that the gauge of dried olives must be made by the gallon of 231 cubic inches, and overrule the protest, affirming the collector's decision.

Curie, Smith & Maxwell (W. Wickham Smith, of counsel), for the importer.

Henry A. Wise, Asst. U. S. Atty.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

PER CURIAM. Affirmed, on the opinion of the Board of General Appraisers.

In re DRESSER.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 249.

1. BANKRUPTCY—DISCHARGE—OBTAINING PROPERTY BY MEANS OF FALSE STATEMENT.

Bankr. Act July 1, 1898, c. 541, § 14b (3), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended in 1903 (Act Feb. 5, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]), which authorizes the refusal of a discharge to a bankrupt if he has "obtained property on credit from any person upon a materially false statement in writing made to such person for the purpose of obtaining such property on credit," should not be given the strict construction required in case of a criminal statute, but one sufficiently liberal to effectuate the intention of Congress, which was to deprive any bankrupt of the benefit of a discharge who has obtained property by means of a written statement false in material matters, and within the fair meaning of the clause the statement was "made to such person," if it was given to an agent for the purpose of using it in obtaining property for the bankrupt, and if its contents were communicated by the agent to such person, and it is not necessary that the statement itself should have been delivered to such person, nor that it should have been made for the purpose of inducing any particular person to rely upon it.

2. SAME—REFUSAL TO ANSWER QUESTIONS.

The fact that the refusal of a bankrupt to answer material questions in the course of the proceedings which were approved by the referee was based on the claim of his constitutional privilege not to incriminate himself does not deprive the court of the right to deny him a discharge because of such refusal, under Bankr. Act July 1, 1898, c. 541, § 14b (6), 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended in 1903 (Act Feb. 5, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]).

Herbert H. Maass, for appellant.

R. Burnham Moffat (Robert D. Murray, of counsel), for appellees.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

WALLACE, Circuit Judge. By this appeal it is sought to reverse a judgment of the District Court refusing the bankrupt's discharge. 144 Fed. 318. The court decided that the specifications of objection filed by certain creditors who had purchased drafts drawn by the American Tubing & Webbing Company, and accepted by Dresser & Co., were established by the proofs. The question presented is whether Dresser had (1) "obtained property on credit from any person upon a materially false statement in writing, made to such person for the purpose of obtaining such property on credit;" or had (2) "in the course of proceedings in bankruptcy refused to obey any lawful order of, or to answer any material question approved by, the court," within the meaning of section 14, subd. b, cls. 3, 6, Bankr. Act. July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428] as amended by Act. Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684]. The facts proved in support of the first objection, concisely stated, were these: Dresser concerted with a corporation having intimate business relations with

his firm of Dresser & Co. to raise money by the sale through a broker of accommodation drafts to be drawn by the corporation and accepted by the firm. The scheme contemplated that the proceeds of the drafts should be paid by the broker to the corporation, go into its bank account, and be used by it to the extent required by its financial necessities, and the balance be sent to the firm. To facilitate the sale of the drafts by inducing purchasers to buy, a written statement, false in material facts respecting the financial condition of the firm, was made by Dresser, and placed in the hands of the broker; and in making sales of the paper the broker communicated the substance of the contents of the statement to the various purchasers to whom he sold the drafts. The corporation sent the firm a large part of the proceeds of the drafts sold by the broker to purchasers, who bought them upon the faith of the contents of the statement.

The only part of the contention for the appellant which deserves serious consideration is the argument that to bring the case within the meaning of clause 3 it is necessary to prove that the false statement was delivered by the bankrupt himself to the creditor from whom the property was obtained, or at least that it was meant to be delivered to the particular person of whom the property was obtained, and that in any case the statement itself must have been shown to the person from whom the property was obtained.

The provisions of the section are not to receive the strict construction given to criminal statutes, but should receive a reasonable one to effectuate the intention of Congress, so far as that can be ascertained by the language employed. We think that intention was to deprive any bankrupt of the benefit of a discharge who has obtained property from any person by means of a written statement false in material matters; and within the fair meaning of the clause the statement is made to such person, if it was given to an agent for the purpose of using it in obtaining property for the bankrupt, and if its contents were communicated by the agent to such person. The words "such person" refer to the previous words "any person," and the statement is "made to such person" whenever it is made by the bankrupt himself or his duly authorized agent; and it is none the less "made," although the statement itself is not delivered, when its contents are correctly communicated by the agent. The purpose of Congress in prescribing a written statement to be essential was to protect the bankrupt from the danger of having his statement perverted or distorted by parol evidence, and that purpose is equally well accomplished whether the statement itself is used in obtaining the property, or whether the contents are communicated. The language of the clause does not necessarily import that the statement shall have been made for the purpose of inducing any particular person to rely upon it.

The phraseology of the clause in its entirety is consistent with the interpretation which we have thus indicated. We are asked to read it as though instead of the word "made" Congress had used the

word "delivered." The use of that word would have required a very different construction to be placed upon the clause, and if Congress had intended such a construction it is to be assumed that the word would have been used.

The facts proved in support of the second objection were these: During his examination at a meeting of creditors the bankrupt refused to answer certain material questions relating to the disposition of certain of his property, assigning as a reason that the answer might tend to incriminate himself. The referee formally approved the questions, but refused to order the bankrupt to answer. The facts bring the case directly within the language and spirit of clause 6.

The contention for the appellant is that to enforce clause 6 under the circumstances of this case would deprive the bankrupt of his constitutional right of immunity from self-incrimination. The proceeding for a discharge is not a criminal proceeding, and the constitutional protection extends to the protection of the witness in criminal proceedings only; and of course it may always be waived by the witness himself. We entertain no doubt that it is within the power of Congress to grant or to refuse a discharge to a bankrupt upon such conditions as it may deem proper. Such a privilege is not a natural right, or a right of property, but is a matter of favor, to be accepted upon such terms as Congress sees fit to impose.

We do not deem it necessary to elaborate the reasons for the conclusions thus reached as to both of the objections, because they are satisfactorily expressed in the very full and excellent opinion of Referee Dexter, to whom, as special commissioner, the issues were referred to report the facts, with his opinion thereon.

The judgment is affirmed, with costs.

PORTER et al. v. TONOPAH NORTH STAR TUNNEL & DEVELOPMENT CO.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1906.)

No. 1,241.

MINES AND MINING—CONFLICTING MINING CLAIMS—EVIDENCE CONSIDERED.

The decision of a Circuit Court affirmed, holding that the evidence was insufficient to sustain the burden of proof resting on adverse claimants to show that any part of mining ground sought to be patented by defendant was within the boundaries of a claim as previously located by plaintiffs and their grantors.

Appeal from the Circuit Court of the United States for the District of Nevada.

For opinion of court below, see 133 Fed. 756.

This was a suit in equity, commenced by the appellants against the appellee under the provisions of sections 2325 and 2326, Rev. St. U. S. [Comp. St. 1901, pp. 1429, 1430], to determine the question of the right of possession of certain mining ground situated in Tono-

pah, Nye county, Nev. The court rendered a decree in favor of the defendant. The complainants appeal.

Garoutte & Goodwin and Welles Whitmore, for appellants.

K. M. Jackson, Key Pitman, and Campbell, Metson & Campbell, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. The defendant, the Tonopah North Star Tunnel & Development Company, filed its application for a patent for the Ivanpah mining claim in the United States Land Office at Carson City, Nev., on the 19th day of September, 1903. Within 60 days the complainants filed in said land office their adverse claim to the defendant's application, and within thirty days thereafter commenced suit in the United States Circuit Court for the District of Nevada to determine the rights of the respective parties to the ground in controversy. The case was heard upon oral testimony, documentary evidence, location notices, plats, and diagrams, and a decree entered in favor of the defendant. The claim of the complainants is based upon a location of a mining claim known as the "Dave Lewis Hope," made August 26, 1901, and an amended certificate of location of said claim under the name of the "Mizpah Intersection," made May 17, 1902. The claim of the defendant is based upon a location of a mining claim known as the "Ivanpah," made October 10, 1901. Both claims are situated on the westerly side of Mt. Oddie, in the Tonopah mining district. It is claimed by the complainants that defendant's location overlaps a considerable part of the complainants' location. The defendant, on the other hand, claims that, as the complainants' location was originally made, there is no conflict in the two locations.

The case was heard by Judge Hawley in the Circuit Court, and in his opinion the questions in controversy were fully discussed. *Porter v. Tonopah North Star Tunnel & Development Co.*, 133 Fed. 756. In this court we have had the assistance of oral arguments and elaborate briefs in considering the questions at issue, but we have been unable to find that the court was in error, either in the facts found or in its construction of the law.

For the reasons stated by Judge Hawley in his opinion, the decree of the Circuit Court is therefore affirmed.

PHOENIX CAP CO. v. REISS et al.

(Circuit Court, S. D. New York. December 1, 1905.)

PATENTS—INFRINGEMENT—HERMETICALLY SEALED JARS.

The Weissenthanner patent, No. 483,033, for a hermetically sealed jar, if conceded patentable novelty, is for a combination of elements all of which were old, and its claims must be strictly construed, and limited to the precise combination shown. As so construed *held* not infringed.

In Equity. Suit for infringement of letters patent No. 483,033 for a hermetically sealed jar, granted to Achille Weissenthanner. On final hearing.

Kenyon & Kenyon, for complainant.

Wm. F. Hall and Wm. Wallace White, for defendants.

WALLACE, Circuit Judge. The patent in suit is for an improvement for hermetically sealed jars. Broadly considered, the elements of the claims are:

- (1) A jar having a projecting rim.
- (2) An outer covering, having an annular recess in its rim.
- (3) An interposed cover, having a rim adapted to fit the rim of the jar.
- (4) A gasket or elastic ring in the annular recess of the outer cover. And
- (5) A collar to embrace the rims of the cover and the jar, and hold them locked together.

All of these elements were old separately. Most of them were old in combination, although in the patents for sealed jars of the prior art the gasket was generally held between the rim of the cover and the rim of the jar, and not between the rim of the cover and the rim of an interposed cover. But, as appears in the prior English patent to Gedge, No. 9146, all of the elements were old in combination and old in mode of operation. In that patent, as well as in the patent in suit, the gasket is inserted between the upper and lower covers, and assists to hold the latter by an elastic pressure firmly in place upon the rim of the jar.

The departure of the patent in suit consists in the new form of the parts. Whereas in the Gedge patent the rim of the jar is horizontal at the inner portion and downwardly inclined at the outer portion, in the patent in suit it is downwardly inclined at the inner portion and horizontal at the outer portion. In both patents the rim of the jar and the rim of the upper cover is of a form to fit the peculiar form of the gasket which is to be inserted between them, and the lower cover is also of a form to make room for the gasket and fit the rim of the jar. In both the purpose of the gasket is to afford a packing between the upper cover and the lower cover. In the Gedge patent the rim of the lower cover does not extend over the whole of rim of the jar, and beyond the point to which it extends the gasket is in direct contact with the rim of the jar. This arrangement would seem to be preferable, as it affords a tighter sealing to the jar than would be practicable if the lower cover extended completely across the rim of the jar. Indeed, the expert for the complainant admits

that with a rigid material like tin plate it would be practically impossible to cover the rim of a glass or earthenware jar, so as to prevent the access of air to the contents; and he therefore argues that what is called in the patent "a tin diaphragm" and a "cap or tin cover" should be read as meaning a diaphragm of tin foil, such as was shown in the prior patent to Gillingham. The drawings of the patent in suit, as well as the language of the description, show that such a reading is not the correct one, because it is obvious that with the use of such a tin foil diaphragm it would be unnecessary to make its rim of any particular form, and the desired form could be given to it perfectly by merely pressing the contracting parts together in sealing the jar.

In the patent in suit the gasket is triangular in cross-section, and the rim of the upper cover has a V-shaped annular recess, while in the Gedge patent the gasket is approximately rectangular and grooved at the upper surface, and the rim of the upper cover has corresponding annular grooves. No evidence was offered by the complainant that the patented invention had ever been put to any commercial use. It is difficult to see how it could have been any advance upon the prior art. But it is unnecessary to pass upon the question of the patentable novelty of the claims, because it is manifest that upon the strict construction which must be given to them they have not been infringed by the defendants.

The rim of the defendants' jar is not the rim of the patent, but is substantially the rim of the prior Mason patent. The rim of the upper cover is like that shown in the Mason patent, and does not have any V-shaped annular recess to receive the gasket. The defendants' jar does not have the gasket of the patent in suit, but the ordinary flat packing ring of the prior art, instead of the V-shaped gasket of the patent. The defendants' jar does not have the interposed cover of the patent, its diaphragm being of tin foil, and in this respect not differing substantially from the interposed cover in the prior patents to Cray and to Gillingham.

The bill is dismissed, with costs.

WEST DISINFECTING CO. et al. v. FRANK et al.

(Circuit Court, S. D. New York. June 19, 1906.)

1. PATENTS—DESIGNS.

Design patents are granted for appearance, and not with reference to mechanical usefulness.

2. SAME—INFRINGEMENT—CASE FOR DISINFECTANT.

The Taussig design patent, No. 33,633, for a design for a casing for disinfecting apparatus is valid, the peculiar contour of the patent rendering the device attractive to users. Also *held* infringed.

In Equity. On final hearing.

Harold S. Mackaye and William H. Kenyon, for complainants.

George L. Wheelock and Louis C. Raegener, for defendants.

HAZEL, District Judge. The bill herein charges infringement of a design patent, No. 33,633, of December 4, 1900, for a casing for disin-

fecting apparatus to Emil Taussig, of which complainant company is the owner by assignment. The defenses are want of novelty, prior use, and anticipation. Assuming the validity of the patent infringement is not controverted. The specification states:

"The leading feature of my design consists in a casing for disinfecting apparatus, which comprises a cylindrical body portion, provided with rounded ends, the said body portion having an annular band of perforations therein."

The adaptation of any new, useful, and original shape, contour, or configuration of any manufactured article is entitled to protection under the provisions of section 4929, Rev. St. [U. S. Comp. St. 1901, p. 3398], and it is well settled that the originator of a design cannot claim the distinction of being an inventor unless he has produced a salable article, which is not only original, but which possesses the characteristic and essential element of beauty or ornamentation, or that which imparts to it a peculiar or distinctive appearance. *Gorham Co. v. White*, 14 Wall, 511, 20 L. Ed. 731; *Smith v. Whitman Saddle Co.*, 148 U. S. 678, 13 Sup. Ct. 768, 37 L. Ed. 606. That invention may be involved in reproducing an old and well-known vendable article in such manner as to give it an ornate appearance, the origination, being useful and for display, is undeniable. But there must be originality and beauty in the subject of the design, as the mere adaptation of old forms to new purposes does not involve invention, notwithstanding any ornamentation or pleasing configuration which may render the article more convenient or salable. In *Gorham Co. v. White*, supra, the Supreme Court says:

"And the thing invented or produced for which a patent is given is that which gives a peculiar or distinctive appearance to the manufacture or article to which it may be applied, or to which it gives form. The law manifestly contemplates that giving certain new and original appearances to a manufactured article may enhance its salable value, may enlarge the demand for it, and may be a meritorious service to the public."

Hence the rule may be accepted as well settled that design patents are granted because of appearance, and not with reference to mechanical usefulness. *Rowe v. Blodgett & Clapp* (C. C.) 103 Fed. 874. It was held in *Untermeyer v. Freund* (C. C.) 37 Fed. 342, that he who challenges the novelty of a patent must sustain the challenge by proof beyond reasonable doubt. Applying these rules to this case, complainant is without doubt equitably entitled to a decree sustaining its patent, for the evidence shows that the peculiar contour of its device, which renders it attractive in appearance, commends it to users. This fact, of course, is an excellent test of its attractiveness. *Bradley v. Eccles*, 126 Fed. 945, 61 C. C. A. 669. The prior art does not disclose a casing the elements of which present an appearance to the eye as pleasing as that of the Taussig patent. The invention is concededly a modest one, and does not possess any specially artistic embellishments, but it is neat in appearance, is well shaped, well proportioned, and, in short, it appeals pleasingly to the eye, and is quite different from the Lewis and Imperial Hotel exhibits. The latter design, which approaches nearest in appearance to the design in suit, is egg-shaped, with perforations in the cylindrical part of the casing.

Complainant's design, which is also cylindrical, has rounded and nicely proportioned caps at the ends, and a collection of perforations, smaller and more closely set than those in the Imperial Hotel device, at the upper end of the casing, which extends downward about one-third of its length. The caps mentioned have a low oval curvature, which in combination with the perforated cylindrical case gives complainant's design a different and more pleasing and finished appearance, the general effect of which enables ready distinguishment from the other casings. In view of these remarks, it is manifestly unnecessary to examine the evidence in relation to prior use or the mechanical patents to which attention is directed by the defendants.

The prima facie evidence of invention to which the patent is entitled not being overcome, complainant is entitled to a decree as prayed for in the bill, with costs.

UNITED STATES v. MELDRUM.

(District Court, D. Oregon. July 2, 1906.)

No. 4,750.

1. JUDGES—DEATH OF JUDGE PRESIDING AT TRIAL—POWER OF SUCCESSOR TO DETERMINE MOTION FOR NEW TRIAL.

Where the judge of a federal court who presided at the trial of a criminal case dies after the rendition of a verdict and pending a motion for a new trial, his successor has authority to hear and determine the same on the merits, by virtue of Rev. St. § 953, as amended by Act June 5, 1900, c. 717, § 1, 31 Stat. 270 [U. S. Comp. St. 1901, p. 696], as well as by the law as it previously existed, where the evidence has been taken in stenographic notes, or he is otherwise satisfied that he can fairly pass upon the motion and allow a true bill of exceptions.

[Ed. Note.—For cases in point, see vol. 29, Cent. Dig. Judges, § 161.]

2. SAME—SENTENCE.

The penalty for a criminal offense is a matter for legislative regulation, and where the statute vests the court with a discretion as to the punishment to be imposed, within stated limits, such discretion is to be exercised by the judge independently of the jury; and, in case of the death of the judge who presided at the trial of a defendant after conviction but before sentence, the sentence may be pronounced by his successor, where there is sufficient in the record to enable him to fairly and intelligently exercise such discretion.

On Motion by Defendant to Set Aside the Verdict and Grant a New Trial.

W. C. Bristol, U. S. Atty., for the Government.

Richard W. Montague, for defendant.

WOLVERTON, District Judge. The defendant was, on November 17, 1904, found guilty by the verdict of a jury on 21 counts, 18 of which were for forging affidavits for the purpose of defrauding the government, and the remaining 3 for uttering and publishing as genuine 3 of such false and forged affidavits. On December 13, 1904, defendant filed a motion to set aside the verdict and for a new trial, assigning as grounds therefor the following: (1) That the verdict

is not sustained by any evidence; (2) that it is contrary to law; (3) that error of law was committed by the judge at the trial; (4) that error of law was committed in overruling the objections of defendant to the introduction of any testimony in the cause, for the reason that the indictment fails to charge an offense. On June 14, 1906, defendant assigned an additional ground, namely:

"That after the rendition of the verdict herein, and while said motion for a new trial was pending, and before decision had been rendered thereon or sentence passed, the Honorable Charles B. Bellinger, District Judge of the United States, before whom this cause was tried, died."

In the presentation of the motion upon argument, defendant, through his counsel, explicitly waived all reliance upon the four grounds first named, and based his right to relief solely upon the one recently assigned. This procedure on the part of the defendant is tantamount to a concession that none of the grounds waived was well assigned. With this concession it is nevertheless insisted that the judge now presiding ought not to assume to exercise the authority to sentence the defendant, and hence that the motion, for a new trial should be sustained as of course. The principal ground for this position is that the statute has reposed in the judge a very wide range of discretion in prescribing the punishment that may be imposed, and that only the judge presiding at the trial will presume to exercise such discretion. The punishment may be imprisonment at hard labor for a period of not more than 10 years, or a fine of not more than \$1,000, or both fine and imprisonment. Another reason advanced is that in theory the judge is a component or a constituent part of the jury, thus necessitating a concurrence in the verdict rendered by the judge sitting at the trial; otherwise, a new trial must be awarded. The discretion vested in the judge to grant a new trial is not an arbitrary volition, but a judicial or legal discretion (as it is generally, perhaps not in every sense accurately, termed), to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to defeat, the ends of substantial justice. Says Mr. Justice Foster in *Bundy v. Hyde*, 50 N. H. 116, 120:

"By discretion—judicial discretion—we mean the exercise of final judgment by the court in the decision of such questions of fact as from their nature and the circumstances of the case come peculiarly within the province of the presiding judge to determine, without the intervention and to the exclusion of the functions of a jury."

This was said relative to the authority of the judge to permit leading questions to be asked. In a later case from the same court (*Darling v. Westmoreland*, 52 N. H. 401, 408, 13 Am. Rep. 55) it is said: "Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court"—citing *Bundy v. Hyde*, *supra*. The point involved was as to the latitude allowable in cross-examination. So in *State v. Wood*, 23 N. J. Law, 560, 564, speaking of the discretion of the judge to grant a writ of certiorari, the court says: "True it is a legal discretion—a discretion regulated by sound principle and just reason—but

it is discretion still. It rests in the judgment of the court." It "implies that in the absence of positive law or fixed rule the judge is to decide by his view of expediency, or of the demands of equity and justice." Of such is the nature of the discretion reposed in the court under the Oregon statute to relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. *Thompson v. Connell*, 31 Or. 231, 48 Pac. 467, 65 Am. St. Rep. 818. Of like character, as instanced by the foregoing cases, is the discretion reposed in the court to set aside a verdict, or to award a new trial through considerations of fact. It is not arbitrary, vague, or fanciful, nor is it to be controlled by humor or caprice, but to be governed by principle and regular procedure for the accomplishment of the ends of right and justice. If errors of law are relied upon, then the judgment of the court is required as to the right rule of law to be applied, and the questions are strictly of legal cognizance. Says Hammond, Circuit Judge, in *Wright v. Southern Ex. Co.* (C. C.) 80 Fed. 85, 93:

"It must and should be performed in every case with such conscientious intelligence as belongs to the judge, and that is the best that can be done in any case where he is called upon to discharge that duty."

The principle is applied in a criminal case (*People v. Knutte* [Cal.] 44 Pac. 166), where the court says:

"While it is the exclusive province of the jury to find the facts, it is, nevertheless, one of the most important requirements of the trial judge to see to it that this function of the jury is intelligently and justly exercised. In this respect, while he cannot competently interfere with or control the jury in passing upon the evidence, he nevertheless exercises a very salutary supervisory power over their verdict. In the exercise of that power, he should always satisfy himself that the evidence as a whole is sufficient to sustain the verdict found; and if, in his sound judgment, it does not, he should unhesitatingly say so, and set the verdict aside."

Speaking in general, Mr. Bishop has this to say:

"It is a rule widely governing in these cases, and reconciling multitudes of seeming conflicts in them, that on whatever grounds the new trial is asked the court will look through the entire proceedings which led to the verdict, consider in connection with them the new facts and reasons, and order the reversal if it deems there was injustice which probably may be corrected, otherwise refuse." Bishop's New Crim. Proc. § 1277.

See, also *Serles v. Serles*, 35 Or. 289, 57 Pac. 634; *Mt. Adams, etc., Railway Co. v. Lowery*, 74 Fed. 463, 20 C. C. A. 596; *Pringle v. Guild* (C. C.) 119 Fed. 962.

Now, while in running through the authorities expressions are found that seem to indicate that the presiding judge could alone act the part, they are usually so employed because pertinent to the conditions of the particular case; not that it was intended by any of the cases to decide that particular question. Upon the contrary, I am convinced that it cannot be affirmed upon principle or authority that such discretion is personal to the presiding judge. An early case in the Supreme Court of the United States (*Life & Fire Ins. Co. v. Wilson's Heirs*, 8 Pet. 291, 8 L. Ed. 849) states the law so

clearly that it seems to me a work of supererogation to look beyond it for other authority. The district judge refused to sign a judgment that had been entered by his predecessor; the latter having died in the meanwhile. A mandamus having issued requiring him to show cause why he should not sign the judgment, he answered, among other things, that as the judgment was not rendered by him he had no power to grant a new trial, because he was not acquainted with the facts and circumstances that should influence his discretion in making such an order. To this the Supreme Court, speaking through Mr. Justice McLean, answered:

"But the district judge is mistaken in supposing that no one but the judge who renders the judgment can grant a new trial. He, as the successor of his predecessor, can exercise the same powers, and has a right to act on every case that remains undecided upon the docket, as fully as his predecessor could have done. The court remains the same, and the change of the incumbents cannot and ought not in any respect to injure the rights of litigant parties."

The authority of the succeeding judge to exercise this discretion is expressly recognized by the amendatory act of Congress of June 5, 1900 (31 Stat. 270, c. 717, § 1 [U. S. Comp St. 1901, p. 696]). It is there enacted that in case the judge before whom the cause was tried is, by reason of death, sickness or other disability, unable to hear or pass upon the motion for a new trial, and allow and sign the bill of exceptions, then that the judge who succeeds said trial judge, or any other judge of the court in which the case was tried, if the evidence in such case has been taken in stenographic notes, or if said judge is satisfied by any other way that he can pass upon said motion and allow a true bill of exceptions, he shall then pass upon the motion and sign the bill of exceptions. The further provision is added that in case the succeeding judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly pass upon the motion and allow and sign said bill of exceptions, then he may, in his discretion, grant a new trial to the party moving therefor. This statute is manifestly a recognition, and therefore declaratory, of the law as it existed prior to its enactment, touching the allowance or disallowance by the succeeding judge of a motion for a new trial. A motion to set aside a verdict proceeds upon identical grounds. It is logically impossible, by reason of the order in which the hearings must be had and determinations rendered, to settle a bill of exceptions without passing upon a motion to set aside a verdict or to grant a new trial. If such a motion were allowed, as counsel argues should be of course, where a succeeding judge is sitting, then there could be no further bother about the bill of exceptions, as the case could not be proceeded with further until another trial was had and another verdict rendered; so the Congress has authorized a succeeding judge to settle the bill of exceptions—a thing that was not clear, and perhaps not allowable, prior to the act. But in doing so it has recognized the rule as it previously obtained that a succeeding judge might regularly grant a new trial. See further authorities bearing upon the subject: *Allen v. State* (Ga.) 29 S. E. 470; *People v. Mc-*

Connell, 155 Ill. 192, 40 N. E. 608; Goos v. Fred Krug Brewing Company, 60 Neb. 783, 84 N. W. 258.

True, a judge who has not heard the witnesses, or noted their bearing while upon the stand giving their testimony, might not in many cases be so well qualified as the judge who presided to pass upon such motions; yet unless it develops that he is unable, by reason of the fact that he did not preside, to fairly pass upon the motion, he is as fully authorized to perform the function as if he had presided at the trial. In many cases it must be conceded that the manner of the witnesses in testifying has but little to do with the influence of their testimony, and that is readily manifest from the very nature of the testimony itself. In such a case, why may not the succeeding judge pass upon the motion as readily as the presiding judge? There is no reason left, or, if any, but slight, to urge against it.

The authority being granted, the discretion is to be exercised as the exigencies of the case may suggest or require. If the judge cannot do justice except by awarding a new trial, he should not hesitate to do so; but if, on the other hand, he can see from the record that no wrong can or will be done the defendant by denying the motion, the due and regular administration of justice requires that it should be done.

The discretion reposed in the judge to determine the penalty to be imposed within defined limits is of a somewhat different order. It is a function reposed through statute, by edict of the Legislature or of Congress. A like discretion is frequently accorded to the jury, and the only case that I have been able to find attempting in any way to define the term employed in that sense is where the jury was concerned. I refer to *Brown v. State*, 109 Ala. 70, 20 South. 103. At page 83 Justice Brickell says:

"The discretion they (the jury) are to exercise, and exercise in obedience to their own consciences only, is the choice or election between the alternative punishments. The discretion is legal, in the sense that it is derived from and conferred by law. But it is not of the nature of judicial discretion, which is said to be controlled by fixed legal principles."

All offenses, even of the same order or name, are not of exact similitude in their commission. Each has its own peculiar characteristics. One may be accompanied with evidence of great malignity in the perpetration, and another with conditions tending to palliate or in some manner to excuse the act, though it may constitute a violation of law; and so on with varying shades of emphasis. It is to meet the exigencies, no doubt, of the occasion that the court is in many cases invested with a discretion within certain latitudes to visit punishment upon the offender. Perhaps it was thought also by the lawgiver that the judge has a better opportunity for knowing what punishment, within the limits specified, will best subserve the state or the government in deterring others from a perpetration of the same or like offenses. Where invested in the judge, it becomes wholly a matter for his exercise, the same as where reposed in the jury it is entirely for their exercise, and for none other.

It is a function that belongs of right to neither the court nor the jury, but is solely for legislative regulation and direction, and no constitutional rights are impaired if withheld from both; but it may certainly, within reasonable limits, be accorded to either. So that where the discretion is vested in the court, there is no requirement, either expressed or implied, that it should be exercised by the judge presiding at the trial, in conjunction with, and as a part of, the jury's work in finding the verdict, and not by his successor as an act independent of the jury. Manifestly, such discretion must be exercised with sound judgment, having a conscientious regard for meting out such punishment only as in justice and right ought to be visited upon the offender, bearing in mind all the facts connected with and attendant upon the commission of the offense with which the party stands convicted. What matters, if any, may be considered beyond these here referred to it is not necessary now to suggest.

Now, considering the nature of the discretion involved, both in the consideration of the motion for a new trial and in pronouncing sentence, there exists no good reason why the succeeding judge may not conscientiously discharge both functions in the present case. The evidence has been fully reported, and a careful examination of it shows unmistakably that the jury was entirely justified in arriving at its verdict. There is but little room for the demeanor of witnesses while on the stand to have any particular bearing upon the weight of the evidence, they being called as to plain matters of fact, not readily susceptible of different shades of rendering. This holding is not in conflict with the case of *U. S. v. Harding*, Fed. Cas. No. 15,301, for there none of the facts appearing at the trial were preserved; Kane, District Judge, who wrote the prevailing opinion, saying: "The record which is before us is of course barren of facts."

There may be cases where no one but the judge who presided at the trial could intelligently, or with propriety, pass upon the motion for a new trial or pass sentence; but this is manifestly not one of them.

Now, as to the second reason assigned by counsel why a new trial should be granted, namely, that the judge is a component or constituent part of the jury, and cannot act in the premises except in conjunction therewith. This contention has for its corollary the further idea that the right to have the judge who sat at the trial pass upon the motion for a new trial is a constitutional guaranty. But it has never been so held, that I am aware of. A trial by jury must be contradistinguished from a trial by the court. It is this sort of trial that the federal Constitution has guaranteed to the accused. Of course, a trial by jury must be presided over by a court; but when the jury has returned its verdict, the accused has had the benefit of the constitutional guaranty. The court could not arbitrarily set the verdict aside without good reason, nor should it be upheld where the act would result in any injustice to the defendant. But the act in passing on the motion for a new trial is separate and distinct from the act of returning a verdict. It is distinctly a further step in the

trial procedure, and it is not reasonable to suppose that, when the federal Constitution guarantied the right of trial by jury to the accused, it also guarantied the right to have the judge who presided at the trial pass upon the motion for a new trial. If such were the case, it would follow inevitably that, whenever the judge who presided became disqualified after verdict rendered and before the motion was disposed of, the proceeding would come to an abrupt close, and a new trial would follow as a matter of course. That such is not the case, the many statutes providing that judges other than the one presiding may pass upon the motion bear testimony. None of these, that I am aware of, have ever been declared unconstitutional, and it is not within the bounds of reason to believe that they ever will be.

It follows from these considerations that the motion for a new trial should be denied, and it is so ordered.

HERDIC v. MARYLAND CASUALTY CO.

(Circuit Court, M. D. Pennsylvania. July 6, 1906.)

No. 21.

INSURANCE—CONSTRUCTION OF ACCIDENT POLICY—DEATH FROM SEPTICÆMIA.

An accident policy, insuring generally against injuries sustained through external, violent, and accidental means, as therein limited, contained the following further clause: "This policy does not cover death or disability resulting from mineral, vegetable, gaseous, or any other kind of poisoning, except as hereinafter stated; but, subject to its conditions, it covers death or disability resulting from septicæmia, freezing, sunstroke, drowning, hydrophobia, choking in swallowing, and death only, as the result of an anæsthetic while actually undergoing a surgical operation at the hands of a duly qualified regular physician." Held, that such clause must be construed in harmony with the general character of the policy, which was one against accidents; that, as so construed, its purpose and effect were to except from the risk death or disability from accidental poisoning in general, and to cover death or disability resulting from septicæmia, freezing, etc., but only when resulting from an accident "subject to its conditions," and that the death of the insured from septicæmia resulting from an operation for appendicitis was not within its terms.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 1175.]

[Ed. Note.—Risks and causes of loss under accident insurance policies, see note to National Acc. Soc. v. Dolph, 38 C. C. A. 3.]

At Law. On demurrer to plaintiff's statement.

John E. Cupp and Clarence E. Sprout, for demurrer.
Seth T. McCormick, for plaintiff.

ARCHBALD, District Judge. This suit is upon an accident policy. The person whose life was insured died of septicæmia, after an operation for appendicitis. This apparently takes the case out of the policy, there being no pretense that death was the result of an accident. It is contended, however, by the plaintiff that, accident or no accident, death by septicæmia is expressly provided for in the policy.

The issue between the parties is thus purely a legal one, and if the defendants are right the case may as well be brought to an end here and now, as sought by the demurrer.

By the policy in suit, the defendant company, in consideration of a premium of \$25, undertook to insure Carl Herdic, the plaintiff's husband, "in the amount of \$5,000 principal sum, and \$25 weekly indemnity, against bodily injuries, not self-inflicted, sustained by the assured while sane, in the exercise of ordinary care, not under the influence of nor affected by intoxicants or narcotics, and through external, violent, and accidental means, * * * independent of all other causes." The death of the assured admittedly did not so result, and, if it is essential to a recovery that it should, the plaintiff has no case, and the demurrer must be sustained.

But the primary undertaking of the company, as so expressed, is made subject to certain further terms and conditions, among which is the following:

"(4) This policy does not cover death or disability resulting from mineral, vegetable, gaseous, or any other kind of poisoning, except as hereinafter stated; but, subject to its conditions, covers death or disability resulting from septicæmia, freezing, sunstroke, drowning, hydrophobia, choking in swallowing, and death only, as the result of an anæsthetic, while actually undergoing a surgical operation at the hands of a duly qualified regular physician."

The question is as to the purposes and effect of this clause. According to the defendants, it is declaratory merely, not enlarging the grounds of liability as contended by the plaintiff, but, on the contrary, restricting and limiting them. According to the plaintiff, however, it is a new and independent provision, by which, regardless of what has gone before, death from any of the causes enumerated, however it may happen to be brought about, is expressly insured against.

Whatever may be said of the last part of the clause, there is no difficulty with the first of it. By it death as the result of any kind of poisoning is taken out of the policy, it being distinctly declared that, except as therein stated, the company will not be liable therefor. This must, of course, refer to accidental poisoning, nothing but death by accident having so far been spoken of; the evident purpose being to relieve the policy from what has proved to be a prolific source of litigation (1 Cyc. 264), poisoning, however caused or induced, being thus put unmistakably beyond its pale. Immediately following this is the provision which is the subject of controversy. By it the policy in terms is made to cover death or disability resulting from septicæmia, freezing, sunstroke, and the rest. So far as septicæmia is concerned, the connection is obvious. This, as is well known, is brought about by the absorption into the blood of putrescent or poisonous matter, and, under the designation of "blood-poisoning," might possibly be regarded as excluded, although it has been held to the contrary. *Omborg v. United States Mutual Accident Ass'n*, 101 Ky. 303, 40 S. W. 909, 72 Am. St. Rep. 413. But when proceeding from external and violent sources, septicæmia is a well-recognized ground of liability in accident insurance. *West Commercial Travelers' Ass'n v. Smith*, 85 Fed. 405, 29 C. C. A. 223, 40 L. R. A. 653; *Nax v. Travelers' Ins.*

Co. (C. C.) 130 Fed. 985; *Delaney v. Modern Accident Club*, 121 Iowa, 528, 97 N. W. 91, 63 L. R. A. 603; *Martin v. Equitable Accident Ass'n*, 61 Hun, 467, 16 N. Y. Supp. 279. Acceding to this, and in order to remove all question, by the provision under discussion septicæmia is declared to be covered by the policy, relieving it from the possible effect of that which had gone before. A like declaration, in part for the same purpose, is added with respect to the other causes of death mentioned. There is no intent manifested in this with regard to either of them to depart from the general scheme of the policy, and, on the contrary, the whole is expressly made subject to its conditions, whereby the company is only liable where death is the result of external, violent, and accidental means.

It is said, however, that without this clause the company would be liable for death from septicæmia as the result of an accident, and that, unless it was intended to cover death from septicæmia however caused, it has no force. But this is met by what has been already said. It loses sight of the preceding provision with regard to poisoning. No doubt without that septicæmia or blood-poisoning the result of accident would be a ground of liability under the policy; but with it, it would not, or at least would be doubtful. Being taken out of the policy under the general designation of poisoning, it was necessary to restore it by express mention, as was done, if liability on account of it was to stand.

But it is further urged that, among the enumerated causes of death which the policy is declared to cover are sunstroke, hydrophobia, and the administration of an anæsthetic; and, as neither of these, under any circumstances, according to the argument of counsel, can be ascribed to accident, death generally must have been intended to be provided against, and not simply death from accidental means. No doubt the causes of death spoken of go together, and the construction to be adopted must be good as to all or none. But, so far as regards the possibility of accidental death from septicæmia, freezing, drowning, and choking in swallowing, there can be no dispute. Neither, as it seems to me, notwithstanding the contention of counsel, can there be, with regard to an anæsthetic, as to which common experience shows that there may be an unintentional and adventitious overadministration of it, within the meaning of the policy, even at the hands of a careful and experienced physician or surgeon of the strictest school. This leaves only hydrophobia and sunstroke to be accounted for, which it must be confessed are diseases pure and simple, and as to which the point may therefore seem to be well made. But the popular idea is not so, and sunstroke, at least, has been the subject of considerable litigation, as the decided cases show. *Sinclair v. Passengers Ins. Co.*, 3 Ellis & Ellis 478; *Dozier v. Fidelity & Casualty Co.*, 46 Fed. 446, 13 L. R. A. 114; *Railway Officers' Accident Association v. Johnson*, 109 Ky. 265, 58 S. W. 694, 52 L. R. A. 401, 95 Am. St. Rep. 370. As a concession to this view, and in order to remove all controversy (the same as in the case of septicæmia) sunstroke and hydrophobia are put in with the rest; the company declaring that, as to them, just as the others, the policy holds good. This is the natural and logical construction to be given to this provision of the policy,

and the one therefore which must prevail. By it all parts are harmonized and reduced to a consistent whole, where otherwise there is incongruity, if not conflict. The argument which seeks to make the clause speak differently, deriving out of it new and independent grounds of liability, loses sight of the fact, already alluded to, that it is expressly made subject to the general conditions of the policy, of the application and effect of which there can be no doubt. It will hardly be contended, for instance, that the provision with regard to intoxicants and narcotics does not obtain, so that death by freezing, the result of drinking, could be made the basis of a claim; or that in case of drowning the question whether it was suicide or not could be disregarded. But by the same logic which was invoked above, if these conditions are operative, why not the others also? And, if so, all must be fulfilled as much as one.

It is no answer to say that, if the policy is ambiguous, it is to be construed most strongly against the company and in favor of the insured. Rightly considered, there is no ambiguity, and no occasion therefor to resort to the rule. Undoubtedly the plaintiff is entitled to a liberal construction of it, but with the utmost liberality the construction contended for cannot be maintained.

Neither can it be said that this is a special provision, and so controlling, with respect to which other and more general provisions must give way. The policy is to be construed as a whole, and effect given to every part of it consistent with the general scheme. *Hubbard v. Travelers' Ins. Co.* (C. C.) 98 Fed. 932. Essentially it is a contract of accident insurance, and such it must remain to the end, unless this cannot be done without violence to its express terms. It certainly is not to be distorted, nor its provision strained, as would have to be the case if, according to the present plea, it is to be taken as an accident policy in one part and a life policy in another.

It is said, however, that an accident policy after all is a life policy, differing only from the ordinary form in that the risks are special and limited (*Zimmer v. Accident Ins. Co.*, 207 Pa. 472, 56 Atl. 1003), and that it may therefore be legitimately extended, by special provisions, to death from any cause. But while this may in a sense be true, it has no particular application here. It might go to relieve a policy from the charge of incongruity where such a condition appears, but as an aid in the construction of the one in hand it is of little use. By express mention, even as to septicæmia and the rest, not only death but disability is covered (anæsthetics only excepted), and its character as an accident policy is thus manifestly intended to be maintained.

The question, after all has been said, is as to the purpose and meaning of the provision, which is to be determined by reference, as well to the general character of the policy, as to the terms in which the particular provision is expressed, and the connection in which it is found. Having regard to these, the correct construction, in my judgment, is the one which has been given above, according to which the plaintiff, on the face of her statement, has no case.

The demurrer is sustained, and judgment directed to be entered in favor of the defendants, with costs.

NEWCOMB et al. v. BURBANK et al.

(Circuit Court, S. D. New York. June 18, 1906.)

1. EXECUTORS AND ADMINISTRATORS—LIABILITY TO THIRD PERSONS—PROPERTY RECEIVED FROM ESTATE.

Whatever property is received by an executor after the death of the testator in virtue of his representative capacity he holds as assets of the estate, and is liable therefor in such capacity to the true owner.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 279-300.]

2. SAME—ACTION AGAINST FOR CONVERSION.

For a conversion by executors of property received by them from the estate of their testator, but owned by a third party, the owner may, at his election, proceed against them individually or in their representative capacity; but where the complaint seeks to charge them both as individuals and as executors, they may set up in their answer any matter which would constitute a defense in either aspect of the case.

At Law. On demurrer to answers.

Dailey & Williams (Abram H. Dailey and Melville J. France, of counsel), for plaintiffs.

Hawkins & Delafield and Francis M. Jencks (Eugene D. Hawkins, of counsel), for defendants.

HAZEL, District Judge. This action is claimed by plaintiffs to be at law, and no objection is made to that form of proceeding. The complaint alleges that the defendants, individually and as executors, have wrongfully converted certain bonds and accumulations to the possession of which plaintiffs are entitled, and wrongfully claim to hold such securities as part of the estate of which they are executors. The separate answers interposed by the defendants, after denying the material allegations of the complaint, set forth that as executors they rejected the asserted claim of the plaintiffs, and, no consent having been filed with the surrogate of New York county, wherein the decedent resided, for hearing of said claim upon the judicial settlement of their accounts, this action is barred by the provisions of section 1822 of the Code of Civil Procedure. Plaintiffs have demurred to the latter part of the answers, claiming that they contain new matter, and are insufficient in law. The theory advanced by plaintiffs at the hearing was that the securities alleged to have been converted by the defendants did not come into their possession as representatives of the estate of Ambrose B. Burbank, because at the time of his demise he was not the owner thereof, and that under an arrangement entered into with plaintiffs' testatrix his custodianship ceased upon his death, and hence it was the duty of his executors, the defendants, on demand, to surrender such property to the plaintiffs. Defendants contend that the property specifically mentioned in the complaint is not distinguishable from other property of the decedent, and therefore it became an asset of the estate, and plaintiffs' claim must be asserted as that of a general creditor. The general rule is found in *De Valengin's Administrators v. Duffy*, 14 Pet. 282, 10 L. Ed. 457, where it is stated:

"Whatever property or money is lawfully recovered or received by the executor or administrator after the death of the testator or intestate, in virtue of his representative character he holds as assets of the estate, and he is liable therefor in such representative character to the party who has good title thereto."

See, also, *Wall v. Kellogg's Executors*, 16 N. Y. 385; *Dunham v. Fitch*, 48 App. Div. 321, 62 N. Y. Supp. 905; *Matter of Van Slooten v. Dodge*, 145 N. Y. 332, 39 N. E. 950.

It may appear on trial that the securities mentioned in the complaint totally lack identity, and in such case may come within the description of assets. *Schouler on Executors* (3d Ed.) § 205. If, as claimed, the decedent held the bonds as bailee, such possession passed to the executors, who similarly held them. In *Moran v. Morrill*, 78 App. Div. Rep. 440, 80 N. Y. Supp. 120, affirmed in 177 N. Y. 563, 69 N. E. 1127, a somewhat similar case, certain paintings of which the plaintiff claimed to be the owner were left in the possession of the testator. An action was brought against the executor in his representative capacity to recover their possession or their value. The possession of the paintings, Justice Laughlin says, was lawfully derived from the testator, and, to quote from the opinion:

"It could become unlawful only upon a demand and refusal to deliver the property to the plaintiff. The right to possession was vested in the plaintiff, and if she had made a demand upon the testator her cause of action would have been complete against him, and would exist against his representative as such. This, I think, brings the case within the rule that executors are liable in their representative capacity to the true owner for property received by them in such capacity."

In this case the plaintiffs allege that possession is wrongfully withheld, but the demand for judgment is confined to the value of the bonds. In the case cited the court was of the opinion that the refusal of the executor to deliver the property might have been treated by the plaintiff as a conversion, but no demand in tort was alleged. The authorities are not uniform as to whether the torts of executors or administrators are to be treated as an individual liability or in their representative capacity, but an election may be made whether the action shall proceed against the executors or in their representative capacity. *Conger v. Atwood*, 28 Ohio St. 134, 22 Am. Rep. 462; 11 Amer. & Eng. Ency. of Law (2d Ed.) p. 943. If upon the trial the plaintiffs elect to proceed against the defendants in their representative capacity, and the defendants are able to show that the property described in the complaint cannot be separated from other property of a like character belonging to the decedent, then, notwithstanding the alleged conversion, it may be that the claim should have been asserted, under the provisions of section 1815 of the Code of Civil Procedure; but, if this is not shown, the asserted wrongful acts would seem to be of such character as to involve an individual liability.

In re DIMM & CO.

(District Court, D. Pennsylvania. July 7, 1906.)

No. 729.

1. BANKRUPTCY—COMPENSATION OF TRUSTEE—SERVICES RENDERED IN SELLING PROPERTY.

A trustee in bankruptcy is entitled to an allowance in his accounts for personal services rendered by him in attending and assisting in continuous auction sales, by means of which the bankrupt's stock of goods was disposed of to the substantial advantage of the estate; and for his necessary personal expenses while so doing. He may also properly be allowed in such account for unavoidable losses of small sums to the estate through inability to collect from purchasers.

2. SAME—COUNSEL FEES.

While the fact that an attorney had acted for a bankrupt may affect the propriety of his employment to act for the trustee, it does not deprive him of the right to compensation for services rendered after he has been so employed.

In Bankruptcy. On certificate from referee sur exceptions to account of trustee.

W. L. Hoopes and Willis E. Myers, for exceptions.

J. Howard Neely, for trustee.

ARCHBALD, District Judge. Of the five exceptions originally filed to the account of the trustee, the first has been withdrawn. This covered the amount paid to Charles Stimmel for services as clerk at the daily auctions of the bankrupts' goods which were held 18 days, at \$3 a day, \$54. By consent of the trustee, also, the third and fourth exceptions are sustained; the one being for \$5 for attending upon a rule to show cause and making answer thereto, and the other being for \$20, the alleged expense of procuring a bond, both of which accordingly go out. But two exceptions therefore remain, the first of which is directed to a claim of \$90, made by the trustee for expenditures, personal and otherwise, incurred in attending and conducting the sale of the bankrupts' stock, and for personal services rendered in connection therewith, and also for a loss on the sales as returned, due to the inability to collect from certain purchasers. The bankrupts were country merchants, and it was deemed advisable to dispose of the merchandise which they carried, not in a single lumping sale, but piece by piece, in continuous daily auctions. No one questions the propriety or advantage of this course, and by it some \$2,242.29 were realized, which is said to be double what would have been secured in any other way. To accomplish this the trustee had to be on hand every day, through a period of nearly three weeks, cleaning and arranging the goods, and looking after sales, during which time he incurred personal expenses by reason of being away from home to the amount of \$9. There were other minor expenditures directly connected with the auction, amounting to \$5.40 more. A claim of \$17.39 is made for losses on reported sales, and \$54 is asked for the daily attendance and services of the trustee. The aggregate is \$85.79; the balance of the \$90 for which credit is asked being made up of affidavit fees, etc., which the trustee is only able to estimate, and of which he kept no direct account.

The services of the trustee were well worth the amount asked, and should be allowed. Some of them were of almost a menial character, made necessary by the condition in which the goods were found; and there can be no question as to the advantage of the course pursued in disposing of them, to which the attendance of the trustee was necessary and materially contributed. The bankruptcy act expressly authorizes the business of bankrupts to be continued for a limited period by the trustee when deemed advisable, and the allowance of additional compensation for such services to that which is otherwise provided. Section 2 (5). And while the daily auction sales in the present instance may not exactly have been a continuance of the business of the store, they were so in effect, fulfilling the spirit, if not the letter, of the law.

The losses on sales are also a legitimate subject of credit. The trustee might well have deducted them from his totals, and only returned the net amount; and had he done this, it probably would never have been questioned. In fact, the only point made is that he did not take this course. It may be that, with more circumspection, the purchasers who got away without paying, or claimed that they did not get the goods struck off to them, would not have been able to successfully make these pleas. But treating the losses as unavoidable, as seems to be conceded, the trustee is entitled to a credit therefor.

The other items which make up the \$90 are not seriously questioned. Some three or four dollars are not in strictness accounted for. But it may well be that they have gone in the way suggested by the trustee, and they are not of sufficient moment to stop over.

The only other objection is to the item of \$75, counsel fees. It is contended that Mr. Neely was the bankrupts' attorney, and therefore not entitled to them. But this, if true—and it is disputed—however it might affect the propriety of appointing him to act for the trustee, would not deprive him of compensation after his services were rendered. Considerable, however, has already gone in one way and another to counsel, in view of which the present allowance will be confined to \$50. This, so far as appears, will fairly cover what has been done.

With this modification, the exceptions are overruled, and the account of the referee is confirmed.

DAVIS v. CLEVELAND, C., C. & ST. L. R. CO.

(Circuit Court, N. D. Iowa, W. D. May 22, 1906.)

No. 417, Law.

1. REMOVAL OF CAUSES—EFFECT OF REMOVAL—WAIVER OF OBJECTIONS TO JURISDICTION.

The removal of a cause does not preclude the defendant from challenging the jurisdiction of either the state or federal court over his person, or from claiming exemption from being sued in a state other than that of his residence.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, § 238.]

2. APPEARANCE—EFFECT OF SPECIAL APPEARANCE.

A special appearance by a defendant in a federal court for the purpose of moving to quash an attachment issued and levied in the cause, on the ground that the court was without jurisdiction of either the defendant or of the property attached, does not constitute a general appearance to the action.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appearance, §§ 42-52.]

3. ATTACHMENT—PROPERTY SUBJECT—RAILROAD CARS—NONRESIDENT CARRIER—INTERSTATE COMMERCE—INTERFERENCE.

Cars owned by a steam railroad company and delivered by it to other companies, loaded with freight, to be used in the transportation of such freight over their lines to points of destination in other states, and then returned within a reasonable time, either loaded or empty, to the owner in the state where received, pursuant to agreements between the companies for the continuous carriage of interstate shipments of freight, as authorized by Rev. St. § 5258 [U. S. Comp. St. 1901, p. 3564], and in conformity to the policy of the statutes regulating interstate commerce, are, until their return to the owner, instruments of interstate commerce, and are not subject to attachment under the laws of a state into which they may be carried by such other companies.

[Ed. Note.—For cases in point, see vol. 5, Cent. Dig. Attachment, § 127.]

4. STATE LAWS—VALIDITY AND EFFECT—HOW DETERMINED—MATTERS WITHIN EXCLUSIVE CONTROL OF CONGRESS.

The validity of a law of the state, so far as it relates to or may operate upon matters within the exclusive control of Congress, is determined by its effect upon such matters when enforced, and not by the purpose for which it may have been enacted.

5. GARNISHMENT—FREIGHT MONEY DUE NONRESIDENT CARRIER—INTERSTATE SHIPMENTS.

Sums due to a railroad company from other companies as its share of freight collected by them as the terminal or final carriers on continuous interstate shipments are not subject to attachment by garnishment of the debtors under the foreign attachment laws of another state in which the defendant cannot be personally sued.

On Motion to Quash Attachment and Service of Process.

The plaintiff, a citizen of Iowa, as administrator of the estate of Frank E. Jandt, deceased, filed in the district court of Iowa in and for Woodbury county a petition against the defendant railway company, asking judgment against it in the sum of \$10,000 for the alleged wrongful and negligent killing of the deceased in the state of Illinois while a passenger on one of its trains in that state. An order was allowed by a judge of that court authorizing the attachment of property of the defendant company not exceeding \$15,000 in value. Thereupon writs of attachment were issued to the sheriffs of Woodbury and Pottawattamie counties in the state of Iowa, and thereunder 22 freight cars of the defendant railroad company, while in the possession of nine other railroad companies, who had severally brought one or more of such cars into the state of Iowa, were attached by said sheriffs in Pottawattamie and Woodbury counties, and said railroad companies were also attached as garnishees of the defendant company, and required to appear and answer in said district court of Woodbury county. The defendant was not served in the state of Iowa with notice of the filing of said petition, the commencement of said action, or of any of the proceedings under said writs of attachment, but was served with such notices at its office and principal place of business in Cincinnati, Ohio. The defendant appeared specially in the state court for the purpose of removing said cause to this court, and in due time did so remove the same on the grounds of the diverse citizenship of the plaintiff and the defendant. The record has been filed in this court, and the defendant ap-

appears specially, and moves to set aside the service of the notices upon it, and to quash the writs of attachment and the proceedings thereunder, upon the ground that the state court by the proceedings therein acquired no jurisdiction of the defendant or of its property, and that this court has none, for the reason that the defendant is, and was when the proceedings were commenced, a corporation created and existing under the laws of Ohio and Indiana, and not under the law of Iowa; that it does not and did not own or operate any railroad in Iowa, did no business in that state, and had no officer or agent in said state upon whom process could be served, and that none was served upon it in said state of Iowa; that the cars attempted to be seized under said writs of attachment and garnishee process were loaded with property upon defendant's line of railroad outside of the state of Iowa, to be carried without change of cars to points within that and other states, and were delivered by the defendant outside the state of Iowa to the several garnishee companies which are connecting carriers with the defendant, pursuant to agreements with each of them for the formation of continuous lines of railroad for the transportation of property from one state to and through others over their respective roads, pursuant to the acts of Congress so authorizing; that the cars in question were brought into the state of Iowa by said several garnishees, pursuant to such agreements, for the purpose only of completing an interstate shipment of the property with which they were loaded, and when emptied were to be returned to the defendant company in the state of its incorporation, or, where the cars were delivered to said garnishees, as soon as it could reasonably be done; that said several garnishees, under the agreements between them, the defendant, and each other, had the right to use the cars of this defendant in the transportation of property in the regular course of business while returning said cars; in other words that said cars at the time of their attachment were being used by the defendant and its connecting carriers, the said several garnishees, in interstate commerce; that all of the indebtedness, if any, that might be due the defendant from said several garnishees is solely and only by reason of the contracts and agreements heretofore stated, and that such agreements and contracts are to be discharged, satisfied, and settled only in the city of Chicago, state of Illinois, where the same were made, and that such accounts or debts, if any, in favor of this defendant have no situs in the state of Iowa, and are not subject to attachment in that state. The motion is supported by the affidavit of an officer of the defendant, which sets forth in detail the facts above stated. Each of said garnishees severally answered under oath in the state court, admitting that it had cars of the defendant in its possession, but alleged that said cars were delivered to it by the defendant at points outside the state of Iowa, loaded with freight consigned to points within that or other states, and were brought into that state by it in the regular course of its business in the transportation of property between the states; that said cars were so received by it from the defendant pursuant to an agreement between it and the defendant company for the purpose of forming continuous lines of railway for the transportation of property between different states, and for the interchange of cars and traffic between them, substantially as alleged in the motion of defendant to quash the attachment, and to release said cars and the several garnishees therefrom. Some of the garnishees deny being indebted to the defendant in any sum, and others allege that, if any indebtedness is due to the defendant from them, it is on account of the interchange of traffic between them and defendant, as alleged, which account was constantly changing from amounts due defendant to amounts due from it to the garnishee; and that if upon a settlement thereof anything was found to be due to defendant, it was so due in Chicago, where the agreement was made, or at the principal place of business of the defendant in Cincinnati, Ohio, and not in the state of Iowa. The railroads of the defendant and the several garnishees are operated by steam, and each of the garnishees except one is a foreign corporation, and all operate their roads in Iowa and other states, and have agents in Iowa upon whom process may be served, as provided by section 3529, Code Iowa 1897.

The plaintiff filed in the state court a pleading, as authorized by the statute of Iowa, but not under oath, taking issue upon the answers of the several garnishees, and in such pleading denies generally the answers of said garnishees except as admitted or otherwise answered by said pleading. It is admitted that said cars were delivered to the several garnishee companies for the purpose of completing an interstate shipment of the property with which they were loaded; but it is not alleged that either of the garnishee companies has in its possession or under its control any property of the defendant other than said cars, or that either is indebted to the defendant in any sum other than for its proportionate share of the compensation for the carriage of said property from the point of shipment to its destination, which the garnishees may have collected at said destination as the terminal or final carriers of such interstate shipment. It is also alleged that some of the cars at the time that they were attached were empty.

The plaintiff resists the motion to quash the writs of attachment and proceedings thereunder, upon the grounds: (1) That the state court rightly acquired jurisdiction of the defendant's cars, because they were within the state of Iowa at the time of their attachment; and (2) that the defendant has appeared in this court, and moved to quash the attachment proceedings, and has thereby waived its special appearance, and submitted itself and its attached property to the jurisdiction of this court. No evidence is submitted by the plaintiff in opposition to the motion of the defendant to quash the attachment, or in support of its pleading controverting the answer of the several garnishees, and the matters are submitted upon the record, including such motion and admissions of the pleadings.

Wilbur Owen and Bevington & McVey, for plaintiff.

Shull & Farnsworth, for defendant.

Wright & Call, J. C. Davis, Clark & McLaughlin, W. S. Kenyon, Henderson & Fribourg, J. W. Hallam, W. A. Kelly, and John N. Baldwin, for the several garnishees.

REED, District Judge (after stating the facts). The removal of the case by the defendant from the state court, even if its appearance in that court had not been limited to such purpose, does not preclude it from challenging in this court the jurisdiction of the state court or of this court of its person, or from claiming exemption from being sued in a state other than that of its residence. *Wabash Western Railway Co. v. Brow*, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; *Murray v. Wilcox*, 122 Iowa, 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263.

The contention of the plaintiff is that the defendant by moving to quash the attachment, though appearing specially for that purpose, thereby invoked the judgment of the court upon a question other than that of its jurisdiction of the person of the defendant, and that by so doing it has appeared generally to the action. The question of the jurisdiction or right of a court to attach property at all, and that of its right to determine what disposition shall be made of property that it has the right to and has in fact attached, are quite distinct. In the one case the court can only determine its jurisdiction or right to attach the property, and, if it has not such right, then to order its release in case it has been attached; but if it has the right to attach the same, and has in fact done so, then it may and must determine the rights of claimants thereto if any are presented. The motion of the defendant to quash the attachment presents the former of the above questions, and challenges the jurisdiction of the court to

attach its cars upon the ground that they were, when attached, an instrumentality used by it and its connecting carriers in interstate commerce, and it limits its appearance specially for such purpose. Does the defendant by invoking the judgment of the court upon such question waive its special appearance to thus challenge the jurisdiction of the court, and thereby appear generally to the action? Section 3541 (3) Code Iowa 1897, is relied upon as supporting the contention of the plaintiff. That section provides "that an appearance by the defendant * * * for any purpose connected with the case renders any further notice unnecessary." In *Chittenden v. Hobbs*, 9 Iowa, 417, it is held under this statute that an appearance by the defendant to quash an attachment was a general appearance to the action, and rendered notice of the suit unnecessary, but it is plainly indicated in the opinion of the court that if the appearance had been special for the purpose of objecting to the jurisdiction of the court, it would not have had the effect that was given to it. If an appearance to object to the jurisdiction of the court over the person or property of the defendant has the effect of conferring such jurisdiction, then a defendant is effectually precluded from ever presenting such question for determination, for his appearance to do so would defeat the very purpose for which he appears and confers the jurisdiction. Such could not have been the purpose of the statute. This section is the same as section 2840 (3) of the Revision of 1860, and from the note to that section it appears that its purpose was to prevent appearances for the purpose of objections to the substance or manner of the service. But this is quite different from an appearance to object to the jurisdiction of the court. *Spurrier v. Wirtner*, 48 Iowa, 486; *Cibula v. Pitts Co.*, 48 Iowa, 528. In *Murray v. Wilcox*, 122 Iowa, 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263, it is held that this provision of the statute has no reference to an appearance, though general, by a nonresident defendant to claim that he was exempt from service at the time process was served upon him in this state. The court says:

"In enacting this statute, and in authorizing suit against a nonresident in any county of the state where found, the Legislature had no thought of interfering with a rule concerning exemption from service of notice."

See, also, *Wilson v. Donaldson*, 117 Ind. 356, 20 N. E. 250, 3 L. R. A. 266, 10 Am. St. Rep. 48, and cases cited, and *Atchison v. Morris* (C. C.) 11 Fed. 582-585.

In *Harkness v. Hyde*, 98 U. S. 476-479, 25 L. Ed. 337, it is said:

"Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity. Nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. * * * It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived."

In *Goldey v. Morning News*, 156 U. S. 518-523, 15 Sup. Ct. 559, 39 L. Ed. 517, it is said:

"The removal of a suit into the Circuit Court of the United States does not admit that it was rightly pending in the state court, or that the defendant

could have been compelled to answer therein, but enables the defendant to avail himself in the Circuit Court of the United States of any and every defense duly and seasonably reserved and pleaded to the action, in the same manner as if it had been originally commenced in said Circuit Court."

And in *Railway Co. v. Brow*, 164 U. S. 271-278, 17 Sup. Ct. 126, 41 L. Ed. 431, it is said:

"We regard it as not open to doubt that the party has a right to the opinion of the federal court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of Congress to hold that a party who has the right to remove a cause is foreclosed as to any question upon which the federal court can be called upon under the law to decide."

Construction Co. v. Fitzgerald, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608, is clearly distinguishable from the above cases; for in that case the defendant appeared generally to the action and proceeded into the third day of the trial before raising the question of the jurisdiction of the court over the person, and its jurisdiction over the attached property was at no time challenged. *Held*, that by such appearance and participation in the trial the defendant waived all questions of service of process, and converted into a personal suit that which before was but a proceeding in rem.

The defendant appeared specially in the state court for the purpose of removing the cause to this court, and in this court limits its appearance to the purpose of showing that the state court acquired no jurisdiction of its person by the service of process upon it in the state of Ohio, and that its property attached under the process of the state court was not subject to such attachment. Such appearance, under the authorities above cited, is not a general appearance to the action.

The remaining question is, was the property of the defendant subject to attachment by the state court?

Section 3876, Code Iowa 1897, provides:

"That the plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement of or during the progress of the proceeding * * *."

"Section 3877. * * * And in all cases the proceedings relative to the attachment are to be deemed independent of the ordinary proceedings, and only auxiliary thereto."

"Section 3929. A motion may be made to discharge the attachment or any part thereof at any time before trial * * * for any cause making it apparent of record that the attachment * * * should not have been levied upon all or on some of the property held."

Under this last-named section it is held by the Supreme Court of Iowa that it may be made "apparent of record that the attachment should not have been levied upon all or some of the property" by affidavits in support of the motion to discharge. *Wilson v. Stripe*, 4 G. Greene, 551, 61 Am. Dec. 138; *Hastings v. Phoenix*, 59 Iowa, 394, 13 N. W. 346; *Cox v. Allen*, 91 Iowa, 462, 50 N. W. 335.

It very clearly appears from the affidavit in support of the motion to quash the attachment that at the time the cars of defendant were delivered to the several garnishees there were existing agreements between the defendant and said garnishees for the continuous carriage

of freight from one state to and through other states to its destination on their said lines of road; that said cars were severally loaded with freight at places on defendant's road outside of the state of Iowa, consigned to places on the lines of the respective garnishees in Iowa and Nebraska, and were delivered by defendant outside of the state of Iowa to said several garnishees, pursuant to said agreements, to be carried by them to the destination of said freight, there to be unloaded, and, as soon as it could reasonably be done, returned to defendant either empty, or reloaded with freight, to be carried in the usual course of their business in returning said cars. Are cars while being so used subject to seizure under the general attachment laws of a state to or through which they are thus carried? Section 5258, Rev. St. U. S. [U. S. Comp. St. 1901, p. 3564] is as follows:

"Whereas the Constitution of the United States confers upon Congress in express terms, the power to regulate commerce among the several states, and to establish post roads, * * * ; Therefore;

Be it enacted that every railroad company in the United States whose road is operated by steam * * * is hereby authorized to carry upon and over its road, boats, bridges, and ferries, all passengers, * * * mails, freight, and property on their way from any state to another state, and to receive compensation therefor; and to connect with roads of other states, so as to form continuous lines for the transportation of the same to the place of destination. * * * " Act June 15, 1866, c. 124, 14 Stat. 66.

It is said that this act is permissive only, and does not impose any obligation upon carriers of the class described to enter into such agreements, or, if such agreements are made, does not relieve them from any liability to which they would otherwise be subject. But the question is, are the cars or other instrumentalities of the companies forming such continuous lines when used in interstate traffic so used pursuant to the authority of Congress? If they are, then such use cannot be rightly burdened or interfered with by or under the authority of state legislation. *Brown v. Maryland*, 12 Wheat. 419, 6 L. Ed. 678; *McCulloch v. Maryland*, 4 Wheat. 316, 4 L. Ed. 579; *Prigg v. Pennsylvania*, 16 Pet. 539, 10 L. Ed. 1060; *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128; *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 31 L. Ed. 700; *Easton v. Iowa*, 188 U. S. 220, 23 Sup. Ct. 288, 47 L. Ed. 452.

The plain purpose of section 5258, is an exercise by Congress of the power conferred upon it by the commerce clause of the federal Constitution; and this it does by permitting the owners of connecting lines of steam railroads to arrange for the formation of continuous lines for the transportation of persons and property over their respective roads from one state to and through others without change of cars, and to receive compensation therefor.

In *Railroad Co. v. Richmond*, 19 Wall. 584, 23 L. Ed. 173, this section and the act of July 25, 1866, authorizing the construction of bridges over navigable waters, were under consideration. The court said in reference thereto:

"These acts were passed under power vested in Congress to regulate commerce among the several states, and were designed to remove trammels upon transportation between different states which had previously existed, and to prevent the creation of such trammels in future, and to facilitate railway

transportation by authorizing the construction of bridges over the navigable waters of the Mississippi. But they were also intended to reach trammels interposed by state enactments or by existing laws of Congress."

In *Bowman v. Railroad Company*, 125 U. S. 465, 485, 8 Sup. Ct. 689, 31 L. Ed. 700, the court in referring to the same sections says:

"So far as these regulations made by Congress extend, they are certainly indications of its intention that the transportation of commodities between the states shall be free, except where it is positively restricted by Congress itself, or by the states in particular cases by the express permission of Congress. * * * The subjects upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation, affecting alike all the states; others are local. Of the former class may be mentioned all that portion of commerce * * * between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulation, and that Congress can alone prescribe. Its non-action in such cases with respect to any particular commodity or mode of transportation is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. * * * Commerce with foreign countries and among the states, strictly considered, consists in intercourse and traffic, including in these terms * * * the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. For the regulation of commerce as thus defined, there can only be one system of rules applicable alike to the whole country, and the authority which can act for the whole country can alone adopt such a system."

By the Act of Congress of February 4, 1887—the act to regulate commerce—it is provided that the provision of this act shall apply to any common carrier or carriers engaged in the transportation of persons and property wholly by railroad, or partly by railroad and partly by water, when both are used under a common control, management, or arrangement for a continuous carriage or shipment from one state or territory of the United States to another state or territory, shall be subject to the provisions of this act; and it shall be unlawful for any such carrier to enter into any agreement, express or implied to prevent, by change of time schedules, carriage in different cars, or by any other means or device, the carriage of freight from being continuous from the place of shipment to its destination; and the term "transportation" shall include all instrumentalities of shipment or carriage. 24 Stat. 379, c. 104 [U. S. Comp. St. 1901, p. 3154]. This law was enacted to further regulate that part of commerce which consists in the transportation of property by means of railway and water lines between the states, and to subject carriers engaged in such transportation to the provisions of the act. That the states may not burden instrumentalities of interstate commerce has been frequently determined by the Supreme Court of the United States. The exact limit of lawful legislation by states upon this subject cannot be definitely defined. It can only be illustrated from decided cases, and from the principles announced in them it will be determined in the particular case under investigation whether or not the legislation of the state under consideration, when carried into effect, imposes any burdens or restrictions upon interstate commerce that may directly interfere therewith. *Wabash Railway Co. v. Illinois*, 118 U. S.

557-571, 7 Sup. Ct. 4, 30 L. Ed. 244. In the recent case of *Central Railroad Co. v. Murphey*, 196 U. S. 194, 25 Sup. Ct. 218, 49 L. Ed. 444, it was held that the imposition by a state statute upon the initial or any connecting carriage of the duty of tracing freight and informing the shipper in writing in case of its injury or loss, when, where, and how, and by which carrier the freight was lost, damaged, or destroyed, and giving the names of the parties, and their official position, if any, by whom the truth of the facts set out in the information could be established, is, when applied to interstate commerce, a violation of the commerce clause of the federal Constitution and void. In *Railroad v. Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, it was held that the statute of a state requiring express trains, intended only for through passengers, to stop at every county seat in the state through which they run, when ample accommodations were provided by local trains, was held to be an unreasonable burden upon interstate commerce, and void. In *Telegraph Co. v. Pendleton*, 122 U. S. 347, 7 Sup. Ct. 1126, 30 L. Ed. 1187, a state law requiring telegraph messages to be delivered within one mile of the station is held void as to messages between the states. Many other cases might be cited, but to do so would unduly extend this opinion.

The burden imposed by such legislation is slight as compared with that which would authorize the seizure upon attachment of an entire train of cars, or of any part thereof, carrying freight from one state to or through another. When the defendant and its connecting carriers, the several garnishees, entered into the agreements shown by this record, they became subject to the acts of Congress regulating commerce, and it would have been unlawful for any of them to have refused to accept the cars of others loaded with interstate freight destined to points on their respective lines, and carry the same to their destination, and in case of such refusal they might have been compelled by mandatory injunction to perform the public duties imposed upon them by these acts of Congress. Act March 2, 1889, § 10, c. 382, 25 Stat. 862 [U. S. Comp. St. 1901, p. 3172]; *Union Pac. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *In re Lennon*, 166 U. S. 548, 17 Sup. Ct. 658, 41 L. Ed. 1110; *C., B. & Q. Ry. Co. v. Railway Co.* (C. C.) 34 Fed. 481; *Toledo & A. Ry. Co. v. Pennsylvania Co.* (C. C.) 54 Fed. 730-746, 19 L. R. A. 387.

The formation of continuous lines of transportation, whereby each road, instead of remaining a separate line, becomes a part of a great railway system extending into all parts of the country, upon any part of which cars may be loaded with freight to be transported from one state to or through another, without unloading, to its destination on any part of the system, is authorized by Congress. This greatly subserves the public convenience, lessens the cost of transportation and delays in carriage, and to authorize cars while being so used to be seized upon attachment under authority of state laws at the suit of an individual would greatly inconvenience the public and directly interfere with interstate commerce and with the authority of Congress in providing for such continuous lines of transportation.

That cars so used are not subject to attachment or garnishment under the general attachment laws of a state into which they are carried is held upon full and careful consideration in *Wall v. Norfolk & Western Ry. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948, *Connery v. Railway Co.*, 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. Rep. 659, and *Mich. C. Ry. Co. v. M. & Lake Shore Co.*, 1 Ill. App. 399, for the reasons, among others, that such attachment would be against public policy, and a direct interference with interstate commerce and the acts of Congress regulating the same. See, also, *Montrose Pickle Co. v. Dodson*, 76 Iowa, 172, 40 N. W. 705, 2 L. R. A. 417, 14 Am. St. Rep. 213; *Bates v. Railway Co.*, 60 Wis. 296, 19 N. W. 72, 50 Am. St. Rep. 369.

The execution or attachment laws of the several states doubtless were not primarily intended as burdens upon or as an interference with interstate commerce. But, if the instrumentalities of such commerce when being lawfully used therein may be seized and held under such laws, then when enforced they would in fact be a most serious burden upon or interference with that commerce, and to the extent that they so authorize they are just as obnoxious as if that had been their primary purpose. The validity of a law of the state, so far as it relates to or may operate upon matters within the exclusive control of Congress, is determined by its effect upon such matters when enforced, and not by the purpose for which it may have been enacted. *Easton v. Iowa*, 188 U. S. 220-231, 238, 23 Sup. Ct. 288, 47 L. Ed. 452.

It is further urged that some of the cars were when attached empty, and had not started on the return trip, and were not therefore then engaged in interstate transportation. In *Johnson v. Southern Pac. Ry. Co.*, 196 U. S. 1-21, 25 Sup. Ct. 158, 49 L. Ed. 363, a like contention was made as to a dining car, which was regularly used to furnish meals to passengers between San Francisco and Ogden. The car was waiting at a point near Ogden for a train to carry it back to San Francisco. It was contended that until the car had actually started upon the return trip it was not used in interstate traffic, within the meaning of the safety appliance law of Congress. The Supreme Court said of this contention:

"Counsel urge that the character of the car at the time and place of the injury was local only, and could not be changed until the car was actually engaged in interstate movement, or being put into a train for such purpose. * * * Confessedly this car was under the control of Congress while in the act of making its interstate journey, and in our judgment it was equally so when waiting for the train to be made up for the next trip. It was being regularly used in the movement of interstate traffic, and so within the law."

The cars of defendant when brought into the state of Iowa to complete an interstate shipment of property were being used in interstate commerce, and were so being used while waiting at least a reasonable time to be loaded for the return trip.

Finally, it is urged that the debts, if any, owing by the several garnishees to the defendant for its share of the price of the carriage, which may have been collected by them as the terminal carriers of the shipment, are subject to garnishment under the Iowa Code. Section 3897 of that Code provides:

"That property of the defendant in the possession of another, or debts due the defendant, may be attached by garnishment. * * *

"Sec. 3935. The mode of such attachment is by serving upon the garnishee a notice in the manner required for the service of original notice, that he must not pay any debt owing by him to the defendant," etc.

Of course, it is only debts that are within the jurisdiction of the state that can be thus attached. Whether the situs of a debt for the purpose of attachment is at the domicile or residence of the garnishee or his creditor is a question upon which the authorities are not in accord. In *Mooney v. Railway Co.*, 60 Iowa, 347, 14 N. W. 343, *Hannibal, etc., Ry. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581, and in some other cases it is held that such debts may be attached wherever legal process may be served upon the garnishee defendant, though the principal defendant and his creditor both reside in another jurisdiction, where the debt was contracted and is payable. The contrary is held in *Central Trust Co. v. Railway Co.* (C. C.) 68 Fed. 685; *Nye v. Liscombe*, 21 Pick (Mass.) 263; *Gold v. Railway Co.*, 1 Gray (Mass.) 424; *Wright v. Railway Co.*, 19 Neb. 175, 27 N. W. 90, 56 Am. Rep. 747; *Singer v. Fleming*, 39 Neb. 679, 686, 58 N. W. 226, 23 L. R. A. 210, 42 Am. St. Rep. 613; *Drake v. Railway Co.*, 69 Mich. 168, 37 N. W. 70, 13 Am. St. Rep. 382; *Railway Co. v. Smith* (Miss.) 12 South. 461, 19 L. R. A. 577, and notes, 35 Am. St. Rep. 651.

It is not necessary to determine this question in this case, for the defendant's share of the compensation for the carriage of the freight in question is as much a part of interstate commerce, within the meaning of the acts of Congress regulating commerce and as defined by the Supreme Court, as the actual carriage of the property. If a debt due to a nonresident carrier for such transportation upon its own line, when collected by the terminal or final carrier may be thus attached in any state where the cars may go to complete an interstate shipment of property, then the owner of such cars will be compelled to follow them into such state, to there litigate with whomever may be authorized to attach such debt. If this is permissible, owners of cars could not safely permit them to go beyond their own lines, nor could connecting carriers receive them, or collect the cost of the entire shipment, without being drawn into litigation in which they have no interest, and be subject to much inconvenience and expense because thereof. The effect of such proceedings upon interstate transportation is apparent. *M. C. Ry. Co. v. M. & L. S. Ry. Co.*, 1 Ill. App. 399, above. And see *Nazro v. Cragin*, 3 Dill. 474, Fed. Cas. No. 10,062.

The conclusion, therefore, is, that the cars of the defendant company and the debts, if any, owing it by the several garnishees for its share of the carriage of the interstate shipments in question were not subject to attachment in Iowa, and that such attachment and the several garnishees should be discharged, and it is so ordered.

DOUGLAS PARK JOCKEY CLUB v. GRAINGER et al.

(Circuit Court, W. D. Kentucky. May 24, 1906.)

1. COURTS—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.

A suit to enjoin officers or agents of a state from exercising powers conferred on them by a state statute, on the ground that their action is in violation of the property rights of complainant under the Constitution of the United States, is within the jurisdiction of a federal court, without regard to the citizenship of the parties, where the requisite amount is involved.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 820.

Jurisdiction of federal courts in action involving federal question, see notes to *Bailey v. Mosher*, 11 C. C. A. 308; *Montana Ore Purch. Co. v. Boston & M. C. C. & S. Min. Co.*, 35 C. C. A. 7.]

2. CONSTITUTIONAL LAW—ACTION OF STATE—EXERCISE BY OFFICERS OF AUTHORITY UNDER STATE STATUTE.

Where state officers, in the exercise or attempted exercise of their official authority, deny to any citizen, whether an individual or a corporation, the equal protection of the laws, or deprive him of his property without due process of law, the act is that of the state, and comes within the prohibition of the fourteenth constitutional amendment.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Constitutional Law, § 678.]

3. SAME—CONSTITUTIONALITY OF STATE LAW.

The unconstitutionality of state legislation may be manifested either on its face in its express provisions, or in the manner of enforcing and carrying it into effect.

4. SAME—DENIAL OF EQUAL PROTECTION OF LAWS.

Act Ky. March 26, 1906, to regulate racing within the state, provides that any corporation formed for the purpose of racing and breeding or improving the breed of horses and conducting races and contests of speed "shall have the power and right, subject to the provisions of this act, to hold one or more running race meetings in each year." It creates a state racing commission, with power to prescribe the rules, regulations, and conditions under which running races shall be conducted, and provides that no such races shall be conducted except by a corporation or association duly licensed by said commission; that any corporation or association desiring to conduct such racing may apply annually to the commission for a license, which the commission may grant for one year if in its judgment a "proper case" for its issuance is shown. Complainant was a corporation chartered by the state, with power to establish and maintain a race track and to conduct races thereon, and was the owner of grounds, buildings, etc., used for such purposes of large value. *Held*, that such statute gave the commission no power to arbitrarily discriminate between applicants for licenses, by means of regulations governing the granting of such licenses or otherwise, and that its action in refusing complainant a license solely on the ground that it had "assigned a date" for the holding of a race meeting to another association, which would conflict with the date on which complainant desired to hold its meeting, was not within the authority given by the act, and whether so authorized or not was a denial to complainant of the equal protection of the laws, and deprived it of its property without due process of law, in violation of the fourteenth constitutional amendment.

In Equity. On motion for preliminary injunction.

Alfred S. Austrian, Bond, Marshall & Bond, Helm, Bruce & Helm, William Marshall Bullitt, and David W. Fairleigh, for complainant.

Lewis McQuown, D. W. Sanders, and David W. Baird, for defendants.

EVANS, District Judge. An act to regulate the racing of running horses in the commonwealth of Kentucky, and to establish a state racing commission, and prescribing its powers and duties, was enacted by the General Assembly, and was approved by the Governor on the 26th day of March, 1906. Pursuant to its provisions, the Governor appointed the defendants to constitute the state racing commission.

Section 1 of the act referred to is in this language:

"Any corporation formed for the purpose of racing and breeding or improving the breed of horses and conducting races and contests of speed, shall have the power and right, subject to the provisions of this act, to hold one or more running race meetings in each year, and to hold, maintain and conduct running races at such meetings. At such meetings the corporation or the owners of the horses engaged in such races, or others who are not participants in the racing, may contribute purses, prizes, premiums or stakes to be contested for; but no person or persons other than the owner or owners of a horse or horses contesting in a race shall have any pecuniary interest in a purse, prize, premium or stake contested for in such race, or be entitled to, or receive any portion thereof after such race shall have been finished; and the whole of such purse, prize, premium or stake shall be allotted in accordance with the terms and conditions of such race. Such meetings shall not be held except during the period extending from the 1st of April, to the 1st day of December, inclusive in each year. No running races are authorized or shall be permitted except during the period aforesaid, nor except between sunrise and sunset."

Section 3 is as follows:

"Said commission shall have the power to prescribe the rules, regulations and conditions under which running races shall be conducted in this state, and no such races shall be conducted, except by a corporation or association duly licensed by said commission, as herein provided. Any corporation or association desiring to conduct such racing may annually apply to the state racing commission for a license so to do. If in the judgment of the commission a proper case for the issuance of such license is shown, it may grant the same for a term of one year; and every such license shall contain a condition that all races or race meetings conducted thereunder shall be subject to the rules, regulations and conditions from time to time prescribed by the commission, and shall be revocable by the commission for any violation thereof, or whenever the continuance of such license shall be deemed by the commission not conducive to the interests of legitimate racing. But if said license is refused or revoked, said commission shall publicly state its reasons for so doing, and said reasons shall be written in full in the minute book of said commission, which shall at all times be subject to inspection upon application of anyone desiring to do so; said finding of said commission shall be subject to the review of a court of competent jurisdiction; provided, that a refusal of the commission to grant any racing association a license or to assign any racing association at least forty days in each year if desired for racing at such association, and the decision of such commission revoking any license of any association shall be subject to review of the courts of the state."

Subsequent sections impose severe and comprehensive penalties for violations of the statute.

The complainant is a body corporate, organized under the laws of Kentucky, with the right and power, among other things, to establish and maintain a race track, to give exhibits of speed and races between horses, to charge the public for admission, to give premiums, and to engage in pool selling, bookmaking, and registering bets, to purchase real estate, and make improvements thereon. The charter of the complainant upon its face appears, therefore, to bring it within those provisions of section 1 of the act under consideration, which, in

terms, gives corporations like the complainant the right and power, subject to the provisions of the act, to hold one or more running race meetings in each year, and to hold, maintain, and conduct running races at such meetings. The legislation of the state being thus, the complainant has filed its bill of complaint, setting forth its rights under its charter, and averring that upon the faith thereof it had heretofore purchased very valuable real estate in Jefferson county, near the city of Louisville, and had erected very extensive and very costly and valuable improvements and tracks thereon, which are adapted only to the purpose of meetings for running races, the races themselves, and preparations and facilities therefor; that the defendants, as such state racing commission, and acting as such, have arbitrarily, unjustly, and without any good reason refused to license it under the provisions of the act for the period beginning April 1, and ending December 1, 1906, which conduct upon the part of the defendants, it is asserted, will greatly, and to the extent of many thousands of dollars, injure and destroy the complainant's property, and thus deprive complainant of the property so destroyed and diminished in value without due process of law; and it is further claimed that the alleged unjust and arbitrary conduct of the defendants set forth in the bill denies to the complainant the equal protection of the laws of the state of Kentucky. We have not undertaken to set forth in detail all the averments of the bill, but only to indicate, in very general terms, the grounds upon which the complainant insists that the acts of the defendants are in violation of the fourteenth amendment to the Constitution of the United States.

In every case brought here the first inquiry must be whether the court has jurisdiction. The judiciary act of 1887, as amended by the act of 1888, gives the Circuit Court of the United States original cognizance, concurrent with the courts of the several states, over all suits of a civil nature in law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and arising under the Constitution or laws of the United States. Under this provision, it is perfectly well settled that the courts of the United States have jurisdiction, without regard to the citizenship of the parties, over all such cases as are described in the judiciary act, and wherein what is called a federal question is raised by the plaintiff's petition or bill of complaint, and as the courts of the United States, especially the Supreme Court, are the final arbiters of constitutional construction, the power of those courts extends over all statutes, whether passed by a state Legislature or by Congress, which are claimed to be in contravention of the Constitution of the United States, though not to statutes claimed to be void under a state Constitution. No citation of authorities is necessary upon these propositions, but many of them are collected in section 84 of Desty's Federal Procedure.

Manifestly, the complainant in its bill claims rights under the Constitution of the United States in a case where the matter in dispute exceeds the sum or value of \$2,000, exclusive of interest and costs, and we reach the conclusion, therefore, that this court has the right

and power to hear and determine the case presented by the bill, and that is jurisdiction.

When any legislation of a state comes under contention in a court of the United States, it is always to be regretted if its proper construction as to the interpretation of its language and as to its relation to the provisions of the state Constitution have not been determined by the highest court of the state, for, if the construction of such legislation in those respects has been determined by the state court, the result is at once uniformly accepted and followed by the federal courts. If, however, the state court has not determined these matters, the federal court, in pertinent cases, must deal with them as best it can. In the case before us we are gratified to find that we shall not be compelled to go very far into that work, for it seems to us that the questions here to be solved have reference in the main to the Constitution of the United States, and especially to the fourteenth amendment thereto, and in such cases a different rule prevails, for, however persuasive the decisions of the state courts upon questions of constitutional law may be, they are not binding as authority upon the federal courts. Having these general propositions in view, we have not been able to perceive how the act of 1906 violates the Constitution of the state of Kentucky, and we shall assume, rather than decide, that on its face it does not violate the Constitution of the United States, but we may, and in this case we must, go beyond the mere language of the act.

The applicable clause of section 1 of the fourteenth article of Amendments to the Constitution of the United States is as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction its equal protection of the laws."

It is entirely well settled that when state officers, in the exercise or attempted exercise of their official authority, deny to any citizen the equal protection of the laws, or deprive him of his property without due process of law, it is the state itself which does it, and such official action therefore comes within the constitutional prohibitions (*Ex parte Virginia*, 100 U. S. 313, 25 L. Ed. 667; *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *Carter v. Texas*, 177 U. S. 442, 20 Sup. Ct. 687, 44 L. Ed. 839), and that corporations are within the protection of the fourteenth amendment was held in *Santa Clara County v. Railroad*, 118 U. S. 394, 6 Sup. Ct. 1132, 30 L. Ed. 118, and *Pembina v. Pennsylvania*, 125 U. S. 187, 8 Sup. Ct. 737, 31 L. Ed. 650.

It has also been held that the unconstitutionality of the state legislation may be manifested in either one or two ways, namely—either (1) upon its face in its express provisions; or (2) in the manner of enforcing and carrying into effect such legislation. *Owensboro, etc., Bank v. City of Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 850; *People v. Weaver*, 100 U. S. 539, 25 L. Ed. 705; *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. 1121, 32 L. Ed. 118, and other cases. If in the latter way, the facts should be carefully inquired

into, and nothing left to mere inference; but if in the former, the question can be determined upon consideration of the mere language of the legislative enactment. In this case we are to inquire into the manner in which it has been attempted to carry into effect the act of the Legislature to which we at first referred, and ascertain whether, by the official conduct of the defendants, the complainant has been deprived of any of its property without due process of law, or whether it has been denied the equal protection of the laws. It may be that the latter clause will be the one most nearly applicable to this case, though possibly both clauses may require very earnest consideration.

What we have said may sufficiently indicate, in a general way, the questions with which we are to deal, though notice of one other general proposition may be appropriate. It is this: The public policy of Kentucky as to permitting horse racing has been very plainly manifested for many years, although never more plainly than in the charter of the complainant and in the act of 1906, and there can be no pretense that it is or has ever been the policy of the state to prohibit it as immoral, any more than does the public policy of England, France, Tennessee, California, Louisiana, Maryland, New York, and other states. And this is true, however much public scandal and immorality in various ways may sometimes result from the apparently inevitable accompaniments of horse racing in our day. Hence, a court of equity may not fairly say in a contest like this that the complainant comes into court to ask its aid in support of an immoral and vicious practice. The state has decided otherwise. Nor could a court properly under that decision invoke a plague upon all race tracks and racing associations, unless defendants' description of at least some of them be true, nor unless there was reasonable hope that the invocation would be promptly and favorably responded to.

Having ascertained that the bill of complaint presents, *prima facie*, a case upon which this court may exercise jurisdiction for the purpose and with the aim of protecting a right claimed under the Constitution of the United States, and having found that the right for which protection is asked is not one which the public policy of the state of Kentucky forbids, we have reached the inquiry, whether a case for an injunction was made at the hearing? However, before passing to that general question, it may be well to advert to another phase of the law of Kentucky.

Section 2 of the Constitution of the state is in these important words:

"Absolute and arbitrary power over the lives, liberty and property of free-men exists nowhere in a republic, not even in the largest majority."

Section 27 divides the powers of the commonwealth into three distinct branches, to wit, the legislative, executive, and judicial, and section 28 prohibits officers of one department from exercising the rights and powers of the officers of any other of those departments. Doubtless, it was in deference to these provisions that the General Assembly incorporated into the act of 1906 these provisions which provide for a review by the courts of the action and decisions of the state racing commission. This was an important provision, which might possibly

save the act from a taint of unconstitutionality in bestowing judicial power upon an executive body. It will be remembered, also, that in any case of which the federal courts have jurisdiction the remedies to which any person may be entitled in the state court under state laws, may, if appropriate, be enforced in the national tribunals, as well as in the state courts. *Holland v. Challen*, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; *Chapman v. Brewer*, 114 U. S. 170, 171, 5 Sup. Ct. 799, 29 L. Ed. 83, and cases cited. So that, as the state courts could apply that remedy, we conclude this court in this case has the right, and that it is its duty, to review the act and determination of the defendants in relation to which this action was instituted, and to determine whether that action and determination is, in its necessary result, a denial to the complainant of the equal protection of the laws, or whether it deprives the complainant of any of its property without due process of law, within the meaning of the fourteenth amendment of the Constitution of the United States.

Undoubtedly, the state of Kentucky has the right, in the fair exercise of its police power, to regulate horse racing. It is equally certain that the state may establish a state racing commission, to carry into effect its purpose to that end; but it is fair to presume that the courts of the state would hold, and that the Legislature contemplated that they would hold, that the acts of the commission and the rules and regulations prescribed by it should be general, and should bear equally and fairly upon all corporations which are authorized by the state to hold meetings for running races, thus putting all of them upon a fair and equal footing, without making favorites of any. It is not to be presumed that the act of 1906 meant to do anything else, or intended that the commission should do anything else, or intended, if the commission attempted it, that the courts should not revise and correct such attempted action. Upon its face the act of 1906 appears to us to require perfect equality and fairness to all. To effectuate that purpose it made it the duty of the state racing commission to make rules and regulations, which phrase, *ex vi termini*, necessarily means general rules and regulations applicable alike to every corporation which is authorized to hold meetings for running races, and which rules, upon being complied with, entitle every one to precisely the same treatment. The defendants had made no rules nor regulations to govern after the license was granted. They had attempted, and perhaps properly, to judge each application for a license separately, and upon separate and distinct considerations, granting a license to one, and refusing it to another in the same way, and entering upon its records, as the statute requires, its reasons for its action in either case. Undoubtedly, it was within the range of legislative contemplation that there might be sharp rivalries, and that, however fair the commission might intend to be, its actions might not bear equally upon all rivals, and that the courts consequently should review the decisions of the commission.

We have listened with great pleasure to the able argument of this case upon the one side and upon the other, though finding it unnecessary to notice all the points raised by counsel. Indeed, we are so pressed for time that we are not able very elaborately to go into many

phases of the discussion upon which an expression of opinion might not be inappropriate nor undesirable. Perhaps, not unnaturally, the presence on the commission of the president of one of the rival jockey clubs has caused some comment by counsel, as an indication of the grounds upon which the alleged favoring of that club in the action of the commission occurred. However, the court will lay no stress upon that circumstance. It prefers to assume that the defendants have all been actuated by a sincere desire to discharge their public duties, and we proceed to test the validity of what they have done by the provisions of the act under which they were appointed. That act, in terms, provides that any corporation formed for the purpose of racing and breeding and improving the breed of horses and conducting races and contests of speed shall have the power and right, subject to the provisions of the act, to hold one or more running race meetings in each year, and to hold, maintain, and conduct running races at such meetings. These meetings, however, are not to be held except during the period extending from the 1st day of April to the 1st day of December in each year. The act further provides that the commission shall have power to prescribe the rules, regulations, and conditions under which running races shall be conducted in this state, and that no such races shall be conducted except by a corporation or association duly licensed by the commission, and that any corporation or association desiring to conduct such racing may annually apply to the commission for a license to do so, and in proper cases such license may be granted for one year. As before pointed out, it is also provided that, if a license is refused, the reasons therefor shall be entered of record, and the decision of the commission thereon shall be subject to review by the court. Obviously, the latter provision would be useless unless the court, upon reviewing that action, could control the commission's conduct so far as to reverse, if necessary, its decision, and determine what should be done in the case. In the absence of any construction of the act by the Court of Appeals of Kentucky, we, for the purpose, at least, of this hearing, so construe its provisions. Looking into those provisions as we have analyzed them, we find it difficult to hold that "applying for dates," which is certainly not specifically authorized, is equivalent to applying for a "license," which is; but it seems to be admitted by the answer of the defendants that the other jockey clubs applied for dates, and that the complainant also did so, and that the defendants in their official capacity interpreted this to be a proper mode, or at least one which was approved by them, of applying for a license, and for that reason alone we must regard the complainant's case as one where a license was applied for in the way preferred by the commission, and that the license was refused, as clearly appears, upon the sole ground that a license or dates had been given or assigned to the Louisville Jockey Club at Louisville for the period during a part of which the complainant desired to have its running races in the spring of 1906.

We are much inclined to think that the fundamental error of the defendants has been in misinterpreting the act of the Legislature, and in undertaking to "assign dates" instead of granting "licenses." The latter power is given; the former, at least in terms, is not. Under-

taking to assign dates in this sense is not within the fair purview of the act, and, instead of doing the general thing which is implied in the granting of the license, and which ought to work out results equally fair to all, they went beyond the authority referred to by the act, and entered upon a course where injustice and inequality were almost or quite inevitable. What the statute seems to authorize is to give permission to hold running race meetings at any time between April 1st and December 1st, and it does not seem to confer any power any further to control the acts of the licensee as to the times when he may hold his meetings. That is his own affair, and he is to be governed by his own notion of what is best for his own success; and it may be doubted whether the right to prescribe rules, regulations, and conditions conferred by the third section refers to the license at all, as the language conferring that power seems rather to confer it as to conducting the races after the license has been given. The act does authorize, and perhaps, in practical interpretation, requires, the commission to grant the license in a proper case, and, if it refuses to do so, requires it to state its reasons therefor upon its record, and confers upon the courts the power to review that decision of the commission; and we have interpreted this provision to be meaningless unless it confers upon the court the power to determine when there is a proper case for granting the license. What should be regarded as a proper case? Certainly we are to presume that there were no fair objections to complainant, personally, so to speak, as an applicant for a license, inasmuch as the record indicates no such ground of objection. Can the phrase "proper case" mean that the commission shall take into consideration the general moral propriety of permitting running races in Kentucky? The answer to this must be in the negative, for, as we have seen, the Legislature has settled the state's policy in that regard for itself, and did not delegate to the commission the power to do so, nor to impugn that action of the General Assembly. Can it mean that a proper case is one where profit can be made, or is that a matter of business, determinable only by those who want to take the chance to make money, or to stimulate the popularity of a good breed of horses? Can it be that a proper case depends either upon whether a given track is fully prepared at the time of application, or whether a rival corporation has either previously acquired a license, or that it has palled and satiated the public appetite for racing, and that therefore the commission should exercise a sort of paternal care and protectorate over the applicants, rather than let them exercise their own judgments upon these phases of the case? Was competition in running races intended to be forbidden by the act, or was competition intended to be encouraged? Rather does not a proper case depend, first, upon the power of the applicant conferred by its own charter; second, upon the possession of a track and other arrangements which are suitable, or which by the time of a proposed meeting could be made suitable, for holding and conducting running races upon either a small or large scale, as might best suit the applicant; or, third, upon other fair considerations as to the capacity of the applicant to do what he is licensed to do? It will also be noticed that the act further authorizes the commission to revoke any license after it is granted if the licensee in the

conduct of its race meeting violates the rules, regulations, and conditions which the commission has made, and which rules and regulations must, as we have seen, apply equally and alike to all licensees.

To conclude, it seems to us, after a very careful effort to give proper interpretation and effect to the legislation, that the questions we have suggested as to what is a proper case for a license are not difficult to answer so far as they are applicable to the complainant. By its charter it is authorized to hold and conduct running race meetings, and it should not be deprived of the fair advantages of so doing and of the proper use of its property at any time it chooses to select between this date and December 1st of this year, unless upon reasons appearing upon the defendants' record, upon which the court should hold the case not to be a proper one. The court has concluded from the testimony and from the record before it that no just cause of objection to the complainant as a personality is shown; that it can within reasonable time, if it is not quite so now, be abundantly equipped and prepared for holding and conducting such meetings, and that great damage would be done to it if refused the license applied for. Further, the court finds that whatever evils may have attended running race meetings as portrayed in the defendants' answer, those evils were not so much caused by the complainant, which has never held a meeting, as they might have been by the older jockey clubs, which have held regular meetings for many years; and, indeed, it might possibly be, if continuous racing would destroy the business, and if the concomitant evils are as great as pointed out in the defendants' answer, that it might be well to remedy the evil by making the meetings so continuous as to destroy the source and origin of those evils. Still, as we have said, that is a matter for legislative consideration.

The defendants' answer is elaborate and ably argumentative, but while the arguments and the considerations they present might, if presented to the Legislature, have induced it to prohibit all forms of racing in Kentucky, the court is not at liberty while interpreting and enforcing the law to give weight to such considerations. The fact appears to be that, with its charter behind it, with the ability to conduct a running race meeting, and with no legal difference in its situation and that of the Louisville and Latonia Jockey Clubs, the complainant, along with those clubs, applied for a license in the form preferred by the defendants. Licenses were promptly granted to the other two clubs, and this, no doubt, was a proper exercise of the authority of the commission. But a license was refused to the complainant upon the sole reason, as stated by the defendants, that the dates applied for had already been assigned to other licensees. In legal contemplation, under the act, this can only mean that a license was refused to the complainant because one had been granted to the Louisville Jockey Club. This is evident when we use the proper word "license" instead of the improper phrase "assignment of dates." In reviewing the decision of the state racing commission, whereby a license upon this ground only was refused to the complainant, we have concluded that the reason given was no legal reason at all, any more than granting a license to one person to practice law would, per se, be a just reason

for denying it to another person equally fit, but that the act of the commission was arbitrary, unduly oppressive, and an unjust discrimination against the complainant, whereby it was denied the equal protection of the laws of the state of Kentucky, and such discrimination, if permitted to stand, would greatly injure the complainant in its property, and that, as all this was done by the officers of the state, it was done by the state itself, and therefore contravenes the fourteenth amendment to the Constitution of the United States.

We think the general purpose of the enactment was clearly within the competency of the Legislature, but the reluctance of a federal court, except in plain cases, to declare a state statute to be unconstitutional has led us to interpret the meaning of the act rather than to attempt to overthrow it. We think the enforcement of a proper interpretation of the act will remedy the wrong done the complainant, and are content with that result; but if we were compelled to go further, there is much in the opinion of the Supreme Court in *Yick Wo v. Hopkins*, 118 U. S. 357, 6 Sup. Ct. 1064, 30 L. Ed. 220, *Dobbins v. Los Angeles*, 195 U. S. 223, 25 Sup. Ct. 18, 49 L. Ed. 169, and possibly other recent cases, which might well call for great consideration, although, as the complainant is a Kentucky corporation, it would certainly seem that the state had much greater power over its own creature than it could have over an individual citizen.

We are quite clear in the conviction that the views we have expressed are correct and controlling, but if we had any doubts they would be solved in favor of granting the pending motion for a temporary injunction, because, if the injunction is granted, the defendants, under the act of April 14, 1906, might be able to appeal the case within 30 days to a higher court, and thus obtain the opinion of that court upon the questions involved, while if we denied the motion the complainant could not appeal.

It results that the motion should be sustained. What shall be the form of the order has been considered, and upon the authority of what was said by the Supreme Court in *Re Lennon*, 166 U. S., at page 556, 17 Sup. Ct. 658, 41 L. Ed. 1110, we are disposed to think that one clause of the order should enjoin the defendants from longer refusing to grant in due form a license to the complainant to hold one or more race meetings, as authorized by the act, at any time or times it may elect between this date and the 1st day of December, 1906, not exceeding, of course, the number of days fixed by the act.

MORRIS (Howell, Intervener) v. BEAN et al.

(Circuit Court, D. Montana. May 8, 1906.)

1. COURTS—UNITED STATES COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

In a suit concerning water rights the thing in controversy is the right to the use of the water, and where that exceeds in value \$2,000, exclusive of interest and costs, a Circuit Court of the United States has jurisdiction.

2. WATER AND WATER COURSES—ACTIONS TO PROTECT RIGHTS—RIGHT OF ACTION—INTERSTATE STREAMS—JURISDICTION.

A citizen of one state may maintain a suit in a Circuit Court of the United States in another state to enjoin the unlawful diversion of water

in the state where the suit is brought, which prevents its flowing to his lands in the state of his residence.

3. SAME—APPROPRIATION OF WATER RIGHTS.

The complainant, a citizen and resident of Wyoming, instituted a suit in the Circuit Court of the United States for the District of Montana to enjoin the defendants, residents and citizens of that state, from diverting water from a stream rising in Montana and flowing into Wyoming. *Held*, that defendants could not justify their diversion of water in Montana in hostility to the rights of the complainant in Wyoming upon the ground that the laws of Montana authorize its citizens to appropriate water within the state. *Held* further, that the fact that the stream has its source in Montana, and from thence flows into Wyoming, does not affect the right to appropriate, but that the general doctrine of priority governs regardless of state lines.

4. SAME—DEFINITION.

An appropriation consists of the diversion of water and its application to some beneficial use. In the absence of any statute, if the work is prosecuted with reasonable diligence, the right of the appropriator relates to the beginning of the work.

5. SAME—RECORDING—NOTICE.

Where one appropriates under a statute, the recording of the claim is constructive notice, but such statutes do not preclude the taking of water for beneficial uses by methods other than those therein prescribed. The effect of the statutes is to preclude an appropriator from claiming, by the doctrine of relation, to the time when the work was begun as against one who does comply with the statutory requirements, and prosecutes the work to completion in accordance therewith.

6. SAME—APPROPRIATION IN WYOMING—REPEAL OF STATUTE.

Complainant, without complying with the statutes of Wyoming, diverted water from Sage creek in that state. Under the statutes then in force, one so appropriating was precluded from giving evidence in any proceeding to enforce a claim to the water thereby appropriated, but the statute was repealed prior to the institution of this suit. *Held*, that the effect of the statute was not to deny the right to appropriate, and that its repeal removed the only obstacle to the assertion of his rights in the courts. *Held* further, that the rights of complainant must be governed by the laws of Wyoming, where his appropriation was made.

7. SAME—EQUITIES.

One who appropriates water is entitled to the full amount appropriated, to the exclusion of all subsequent takers, and equity will not intervene to deprive one of the rights thus acquired by distributing the water to those subsequently claiming, even though the general benefits would be thereby increased.

8. SAME—RIPARIAN RIGHTS.

The defendants acquired lands in the Crow Indian Reservation in Montana subsequent to appropriations made in Wyoming, and they claim riparian ownership as successors of the Indians. *Held*, that the Indians never had any riparian rights, the fee always having been in the government subject to their occupancy. *Held* further, that appropriations could be made of waters running through the reservation which are superior to the rights of those subsequently becoming riparian owners.

9. SAME—RIPARIAN OWNER—RIGHT TO USE.

While a riparian owner has the right to reasonably use the water of a stream, he cannot deprive his co-riparian owners of like use. In the absence of any testimony as to what is a reasonable use, there can be no decree regulating the use as between such owners.

10. SAME—STATUTE OF LIMITATIONS—NATURE OF POSSESSION.

The statute of limitations does not run upon a scrambling possession. The use must be adverse, exclusive, and uninterrupted under a claim of

right, and the gradual and imperceptible encroachment by subsequent appropriators upon the rights of a prior appropriator will not permit the invoking of the statute as against the latter.

11. SAME—ABANDONMENT.

The provisions of the statute of Wyoming that failure to use water appropriated for a period of two years is to be construed as an abandonment applies to a voluntary act, and not to an enforced discontinuance.

12. SAME—ENFORCEMENT OF RIGHTS—LACHES.

One is not guilty of laches who complains of hostile diversion, and receives water when the same is turned down to him from time to time, or who is prevented from the use of water appropriated by him by gradual diminution through hostile diversions, unless such diversions continue with the acquiescence, knowledge, and consent of such appropriator.

13. SAME—ESTOPPEL.

One who goes upon a stream and diverts water must take notice of all prior appropriations, whether made pursuant to statutory notice or otherwise. The volume of water in the stream and the visible supply is notice of all waters appropriated, and where one takes subsequently to another of the waters of a stream he cannot invoke the doctrine of estoppel as against a prior appropriator on the ground that such appropriator has stood by and permitted him to build up improvements on the strength of diversion of the water, for the reason that one is as much estopped as the other; the facts being within the knowledge of both.

14. SAME—DAMAGES.

Where various persons along a stream divert water in violation of the rights of a prior appropriator, without any community of action, nothing other than nominal damages can be awarded in a suit in equity to restrain the defendants from diverting the water.

(Syllabus by the Court.)

See 123 Fed. 618.

McConnell & McConnell, James R. Goss, and Fred H. Hathorn, for complainant.

McConnell & McConnell and James R. Goss, for intervener.

George W. Pierson, and O. F. Goddard, for defendants.

WHITSON, District Judge. Sage creek is a tributary of the stream designated in these proceedings as Stinking Water river, but geographically known by the euphonious name of Shoshone. This creek rises in the state of Montana, and flows into that river in the state of Wyoming. The complainant, a citizen and resident of Wyoming, is the owner of 160 acres of agricultural land situated in that state, which is riparian to Sage creek. He settled in the year 1887 under the homestead law, and in due course received a patent dated the 12th day of February, 1902. The land being arid in character, and requiring irrigation for the raising of agricultural crops, in April, 1887, complainant constructed a ditch by means of which he diverted water for the irrigation of it.

The intervener, Howell, alleges in his complaint that he is a citizen of the state of Wyoming. It is shown that he is the owner of 200 acres of agricultural land in that state of like character to that of the complainant. He constructed a ditch in August, 1890, for the irrigation of his land, and both the complainant and the intervener have used the

water diverted by them ever since their respective diversions, except when prevented by the diversions of the defendants. The intervener has made entry and holds a final receipt. As to whether his land is riparian to Sage creek does not appear from the record. The defendants are all citizens and residents of the state of Montana. They claim the waters of Sage creek and Piney creek, its tributary, by virtue of diversions made by them, and the use of the water so diverted; they deny the rights of the complainant and intervener upon grounds which will hereinafter more fully appear, but are subsequent in time to both. Complainant seeks to enjoin the defendants from the diversion of water from Sage and Piney creeks in Montana to his deprivation of the use of the waters of Sage creek in Wyoming, and the intervener seeks like relief.

The cause was referred to the master, who has reported the testimony, together with his findings of fact and conclusions of law. Those findings to which exceptions have been taken, and those tendered and not found, need only be considered in a general way, leaving a specific mention of them to subsequent proceedings to be had in accordance with this opinion. One of the pivotal points upon which the case largely turns is the finding that the complainant had not at the time of the hearing complied with the laws of the state of Wyoming relating to the appropriation of water, and the conclusion that he is not entitled to any injunctive relief for that reason. As this incidentally involves the jurisdiction of the court, and as it is challenged upon other grounds, naturally, the power to consider the case must first be inquired into.

1. Jurisdiction. The objection to jurisdiction is threefold:

(a) The complainant filed no notice as a claimant to the waters of Sage creek, as required by the laws of Wyoming, and the master concluded that the filing of such notice was a prerequisite to the making of a valid appropriation. Relying upon that fact and the conclusion thus reached, it is contended that the jurisdiction fails because it cannot rest upon the citizenship of the intervener, claimed by the defendants to be the same as that of themselves, and, the complainant having failed to establish any right, it cannot rest upon his citizenship, and therefore a dismissal of the suit must follow. This involves the question whether complainant is an appropriator. It is conceded by his counsel, as the master found, that he did not comply with the statutory requirements of Wyoming. The inquiry is, could one seeking to make an appropriation at the time the complainant diverted and used water from Sage creek acquire the right to its use without complying with the statutes of that state? An appropriation of water consists in the taking or diversion of it, and its application to some beneficial purpose. "Appropriation" is a much abused word. It is often loosely spoken of as the preliminary step—such as filing a notice, making a claim to the water, or the like—but in its legal significance is embodied not only the claim to the water, but the consummation of that claim by actual use. Long before the enactment of any statute in the arid states or territories, the custom of taking water had ripened into the right to use it. *Jennison v. Kirk*, 98 U. S. 456, 25 L. Ed. 240; *Atchison v. Peterson*, 20 Wall. 507, 22 L. Ed. 414; *Basey et al. v. Gallagher*, 20 Wall. 670, 22 L. Ed.

452; *Broder v. Water Company*, 101 U. S. 274, 25 L. Ed. 790. After the custom had been fully established, statutes were enacted for the purpose of protecting appropriators by furnishing a public record, thereby avoiding disputes over priorities. It cannot be said that these statutes were enacted for the purpose of enabling the appropriator to claim by relation to the date when work was begun, because that was the rule prior to any legislation upon the subject, if the work was prosecuted with reasonable diligence. *Long on Irrigation*, § 51; *Irwin v. Strait et al.* (Nev.) 4 Pac. 1215; *Board of Commissioners v. Leonard* (Colo. App.) 34 Pac. 583; *Kelly v. Water Company*, 6 Cal. 109; *Nevada Ditch Company v. Bennett* (Or.) 45 Pac. 478, 60 Am. St. Rep. 777; *Murray v. Tingley* (Mont.) 50 Pac. 725; *Moyer v. Preston* (Wyo.) 44 Pac. 848, 71 Am. St. Rep. 914; *Cole v. Logan* (Or.) 33 Pac. 569. But the rule of relation was in a measure uncertain in its application, in that what constituted reasonable diligence in the completion of the work was a matter within the sound discretion of the courts. Again, the appropriator who initiates his right by statutory notice is required to designate the amount of water claimed, the purpose for which it is to be used, if for irrigation, the land upon which it is to be applied, etc., thus affording information to other intending appropriators, and giving constructive notice as to the amount of water which has already been claimed from the common source of supply. But where one has actually diverted water, and is using it, the right to its use may, by analogy, be likened unto the doctrine that one purchasing real estate must take notice of the rights of those in possession, notwithstanding the recording statutes. Water diverted from a stream naturally diminishes the volume. One seeking to acquire the right to the use of water must take notice of the amount available and visible, and it must be conclusively presumed that he inquires into the extent of the supply from which the water is to be drawn, and how that supply has been diminished by others whose rights are prior in time. These statutes were never intended to destroy the right of appropriation by methods other than those defined by them. Their only effect is to deny the power of an appropriator who fails to file the notice required, to claim as of the date of the beginning of his work; the penalty for such failure being to limit the right to the time when the water is actually applied and used. *Long on Irrigation*, § 39, expresses the principle in this language:

"The statutes did not change the rule as to what constitutes an appropriation, but their object was simply to preserve evidence of the appropriator's rights, and to regulate the doctrine of relation back. In accordance with these principles, it is held that one who fails to comply with the statutory requirements, but who actually diverts water, and applies it to a beneficial use, in the absence of any conflicting adverse claim, acquires a valid title thereto, which cannot be divested by another appropriator, who complies with the terms of the statute after the former has completed his appropriation. * * * Where the statutory requirements have not been complied with, the rights of the appropriator, which, but for the statutes, would relate back to the commencement of the work of appropriation, relate back only to the completion of the work; this being the only change wrought in the law by the statutes."

These views are sustained by numerous authorities: *Murray et al. v. Tingley*, 50 Pac. 723, 20 Mont. 260; *Wells v. Mantes et al.* (Cal.) 34 Pac. 324; *Cruse v. McCauley* (C. C.) 96 Fed. 370; *DeNecochea v. Curtis* (Cal.) 20 Pac. 563; reaffirmed 22 Pac. 198; *Burrows v. Burrows et al.* (Cal.) 23 Pac. 146; *Watterson v. Saldunbehere* (Cal.) 35 Pac. 432.

We are now to inquire whether any law of the territory of Wyoming or custom prevailing there prevented an appropriation other than by notice duly filed; for, if not, complainant has brought himself within the general rule by which his rights must be measured. At the date he began the use of water the statute of the territory precluded the giving of evidence by one claiming to be an appropriator in any case involving his right, unless there had been a compliance with the requirement of filing notice of his claim with the officer therein designated.

The Supreme Court of Wyoming, referring to this statute in *Moyer v. Preston*, 44 Pac. 845, 71 Am. St. Rep. 914, said:

"The contemporary construction placed upon that statute although the question was not presented to this court, we understand to have been that the act itself provided the penalty for the failure to file the required statements, viz, that in any adjudication of water rights evidence would not be received in behalf of any person until he had filed the statements. The object of these particular provisions was obviously the establishment and preservation of a record of water rights, which had become in many instances of great value. The section requiring such statements to be filed in the offices of the county clerk and clerk of court was repealed in 1888, and another provision substituted, providing for the filing of the statements in the office only of the county clerk, who is ex officio register of deeds; and in 1890, when this requirement was abrogated, and the whole matter was transferred to the office of the state engineer, where the primary records were to be kept, the section of the statute of 1886, fixing the penalty for the failure to file the statements, was repealed. The law of 1890 required the clerks of court to transfer to the office of the state engineer all certificates of county surveyors as to measurements of ditches which had been provided for under another statute of 1886, afterwards repealed; but the act of 1890 made no disposition of the statements of owners which had been filed with the clerks of court."

The statute having been repealed, the complainant cannot comply with its provisions. Its repeal removed the only obstacle to the assertion of his right in court. He could, therefore, at the present time give evidence in a controversy in Wyoming relating to the subject-matter of this suit, and hence he cannot be denied a remedy in this court which would be accorded him within the jurisdiction of the forum by whose laws his rights as an appropriator must be governed. Nor is there anything in the Constitution or laws of Wyoming which can be construed as a divestiture of the right which the complainant acquired by virtue of his use of the water, or which can prevent him from the assertion of it.

Article 8, § 3, of the Constitution of Wyoming reads as follows:

"Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests."

Section 895 of the Revised Statutes of that state expressly recognizes priority in the use of water.

In *Moyer v. Preston*, *supra*, this language was used:

"To constitute an appropriation there must exist, not only an intent to take the water, but that attempt must be accompanied or followed by some open physical demonstration, and there must ultimately be an application to some beneficial use."

Again, in construing the priority between two claimants of water, neither of whom had complied with the statute, it was said:

"The work of construction was prosecuted with diligence until completion, followed by an immediate application of the water to beneficial uses, which application had been continued."

In *Farm Investment Co. v. Carpenter* (Wyo.) 61 Pac. 258, 50 L. R. A. 747, 87 Am. St. Rep. 918, the constitutional provision above quoted was construed as follows:

"The constitutional declaration was not intended to interfere with previously accrued rights to use the public waters of the state, and it does not conflict with such rights. It was, however, by all the constitutional expressions undoubtedly intended that such rights and all appropriations should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued is apparent, not only from the accompanying provisions, but from the nature of such rights. * * * The appropriation is made in the first place upon the basis of public ownership of the water, and is protected instead of impaired by the constitutional declaration."

The conclusion must be that complainant is an appropriator, fully invested with all the rights attaching to that interest in property.

(b) It is objected that the amount in controversy does not exceed the sum or value of \$2,000, exclusive of interest and costs. The only testimony upon the subject shows that the water right of the intervenor, Howell, is worth \$25 per acre, and that of complainant a like amount. It is clearly shown, and the court must know, that in an arid country, where irrigation is required for the raising of crops, the land is worthless without it. The Supreme Court has held that the matter in dispute is that upon which the jurisdiction depends. *Elgin v. Marshall*, 106 U. S. 578, 1 Sup. Ct. 484, 27 L. Ed. 249; *Bruce v. Manchester & Keene R. R.*, 117 U. S. 514, 6 Sup. Ct. 849, 29 L. Ed. 990; *Stinson v. Dousman*, 20 How. 461, 15 L. Ed. 966. The water right is the only thing in dispute. It is neither the land, nor in this suit can it be the damages, for it is not shown that the tortious acts of the defendants were joint. The jurisdiction in this regard, therefore, rests upon the value of the water right, and, resting upon that, clearly the amount in controversy is in excess of that required to sustain it. Complainant will be given leave to amend his bill to conform to the proofs upon this view.

(c) The jurisdiction is challenged because Sage creek is an interstate stream, which it is argued precludes an appropriator in Wyoming from the assertion of his rights in Montana; that the state of Montana having recognized the right to appropriate the waters within its borders, it becomes a matter of state concern, which would put upon Wyoming the necessity, in the exercise of its sovereignty, of instituting a suit in the Supreme Court of the United States against the state of

Montana, and that a private citizen of one state cannot enter the courts of another to assert that which is exclusively an exercise of the sovereign power of the state; that the defendants are protected by the laws of Montana, which authorize appropriations to be made within its territorial limits; and that it is not competent for the courts to interfere with the sovereignty of one state by permitting a citizen of another state to collaterally assail that which it has recognized by its laws, and will uphold as a part of its political jurisdiction.

Defendants' counsel have illustrated their contention in this way: A riparian owner on the Mississippi river might seek to enjoin the diversion of the waters of Sage creek in Montana because they eventually reach the Missouri river, and finally through that river flow into the Mississippi. This argument may be classed under the head of *reductio ad absurdum*, which sometimes is very effective in illustrating results which may flow from the doing of a given thing. It will be time enough to solve that problem should it ever be propounded.

The contention ignores the right to appropriate water which is recognized by both states. It assumes a condition which does not in fact exist, namely, that the state of Montana has undertaken to authorize the appropriation of water as against a prior appropriator in another state. It has authorized by its laws the taking of unappropriated waters. Indeed, it could not authorize the taking of any other without doing violence to well-known principles; and the rule would be the same whether the statutes of that state expressly limited the right to take unappropriated waters or were silent upon the subject; because the doctrine of appropriation, as construed in Montana and elsewhere, is well understood to apply to water the right to the use of which has not already vested in others. In both states the custom of appropriation had been fully recognized before the complainant and intervener began the use of the water claimed by them, and it had the sanction of the statutes of both while they were territories, and subsequently received express recognition in the Constitution of Montana (article 3, § 15), and in the Constitution of Wyoming, as shown elsewhere in this opinion. It also had the sanction of the general government, the owner of both the land and the water, and the artificial line drawn between the two territories, created by Congress, could in no way debar one from the exercise of a right so universally acknowledged. A natural stream flowing in Wyoming was as much upon the public lands as the same stream flowing in Montana. At the time of the adoption of the constitutions of those states the rights of the complainant and intervener had vested. For the courts, in the absence of any express and unqualified assertion either in the Constitution or statutes of Montana, or any claim on the part of the state through its proper officers, through whom the contention could only be made, if it could be made at all, to deny the existence of an appropriation made in Wyoming, would be to violate that which has been accepted without dissent, and to disturb vested rights which have the approval of general acquiescence, at the behest of a private suitor, who seeks to invoke the power of the state to do that which it does not even contend for. It would overlook the well-known comity existing between these states, both of

which recognize the same doctrine as applied to the use of water, in so far as it relates to an appropriation of the same, as well as to ignore a public policy well recognized and existing, which has its approval in custom of equal efficacy to the right to appropriate at all—a right which inheres in, and is a part of, the custom to which appropriations of water must be referred.

In the early stages of this suit Judge Knowles refused to sustain the views thus presented by the defendants. Whether the ruling made is the law of this case does not become material, because the reasons which actuated him in his decision are not only based upon sound principles, but are sustainable upon authority. No case has been cited where the distinction sought to be drawn has prevailed in the courts, but, on the contrary, apparently, wherever the question has arisen the holding has been the other way. *Howell v. Johnson* (C. C.) 89 Fed. 556; *Morris v. Bean* (C. C.) 123 Fed. 618; *Hoge et al. v. Eaton et al.* (C. C.) 135 Fed. 411; *Anderson et al. v. Bassman et al.* (C. C.) 140 Fed. 14; *Willey v. Decker* (Wyo.) 73 Pac. 210, 100 Am. St. Rep. 939.

The court therefore has jurisdiction.

2. Riparian rights. The complainant does not and cannot claim as a riparian owner. The intervener has not disclosed such proprietorship. Under the laws of Wyoming, by which their rights must be adjudged, that principle is not recognized. The defendants do claim as such. They base their claim upon the assumption that because the land now owned by them was at the inception of the rights of their adversaries embraced within the limits of the Crow Indian Reservation, that the taking of water by them never conferred the right to its use against the riparian rights of the defendants, acquired, they contend, as the successors in interest to the Crow Indians.

It is difficult to understand how this contention, if upheld, would aid them. The Indians made no appropriations. If all that the defendants contend for in this regard should be sustained, it would be of small value, because the right of a riparian owner to use water for irrigation is limited to a reasonable use, and that reasonable use will not permit one owner to deprive his co-owner of the same privilege he exercises himself. *Lux v. Haggin*, 69 Cal. 255-390, 10 Pac. 674; *Long on Irrigation*, § 9-18-20; *Union Milling & Min. Co. v. Ferris*, 2 Sawy. 176, Fed. Cas. No. 14,371; *Union Milling & Min. Co. v. Dangberg*, 2 Sawy. 450, Fed. Cas. No. 14,370; *Gould v. Eaton*, 117 Cal. 539, 49 Pac. 577, 38 L. R. A. 181.

While the defendants have pleaded their riparian ownership, they have waged the contest as appropriators. Their testimony was directed exclusively to that claim, and there is no proof as to what would constitute a reasonable use by them, considering the rights of those whose lands are situate in Wyoming. If a decree should declare that they are entitled to a reasonable use of the water flowing through their lands, the rights of the parties would be left in such a state of uncertainty as to render it void. *Morris v. Bean* (C. C.) 123 Fed. 618. When the right of the Indians was extinguished, and the land was thrown open to settlement, it became public, and, assenting for the

sake of argument to the theory of the defendants, all that was in the way of the validity of the prior appropriations had been removed, and the appropriators in Wyoming were in point of time ahead of any claim which the defendants could possibly make, because their appropriations attached eo instanti. *Beecher v. Wetherby*, 95 U. S. 525, 24 L. Ed. 440; *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681.

It is no answer to say that, because the doctrine of riparian ownership does not exist in Wyoming, that therefore, under claim of that right in Montana, the defendants can deprive the complainant and intervener of the use of the water naturally flowing in the stream. While they cannot claim as riparian owners, yet they are entitled to the use of the water and the assertion of riparian ownership in Montana cannot be allowed to prevail as against what are held to be appropriations in Wyoming, when those appropriations are prior in time to the beneficial use of the water by the defendants. It is the water that the appropriator in Wyoming desires, and it is immaterial whether he gets it by virtue of riparian ownership or appropriation.

But this is perhaps drifting into refinements. There are more substantial reasons for denying the claims of the defendants. The Indians were not riparian owners. Their right was that of occupancy only, while the fee was in the United States.

In *Beecher v. Wetherby*, *supra*, the Supreme Court, in referring to the nature of the title of the Menomonee Indians, said:

"It is true that, for many years before Wisconsin became a state, that tribe occupied various portions of her territory, and roamed over nearly the whole of it. In 1825 the United States undertook to settle by treaty the boundaries of lands claimed by different tribes of Indians, as between themselves, and agreed to recognize the boundaries thus established; the tribes acknowledging the general controlling power of the United States, and disclaiming all dependence upon and connection with any other power. The land thus recognized as belonging to the Menomonee tribe embraced the section in controversy in this case. Subsequently, in 1831, the same boundaries were again recognized. But the right which the Indians held was only that of occupancy. The fee was in the United States, subject to that right, and could be transferred by them whenever they chose. The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States. * * * The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court from the foundation of the government."

So it was said in referring to the same subject, in *Johnson v. McIntosh*, 8 Wheat. 543, 5 L. Ed. 681:

"The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant."

In case of conflict between a treaty with the Indians and a subsequent act of Congress the latter must prevail. *United States v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650, 37 L. Ed. 509; *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S. 641, 10 Sup. Ct. 965, 34 L. Ed. 295; *Cherokee Nation v. Hitchcock*, 187 U. S. 295, 23 Sup. Ct. 115, 47 L. Ed. 183; *Lone Wolf v. Hitchcock*, 187 U. S. 564, 23 Sup. Ct.

216, 47 L. Ed. 299. This doctrine is inconsistent with the theory of the defendants. It would be tedious to refer to the numerous acts of Congress which have dealt with the rights of the Indians, together with the many treaties which have been made from time to time. It is sufficient to observe that legislation upon the subject has with great uniformity followed the rule so often reiterated by the Supreme Court in relation to the nature of Indian titles, which recognizes in them the right of occupancy only, subject to the paramount authority and title of the United States. Under Act Feb. 8, 1887, c. 119 (24 Stat. 388), which provides for allotments, not only does Congress adhere to the word "use" with great care as applied to the rights of the Indians, but the act provides for the issuance of patents, which would be quite unnecessary if the fee were already in the Indians. Applying the rule to this case, when the right of occupancy ceased, the fee always having been in the United States, the lands became public by being thrown open to settlement, as the term was defined in *Newhall v. Sanger*, 92 U. S. 761, 23 L. Ed. 769. But the land was always a part of the public domain. The rights of the defendants attached as settlers after the lands were made subject to settlement. They cannot antedate settlements made by them. At that time, prior appropriations had been made by the complainant and intervener, and defendants took their riparian rights subject to and charged with those appropriations. *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 39 L. R. A. 107, 61 Am. St. Rep. 912; *Lux v. Haggin*, 69 Cal. 255-390, 10 Pac. 674; *Thorpe v. Tenem Ditch Co.*, 1 Wash. St. 566, 20 Pac. 588; *Vansickle v. Haines*, 7 Nev. 249.

3. Statute of limitations. The statute of limitations is applied by analogy in courts of equity to that relating to the possession of real estate. It never runs upon a scrambling possession. It presupposes adverse, exclusive, and uninterrupted possession under a claim of right. The claim must be hostile to that of the person against whom it is asserted. The aid of the statute has occasionally been invoked with success in cases of this character, but not under conditions similar to those of this case.

The defendants made their first diversions of water in 1893. A few of them have brought themselves barely within the statutory period. It often happens that persons who are takers of water from a stream gradually enlarge their diversions until they begin to deprive the first appropriators of the amount to which they are entitled. The taking is so gradual, and the enlargement of the use so imperceptible, that it is impossible to fix a time when it begins to be adverse. This is not an unusual situation, and it is presented by the testimony here. The quantity of water in this stream varies greatly from spring floods to low water in the fall. Most small streams are subject to this variation. The flow of water varies also with the seasons, depending largely upon the amount of snowfall or rain in the mountains. It is manifestly impracticable to apply the statute of limitations to such a state of affairs, and in this case particularly it could not apply, because the defendants have not had the uninterrupted use of the water for the statutory period. It is shown that they at times turned the water down, upon

demand of the complainant. They have gradually increased their diversions, and just at what point they encroached upon the rights of the complainant and the intervener cannot be determined from the testimony, and just how long it has continued cannot be ascertained; but it is clear that they did not do so to any considerable extent until after the year 1893, and this suit was brought in 1903. As to real estate the possession is easily discovered. It is susceptible of actual proof, but here it is not shown that either the complainant or intervener were ever entirely deprived of water. During the flood time water always reached them. They had the use of it for a time, some years longer than others. Who can divine with definiteness just what amount of water the defendants used to the exclusion of the complainant or intervener, or how long it was used to their exclusion each year? The burden is upon the defendants to bring themselves within the statute, and the proof must be clear before a prescriptive right will be enforced. The claim cannot prevail under the conditions disclosed. *Last Chance Ditch Co. v. Heilbron* (Cal.) 26 Pac. 523; *Fogarty v. Fogarty* (Cal.) 61 Pac. 570; *Boyce v. Cupper* (Or.) 61 Pac. 642; *Huston et al. v. Bybee* (Or.) 20 Pac. 51; *Long on Irrigation*, §§ 90-91-92.

4. Abandonment. The statute of Wyoming provides, in effect, that failure of one to use water appropriated for a period of two years shall be construed as an abandonment, and the defendants would avail themselves of its provisions. If it be admitted that their unlawful diversions deprived the appropriators in that state from the use of the water for more than this period, yet cessation of its use because it did not reach the parties entitled to it does not work an abandonment. Evidently that, in contemplation by the Legislature, was a voluntary act, and not an enforced discontinuance. An abandonment must always be voluntary. The statute could not have been intended to apply to anything more than failure to use from an available supply, and in its application it must be construed in the light of the well-known meaning of the words employed to express the legislative will.

5. Estoppel and laches. It is safe to say that few cases of this character have been tried where the defense of estoppel has not been interposed with result uniformly unsuccessful. The estoppel argued for here is that the parties now seeking to assert their rights ought not be allowed to do so, because they knew that the defendants were building up their improvements, and relying upon the use of the water to maintain them. An all-sufficient answer to this is that the defendants knew also that the complainant and intervener were relying upon the same water to maintain their improvements already made, and to carry on their farming operations already begun. Under this view of it, the one side is as much estopped as the other.

What is it that the appropriators in Wyoming have concealed which has misled the defendants to their prejudice? An estoppel of this character is based upon fraud—the inequity of asserting a right after having by silence misled a party by concealing facts which were unknown to him. Here they were equally known to both parties, hence the case does not present elements upon which an estoppel can be founded. Nor can it be successfully contended that the moving

parties in this controversy have been guilty of laches. The intervenor has been in the courts more than once, attempting to restrain the defendants, and the complainant has protested while the supply of water grew less from year to year, until finally his ills became unbearable. There is no principle of estoppel which can aid the defendants, nor can they invoke the doctrine of laches. *Galliher v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Smyth v. Neal* (Or.) 49 Pac. 850; *Boggs v. Mining Co.*, 14 Cal. 368; *Water Supply & Storage Co. v. Tenney* (Colo. Sup.) 51 Pac. 505; *Lower Latham Ditch Co. v. Loudon Irrigating Canal Co.* (Colo. Sup.) 60 Pac. 629, 83 Am. St. Rep. 80; *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674; *Bathgate v. Irvine* (Cal.) 58 Pac. 443, 77 Am. St. Rep. 158; *Rigney v. Tacoma Light & Water Co.*, 9 Wash. 577, 38 Pac. 147, 26 L. R. A. 425.

6. The equities. Defendants claim that it is inequitable, to use the language of their counsel, "to lay barren and waste the lands of defendants in Montana that two farms in Wyoming may be supplied with water." This may appeal to state pride and local bias, but the contention disregards the maxim that he who is first in time is strongest in right, which is the very essence of the doctrine of appropriation. An appropriator is entitled to the water used by him to the fullest extent as against all persons subsequently claiming. Complainant and intervenor in this case found certain natural conditions. There was a running stream upon the public lands, supplied from the snows of the Pryor Mountains. It afforded water sufficient for their purposes. The arid lands near and adjoining which were subject to settlement invited its use. Their needs as farmers required it. They took advantage of the benefits which the laws guaranteed and which the conditions made available; hence the plea on behalf of the defendants that the creek goes dry every year, and did prior to their settlements, is not a defense, though it might, for the purposes of this decision, be admitted without aiding them. If the creek goes dry every year, it is because of the shortage of the supply above. It must be assumed that if no snow fell in the Pryor Mountains in any given year, that the water would perhaps not flow into Wyoming; that if this condition continued for several years the water would cease entirely to flow, even to the lands of the defendants, because the supply comes almost entirely from the snowfall. This is illustrative of what must necessarily be true; that is, the greater the fall of snow the more water. This is also true, that the more water which finds its way into the creek the greater will be the flow, and of course the more water that is diverted the less will be the supply. The appropriators took with the right to have the stream continue to flow as it was wont to flow, and to remain in the condition in which they found it, and whenever water is diverted above it keeps back that which would otherwise reach them, and the more water that is kept back the less will the complainant and intervenor have. But for the wholesale diversions by defendants the water would reach them later in the season, and abide longer, and this is what their appropriations entitle them to. In the abstract

there would be more people benefited by allowing the defendants to take all the water. Its flow through a sandy and gravelly stretch of something like eight or ten miles, and perhaps farther, is, in a measure, a waste, but equity does not consist in taking the property of a few for the benefit of the many, even though the general average of benefits would be greater. It can no more ignore well-defined legal rights than it can go in the face of a positive statute. Then, again, the theory of the defendants cannot be accepted. The witnesses perhaps have told the truth, but not the whole truth. That the water would not reach one lower down the stream is quite a common defense. It is often urged in irrigation suits by trespassers as a justification for their invasion of the rights of others. It is probably as old as irrigation and perhaps as trespass itself. In this case failure of the water to reach the complainant and intervener was co-incident with its use by the defendants. The fact that witnesses saw in the varying changes of the seasons a shortage of water at different points on the stream does not explain the whole situation; in other words, in one extremely dry season perhaps the water was lower than in another. It varies, and it varies because of the shortage of the supply above, and these defendants retarded its flow by reason of their diversions, which decreased the supply to that extent which prevented it from reaching Wyoming at all; and when the supply is diminished by the light snowfall the diversion of the defendants increases the shortage, and that is an invasion of the rights of the appropriators who are seeking the enforcement of their priorities in this suit.

7. Damages. No damages other than nominal can be recovered. The defendants did not act jointly. Each claimed individually. There was no community of action. It would not be proper to charge all or either of them with damages at the option of the injured parties, as in the case of a joint undertaking in tort, because their acts were not committed in pursuance of the same common purpose, although they produced the same general result.

8. Extent of the rights of complainant and intervener. The complainant and intervener, respectively, constructed ditches of sufficient capacity to irrigate the whole of their lands. The finding must be that they increased their cultivated area with reasonable diligence, particularly in the light of the unlawful diversions made by the defendants.

The master found that the intervener, Howell, had appropriated and was entitled to the use of 110 inches of water, miner's measure, for the irrigation of his 200 acres, which finding will be sustained. He did not find as to the amount diverted and used by the complainant. Upon that the finding will be that complainant is entitled to water for the irrigation of his 160 acres at the same ratio. Under the issues tendered, the priorities of the defendants as between themselves cannot be adjudged, nor can their prayer that those priorities be fixed, for the purpose of restraining them in the order of the date of their several appropriations.

Findings will be made in accordance with the views herein expressed. The exceptions taken by the defendants will be overruled in so far as they conflict herewith. The decree will enjoin the defendants from diverting the water of Sage and Piney creeks to the prejudice of the parties found to be entitled to the same as prior appropriators, and costs will follow the decree.

IOWA LILLOOET GOLD MINING CO., Limited, v. UNITED STATES FIDELITY & GUARANTY CO.

(Circuit Court, N. D. Iowa, Cedar Rapids Division. July 21, 1906.)

No. 192.

1. CORPORATIONS—FOREIGN CORPORATIONS—COMPLIANCE WITH STATE LAWS—CONTRACTS.

Code Iowa 1897, § 1637, requires foreign corporations doing business within the state to file copies of their articles of incorporation with the Secretary of State, and otherwise comply with the law relating to domestic corporations, etc.; but section 1636 declares that no person or persons acting as a corporation shall be permitted to set up a want of legal organization as a defense to any action against it, nor shall any person sued on a contract made with such corporation be permitted to set up a want of such legal organization in his defense. *Held* that, where a foreign corporation was acting as a corporation in Iowa at the time it made the contract sued on with defendant, it was no defense to an action thereon that plaintiff had not complied with section 1637.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2561-2563.]

2. SAME.

A defendant sued by a corporation on a contract made with it cannot question the right or authority of the corporation to make the contract or to transact business in the state in which the contract was made; such question being within the exclusive province of the state.

[Ed. Note.—For cases in point, see vol. 12, Cent. Dig. Corporations, §§ 2536-2548.]

3. SAME—JUDGMENT OF OUSTER.

In a direct action by a state to oust a foreign corporation from doing business therein without complying with the state law regulating foreign corporations, judgment of ouster will not be awarded if the corporation complies with such law within a reasonable time.

Albrook & Lundy, for plaintiff.

Healy Bros. & Kelleher, for defendant.

REED, District Judge. The plaintiff, a corporation of Canada, sues defendant upon its bond given to plaintiff, guarantying the fidelity of its secretary, alleging that said secretary breached the conditions of the bond by embezzling a large amount of plaintiff's money. The defendant in one count of its answer alleges that plaintiff has never complied with sections 1637, 1638, and 1639, Code Iowa 1897, which require foreign corporations who desire to do business in that state to file in the office of the Secretary of State a copy of their articles of incorporation, and procure from said Secretary a permit to transact business in that state; that the business and transactions alleged in the

petition to have given rise to the alleged cause of action against defendant were carried on and transacted in Iowa by the plaintiff in violation of said sections. The plaintiff demurs to said count of the answer. The sections of the Code above named are a part of the general incorporation laws of the state of Iowa, and provide as follows:

"Sec. 1637. Any corporation for pecuniary profit, other than for carrying on mercantile or manufacturing business, organized under the laws of another state, * * * or of any foreign country, which * * * desires hereafter to transact business in this state, * * * shall file with the Secretary of State a certified copy of its articles of incorporation duly attested, accompanied by a resolution of its board of directors or stockholders authorizing the filing thereof, and also authorizing the service of process to be made upon any of its officers or agents in this state engaged in transacting its business, and requesting the issuance to such corporation of a permit to transact business in this state; said application to contain a stipulation that such permit shall be subject to the provisions of this chapter. Before such permit is issued the said corporation shall pay to the Secretary of State the same fee required for the organization of corporations in this state. * * * The Secretary of State shall thereupon issue to such corporation a permit, in such form as he may prescribe, for the transaction of the business of such corporation, and upon the receipt of such permit said corporation shall be permitted and authorized to conduct and carry on its business in this state. Nothing in this section shall be construed to prevent any foreign corporation from buying, selling and otherwise dealing in notes, bonds, mortgages, and other securities.

"Sec. 1638. No foreign corporation which has not in good faith complied with the provisions of this chapter and taken out a permit shall possess the right to exercise the power of eminent domain, or exercise any of the rights and privileges conferred upon corporations until it has complied herewith and taken out such permit.

"Sec. 1639. Any foreign corporation that shall carry on its business in violation of the provisions of this chapter in the state of Iowa, * * * without having complied with this statute and taken out and having a valid permit, shall forfeit and pay to the state for each and every day in which such business is transacted and carried on, the sum of one hundred dollars to be recovered by suit in any court having jurisdiction; and any agent, officer or employé who shall knowingly act or transact such business for such corporation, when it has no valid permit as provided herein, shall be guilty of a misdemeanor, and for such offense shall be fined not to exceed one hundred dollars, or be imprisoned in the county jail not to exceed thirty days, or by both such fine and imprisonment. * * * All foreign corporations, and the officers and agents thereof, doing business in this state shall be subject to all the liabilities, restrictions and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

Among the powers of such corporations are the following:

"(2) To sue and be sued by its corporate name. * * * (6) To make contracts, acquire and transfer property, possessing the same powers in such respects as natural persons. * * *" Code § 1609.

It is not affirmatively alleged that the bond in suit was made to plaintiff in Iowa, but in argument it has been assumed that it was, and that the matters alleged in the petition as constituting a breach thereof arose out of business transactions of the plaintiff in that state. It may be conceded that the state may by statute lawfully prescribe the conditions upon which it will permit foreign corporations not engaged in interstate commerce to transact business therein, and prevent them by proper action from doing so until

they comply with such conditions. Whether or not contracts made by such corporations before complying with such conditions, when any are imposed, are void, depends upon the terms of the statute imposing the conditions. *Chattanooga Building Association v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870; *Fritz v. Palmer*, 132 U. S. 285, 10 Sup. Ct. 93, 33 L. Ed. 317; *Cooper v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; *Ammons v. Brunswick-Balke Co.* (C. C. A.) 141 Fed. 570. While it is true, as a general rule, that a penalty imposed by statute for the doing of an act implies a prohibition of the act, yet the courts will look to the entire statute, the subject-matter of it, the wrong which it seeks to remedy or prevent, and the purpose sought to be accomplished by its enactment; and if in so doing it is apparent that it was not intended to render the forbidden act void the statute will be construed accordingly. *Harris v. Runnels*, 12 How. 79, 13 L. Ed. 901; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Watrous v. Blair*, 32 Iowa, 58; *Pangborn v. Westlake*, 36 Iowa, 548.

It is manifest that the statute of Iowa relating to corporations was not intended to render void their contracts made before they had complied with its provisions. The requirements that foreign corporations should file copies of their articles of incorporation with the Secretary of State, and otherwise comply with the law relating to them, was to place them on a level with domestic corporations, impose upon them the same duties, obligations, and liabilities, and subject them, equally with domestic corporations, to the jurisdiction of the courts of the state; this, as a source of revenue to the state, and for the protection of its citizens and others dealing with them in that state, and not to strike down and render void their contracts. Instead of declaring unlawful or void the contracts of either domestic or foreign corporations made before complying with the law, section 1636 of the Code expressly provides that:

"No person or persons acting as a corporation shall be permitted to set up a want of legal organization as a defense to any action against it; nor shall any person sued on a contract made with such an acting corporation be permitted to set up a want of such legal organization in his defense."

When defendant made its contract with plaintiff, the latter was certainly acting as a corporation in Iowa, and no reason has been suggested and none is perceived why the parties to the transaction are not within at least the spirit of this section. *Courtright v. Deeds*, 37 Iowa, 503-511; *Howe Machine Co. v. Snow*, 32 Iowa, 433; *Washington College v. Duke*, 14 Iowa, 14. In fact this section seems but declaratory of the existing rule. *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234-245, 91 N. W. 1081; *Dutchess Manufacturing v. Davis*, 14 Johns. (N. Y.) 239-245, 7 Am. Dec. 459; *Swartwout v. Michigan, etc., Railroad Co.*, 24 Mich. 389-394; *East Norway, etc., Church v. Froislie*, 37 Minn. 447, 35 N. W. 260. In *National Bank v. Matthews*, above, the following from *Sedgewick on Statutory Construction* is quoted with approval:

"When it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the char-

ter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains."

Chattanooga Building Association v. Denson, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, principally relied on by defendant, arose in Alabama, whose statute expressly declares that "it is unlawful for any foreign corporation to engage in or transact any business in this state before complying with this law," and to do so is declared an offense. The Supreme Court of Alabama had construed this statute as rendering void any contract made by a foreign corporation before complying with its provisions. This construction was necessarily followed by the Supreme Court of the United States in determining the case. The statute of Iowa is materially different, for the corporation commits no offense in transacting business in that state before compliance with its provisions, but incurs a civil liability only to the state of \$100 for each day in which its business is transacted, though its officers or agents who knowingly transact the business when the corporation has no permit may be guilty of a misdemeanor. The Supreme Court of that state has directly held that the failure of a foreign corporation to comply with the statute does not render its contracts void. *Spinney v. Miller*, 114 Iowa, 212, 86 N. W. 317, 89 Am. St. Rep. 351; *Prudential Insurance Co. v. Cushman (Iowa)* 106 N. W. 394. The bond in suit, therefore, is not void. Again, it is well settled that a defendant sued by a corporation upon a contract made with it cannot question the right or authority of the corporation to make the contract, or to transact business in the state in which it is made. The state alone may do this. *Smith v. Sheeley*, 12 Wall. 358-361, 20 L. Ed. 430; *National Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Cowell v. Springs Co.*, 100 U. S. 55-61, 25 L. Ed. 547; *Fritz v. Palmer*, 132 U. S. 285, 10 Sup. Ct. 93, 33 L. Ed. 317; *Railway Co. v. Lewis*, 53 Iowa, 101-113, 4 N. W. 842; *Spinney v. Miller*, 114 Iowa, 210-213, 86 N. W. 317, 89 Am. St. Rep. 351; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa, 234, 91 N. W. 1081; *Prudential Insurance Co. v. Cushman (Iowa)* 106 N. W. 394; *Blodgett v. Lanyon Zinc Co.*, 120 Fed. 893, 58 C. C. A. 79. In *Smith v. Sheeley*, 12 Wall. 358-361, 20 L. Ed. 430, it is said:

"It is not denied that the bank was duly organized in pursuance of the provisions of an act of the Legislature of the territory of Nebraska, but it is said that it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained, but this defect in its Constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it."

Even in a direct action by the state to oust a foreign corporation from doing business in Iowa without complying with the law of that state, judgment of ouster will not be awarded if the corporation shall within a reasonable time comply with such law. *State v. Railway Co.*, 91 Iowa, 517, 60 N. W. 121.

Miller v. Ammon, 145 U. S. 421, 12 Sup. Ct. 884, 36 L. Ed. 759, involved the validity of a contract for the sale of intoxicating liquors made in violation of a city ordinance, and *Richardson v. Brix*, 94 Iowa,

626, 63 N. W. 325, was the case of a real estate broker or agent conducting a business in violation of a city ordinance. In each case the ordinance violated was a valid police regulation, which in one case imposed a fine and in the other a fine and imprisonment for its violation. *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 23 Sup. Ct. 206, 47 L. Ed. 328, involved an executory contract to carry on business, which was to continue after the passage of a statute imposing a fine for conducting or carrying on such business in violation thereof. The decision seems to rest upon the ground that to conduct such business after the passage of the statute without compliance therewith would, under its terms, be a crime.

The principles upon which these decisions rest are not deemed applicable under the Iowa statute in question. The conclusion is that the demurrer should be sustained, and it is so ordered.

JONATHAN CLARK & SONS CO. v. CITY OF PITTSBURGH.

(Circuit Court, W. D. Pennsylvania. May 21, 1906. Amendment to Opinion June 11, 1906.)

1. CONTRACTS—BUILDING PUBLIC WORK—ACTION TO RECOVER CONTRACT PRICE.

A contract for a public work for a city which gave the city the right to stop the work of the contractor if at any time in the opinion of the director of public works he was not complying with the contract, and to complete the work and charge the cost to the contractor, construed, and a provision, requiring the contractor to obtain a final certificate from such director of the completion of the work in accordance with the contract before being entitled to final payment, *held* not applicable where such right was exercised and the work completed by the city, and the obtaining of such certificate not a condition precedent to an action by the contractor to recover from the city an alleged balance due him under the contract.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 1308.]

2. SAME.

A contract with a city for the construction of a reservoir gave the city the right, if in the opinion of the director of public works there was undue delay in the work or a failure to comply with the contract in good faith, to stop the work of the contractor and complete the work at his expense; the contractor to be entitled to any excess of the amount due him under the contract above the cost of such completion, and liable for any deficiency. It also contained a provision that any dispute arising between the parties under the contract should be submitted to the director of public works as arbitrator, whose decision should be final and conclusive. *Held*, that the exercise by such director of the right given him to stop the work of the contractor and the completion of the work by the city was a waiver of the arbitration clause, and that the contractor could not be required to submit the question of the amount due him after the work was completed to the director as arbitrator, but was entitled to maintain an action in the courts therefor.

3. SAME—BURDEN OF PROOF.

In such an action the burden does not rest upon the contractor to show the cost of the work done by the city in completing the contract, there being no presumption that such cost exceeded the prices specifically fixed by the contract for the work so done, and being, moreover, peculiarly within the knowledge of the defendant, any excess of cost is a matter of affirmative defense.

Pursuant to a stipulation in writing, this case was tried by the court without the intervention of a jury.

Breck & Vaill, for plaintiff.

Clarence Burleigh and A. M. Thompson, for defendant.

ACHESON, Circuit Judge. On the 13th day of May, 1897, a written contract was entered into between the city of Pittsburgh (the defendant) as party of the first part, through Edward M. Bigelow, director of the department of public works of said city, and Jonathan Clark & Sons Company (the plaintiff), as party of the second part, whereby the plaintiff agreed to furnish the materials, labor, tools, and appliances for, and to construct for, the defendant, a reservoir in Highland Park, in said city, in conformity with the specified requirements and conditions.

The contract contained the following provision lettered section J:

"The party of the second part further agrees that if at any time the director shall be of the opinion that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is willfully violating any of the conditions or covenants of this agreement, or is executing the same in bad faith, he shall have the power to notify the contractor to discontinue all work under this contract, or any part thereof, and thereupon the contractor shall cease said work, or such part thereof, and the director shall thereupon have the power to place such and as many persons as he may deem necessary, the same to be employed by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such material as he may find upon the site of said work or to procure other materials for the completion of the same, and to charge the expense of said labor and materials to the aforesaid contractor, and the expense so charged shall be deducted from and paid by the party of the second part out of such moneys as may then be due, or may at any time thereafter become due to the said party of the second part, under and by virtue of this agreement; and in case such expense is less than the sum which would have been payable under this contract, if the same had been satisfactorily completed by the said party of the second part, then, and in that event, the said party of the second part shall be entitled to receive the difference; but in case such expense shall exceed the said last sum, then, and in that event, the said party of the second part, his sureties and heirs and assigns, shall pay the amount of such excess to the party of the first part on notice from said director of the excess due."

The plaintiff entered upon the execution of the work under the contract and proceeded therewith until April 16, 1900, when the said director, acting on behalf of the city, by letter, notified the plaintiff that in his (the director's) opinion the work provided for in the contract "has been and is unnecessarily delayed, and that you have willfully violated various of the conditions and covenants in said contract, and that you have executed the contract in bad faith. And therefore I do hereby exercise the power in me vested and notify you from this date to discontinue all work under said contract. And I hereby notify you that I shall, as authorized by said contract, have completed the work therein described, and that, in case the expense of said completion shall exceed the sum which would have been payable under the contract had you faithfully kept and performed the same, I shall require you and your sureties to pay the amount of such excess to the city of Pittsburgh." In pursuance of the foregoing noti-

fication, the city, acting by the director, forthwith put the plaintiff off the work then uncompleted, and subsequently employed the Mercantile Trust Company to complete the work. From that time the plaintiff was not permitted by the city to do, and did not do, any more of the work.

Under the proofs in this case, I think the director was not justified upon the facts in the opinion stated in his letter of dismissal. Entertaining, however, as he did, the opinion thus expressed by him, he had a right, under the above-quoted terms of the contract, to notify the plaintiff to discontinue the work, and the city had a right to have the work completed by another in accordance with the terms of the above-quoted section J of the contract.

This suit (as finally submitted) is for the recovery by the plaintiff from the defendant of the alleged balance for materials furnished and used and work and labor done by the plaintiff in the construction of this reservoir. The defendant sets up in bar of the action two provisions of the contract, which may be designated as the "final estimate provision" and the "arbitration clause." The former, having to do with the final estimate, is as follows:

"(V) And whenever, in the opinion of the director, the party of the second part shall have completed the reservoir and its appurtenances, ready to be put into service, then the director shall, with all reasonable diligence, cause a final estimate to be made from actual measurements, giving the whole amount of work done by the party of the second part, and the value thereof under and according to the terms of this contract. The party of the first part will then, within thirty (30) days after the said final estimate, pay to the party of the second part the remainder which shall be found to be due, excepting therefrom five (5) per cent. to be retained as below stipulated, and such other sum or sums as may be lawfully retained under any of the provisions of this contract; provided that nothing herein contained shall be construed to affect the right hereby reserved to reject the whole or any portion of the aforesaid work, should the final estimate be found to be inconsistent with the terms of this agreement, or otherwise improperly given.

"(W) Twelve (12) months after the reservoir and its appurtenances have been completed and put into service, as above stipulated, the director will make a final examination of the whole work; and, if he shall find that the party of the second part shall have fully and faithfully performed this contract on his part, then he will accept the work and the party of the first part will, within thirty (30) days, pay to the party of the second part the previously retained five (5) per cent. and all other money which shall be found to be due.

"(X) The party of the second part further agrees that he will receive the compensation, as above stipulated, in full for all fees or royalties for patented inventions, and all charges for labor, materials, contrivances or processes used in connection with the work, and that he shall not be entitled to demand or receive payment for the aforesaid work or materials or any part thereof, except in the manner set forth in this agreement, nor unless each and every of the promises, agreements, stipulations, terms and conditions herein contained shall have been performed, kept, observed, and fulfilled on his part, and the director shall have given his certificate to that effect."

These provisions just quoted contemplate and expressly cover the contingency of the completion of the reservoir by the "party of the second part," and they do not in terms apply to, and are inappropriate to, the extraordinary contingency of the said party's being turned off the work and prevented from completing it. The above provisions do not say that when the director is of opinion that the reservoir is

completed, but when he is of opinion that it has been completed by the "party of the second part," the final estimate shall issue. Moreover, section J of the contract, under which the plaintiff was put off the work, completely provides for that contingency, and secures to the plaintiff when thus dispossessed what is justly due it for its materials and work, subject to the specified charges and deductions on account of actual expense incurred by the city. The difference after such deduction the plaintiff is expressly declared entitled to receive. Instead of and wholly without any reference to a final estimate or certificate by the director, provision J stipulates for a distinct method by deductions and charges for fixing the amount due the plaintiff. What is honestly due the plaintiff ought to be paid, and clause J within itself prescribes the principles of ascertaining the indebtedness based upon no mere estimate by the director of the dispossessing party, but based upon facts susceptible of actual proof. A stipulation to prevent the liquidation of that indebtedness by the courts, if sustainable at all, ought to be clear and free from any doubt, and in my judgment such is not the case here. In a word, in this contract two totally different contingencies were clearly provided for: If the party of the second part completed the work, then payment was to be through the medium of a final estimate by the director; but if the city took the work out of the plaintiff's hands, and placed its completion with another, then, while perhaps such completing party might have to secure his final estimate, no such restriction was imposed upon the plaintiff as respects payment of the amount due it. Furthermore, all the time provisions and other provisions in the sections last quoted expressly date from or depend upon the precedent final estimate and hence fall with it so far as respects payment of what is due the plaintiff.

The arbitration clause is in the words following:

"(D) In case any question or dispute shall arise between the party of the second part hereto and the said city of Pittsburgh, party of the first part hereto, under the said plans, specifications or terms of this contract, respecting the quality, quantity or value of the work or labor done or materials furnished, or to be done or to be furnished, or any of the terms, stipulations, covenants or agreements herein contained, or respecting any pay for extra work, or respecting any matter pertaining to this contract, or any part of the same, said question shall be referred to the director of the department of public works of the city of Pittsburgh, whose decision thereon shall be final, conclusive and binding upon all parties without exception or appeal, and all right or rights of any action at law or in equity under and by virtue of this contract, and all matters connected with and relative to the same are hereby expressly waived by the party of the second part."

Much that has been said in the discussion of the final estimate provision applies equally to this arbitration clause. Paragraph J is independent of each of the other two cited provisions. That paragraph, complete within itself, and without reference either to an arbitration or an estimate, provides for the peculiar contingency of the city's putting the plaintiff off the work, thereby preventing the plaintiff from proceeding further under the contract and from further benefits thereunder. The director having reached the opinion expressed in his letter of notification to the plaintiff, two alternative courses were open to the city. A dispute had arisen between the

plaintiff and defendant under the contract. The work had undoubtedly been delayed, and the time fixed for its completion was passed. The city's representative, the director, entertained the opinion that the fault of the delay rested with the plaintiff, while the latter contended (and under the proofs, I think, justifiably) that the delay was due to the city's belated furnishment of plans and staking out and to changes by the city in the plans. Now, it is clear to me that the election by the city to proceed under the dismissal clause (J) necessarily excluded and was a substitute for action under the arbitration clause, and this for several reasons. In each course of procedure, the director was to act, but in totally different capacities. As arbitrator, he would act judicially and hear both sides, and the opinion he would reach would be judicial. Under clause J, the opinion of the director might be justifiably arbitrary and purely *ex parte*. Nothing short of positive bad faith would invalidate it. Moreover, to the extent that the arbitration clause was operative, it was imperative, and just as binding upon the city as upon the plaintiff. But clearly the city was not bound to submit to arbitration the situation which confronted the parties to this contract on April 16, 1900, but had a perfect right to oust the plaintiff under section J, pursuant to the director's opinion. Not being bound to resort to an arbitration clause, which, so far as applicable to a given situation, was imperative, it follows that the city's election to act under clause J was a waiver of any right to arbitration. Furthermore, clause J of itself afforded the city complete protection, and, as we have seen, fixed the principles upon which the balance due the plaintiff was to be ascertained, and implied the determination of the rights of the parties by regular judicial proceedings. Section J does not in terms call for arbitration, and an intention to oust the courts is not to be presumed. Finally, in holding, as we do, that the ascertainment of the balance due the plaintiff under the provisions of section J is within the cognizance of the court in the ordinary course of judicial proceedings, we follow the principles enunciated in the cases of *Guaranty Trust Company v. Green Cove Railroad*, 139 U. S. 137, 143, 11 Sup. Ct. 512, 35 L. Ed. 116; *Mitchell v. Dougherty*, 62 U. S. App. 443, 90 Fed. 639, 33 C. C. A. 205.

To the suggestion of the defendant that it was incumbent upon the plaintiff to show what it cost the city to complete the work, in order to fix any balance due the plaintiff, I am unable to assent. There is no presumption of any increased cost. Were there any increase, that was a matter of affirmative defense, and any evidence thereof, moreover, was peculiarly within the knowledge of the city. No evidence on this point was adduced. As to the defense under the liquidated damage clause for delay, I find under the proofs that the city was responsible for that delay, and not the plaintiff.

It is proper to say that the subjoined finding consists of the following items: (1) Retained percentages on work done by the plaintiff, as shown by partial estimates Nos. 1 to 29, inclusive, with interest from April 16, 1900. (2) Work done under contract but not included in above estimate. (3) 459 cubic yards of excess excavation below plane shown on plans. (4) 16,000 cubic yards hand tamping around the influent and effluent chambers, caused by the defendant's

defaults in furnishing plans, and 16,000 cubic yards hand tamping in embankment, caused by the defendant's change of plans whereby the embankment was pushed further out than originally intended.

Finding of the Court.

And now, May 21, 1906, the court finds in favor of the plaintiff and against the defendant in the sum of \$81,341.

Amendment to Opinion.

And now, to wit, this 8th day of June, 1906, upon motion of counsel for the city of Pittsburgh, and with consent of counsel for Jonathan Clark & Sons Company, it is ordered that the opinion of the court be, and the same is, hereby, amended in respect to the items contained in the finding of the court, so that said items shall read as follows:

(1) Retained percentages on work done by the plaintiff as shown by partial estimates No. 1 to No. 29 inclusive.....	\$24,879 87
Interest thereon as we compute it, from April 16, 1900 to May 21, 1906	9,106 03
(2) Amount due and not estimated nor paid by the city to Jonathan Clark & Son in final estimate No. 29.....	4,201 20
With interest from November 20, 1899, to May 21, 1906.....	1,638 46
(3) 459 cubic yards of excavation below plane 243.75.....	331 18
With interest from March 20, 1899, to May 21, 1906.....	142 41
(4) 16,000 cu. yds. hand tamping around influent and effluent chambers	12,000 00
With interest from July 20, 1899 to May 21, 1906.....	4,920 00
(5) 16,000 cu. yds. hand tamping in embankment caused by pushing it out three feet further than the original plans.....	16,000 00
With interest from August 20, 1897 to May 21, 1906.....	8,121 85
Making a total of	<u>\$81,341 00</u>

PENNSYLVANIA CO. v. LAKE ERIE, B. G. & N. RY. CO.

(Circuit Court, N. D. Ohio, W. D. August 23, 1905.)

No. 1,930.

1. INJUNCTION—INTERFERENCE WITH PROPERTY—SUIT BY LESSEE OF RAILROAD.

A lessee of a railroad has an interest therein which entitles it to prevent by legal process any illegal interference with its enjoyment of the leased property, and may maintain a suit in a federal court to enjoin an unauthorized crossing of the track by that of another company, a citizen of another state, although the lessor may be a citizen of the same state as the defendant.

2. STREET RAILROADS—RIGHT TO CROSS TRACKS OF STEAM ROAD—LAWS OF OHIO.

Where a company has obtained the right from the proper authorities of a village in Ohio to construct a street railroad upon a street it cannot be enjoined by a steam railroad company whose road crosses such street from crossing such road with its tracks at grade; the steam railroad company itself having no right in the street, except subject to such proper use of it for street purposes as may be authorized by the municipality in the exercise of the powers given by statute, and no proceedings being required or provided for by the statutes of the state with respect to such crossings.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Street Railroads, § 114.]

In Equity. On motion for preliminary injunction.

Marshall & Fraser, for complainant.

James & Kelley, for defendant.

TAYLER, District Judge. The Pennsylvania Company, a corporation of the state of Pennsylvania, being the lessee of and operating a line of railroad through the village of Woodville, Sandusky county, Ohio, filed its bill, alleging that the defendant company was a corporation authorized to construct a railroad, operated by electricity or other motive power, through Wood and Sandusky counties; that the defendant company seeks to install a grade crossing over the line operated by complainant at Woodville; and that the defendant has no right to so install a grade crossing without resort to appropriation proceedings, where there has been a failure to agree with complainant as to the terms of such crossing. A restraining order was issued ex parte on the filing of the bill, and the case now comes up on the answer of the defendant and the affidavits filed by the parties on the question as to whether the restraining order should be continued.

A preliminary question of jurisdiction arises on the claim that, as the railroad is owned by an Ohio corporation, the complainant cannot prosecute this action. As the complainant is lessee of the road, its interest in the property is such as to give it the right to prevent by judicial process any illegal interference with its enjoyment of the leased property, and this right it may enforce by injunction.

It appears from the proof that the defendants have received from the council of the village of Woodville authority to construct a street railroad along Water street, which includes the point where the tracks of complainant cross that street; and the question now presented is whether the defendant, without resorting to appropriation proceedings, possesses the right to put in crossing frogs of the kind required by section 2503, Rev. St. Ohio, 1906. I think there can be no doubt that the defendant possesses this right, and I think that one would look in vain for any authority in the defendant to prosecute any proceeding looking to the appropriation of a right to cross the tracks of a steam railroad in a municipality. Indeed, until the passage of the law of April 7, 1904, street railroads did not possess the right of eminent domain at all, and without entering into a discussion as to the effect of that act of April 7, 1904, on proceedings of this character, it is sufficient to say that it does not in any respect enlarge the right of a street railroad to obtain a crossing within a municipal corporation over the tracks of a steam railroad company.

But it is contended that the defendant is not a street railroad company, and that the railroad which it is constructing in the village of Woodville is not a street railroad. I do not think that this question is open to discussion. The council of the village of Woodville, in the manner provided by law, has authorized the construction by the defendant company of a street railroad along Water street and over a point where the complainant's railroad crosses that street. This, it seems to me, is conclusive upon the question as to what kind of a railroad the defendant proposes to construct. If it constructs some other kind of a railroad, or puts the railroad constructed to some other

use than that which the law and the ordinance of the village council permit it, doubtless a citizen or property owner affected by this misuse of a right will find ample remedy in the courts. The dominion which the state has delegated to municipalities over streets is so large as to leave no uncertainty as to the effect to be given to the right granted by the municipal authorities to a street railroad to operate its line on a street of the village.

Nor is this all to be said on the question presented. If it be said that the defendant's railroad is not a street railroad, and it is therefore without authority to cross the tracks of the complainant within the village of Woodville, I do not know how, if it is not a street railroad, it can acquire that right. So far as I have been able to discover, the rights of so-called interurban railroads, as respects the subject of appropriation, are determined by section 3443-10; but the right granted by that section can only be exercised outside of municipalities. By the act of April 25, 1904 (97 Ohio Laws, p. 537), provision was made for the method by which a steam railroad might cross the track of another steam railroad within the corporate limits of a city or village. The defendant company is not a steam railroad company, and therefore that act has no application here. The act of April 25, 1904 (97 Ohio Laws, p. 548), provides for the manner in which, outside the corporate limits of a city or village, the track of any kind of a railroad company may cross the track of another railroad company. These are the only laws pertinent to the subject under inquiry.

Complainant's bill assumes the possession by complainant of a right in the street which in law it cannot possess. The bill alleges that the defendant is about to enter upon complainant's "right of way." In the sense in which this term is used in the bill, the complainant has no right of way in the street; that is, it has no tangible property therein. True, it has in strictness a right of way across the street; but this right is of an intangible nature. It has no more substance than the right of way over a street possessed by a pedestrian. So that to say that the defendant is about to enter upon complainant's "right of way," meaning the right of way it possesses across the street, is to say that the defendant is about to do what any and everybody has a right to do at all times, subject only to the movement of complainant's trains. What the defendant proposes to do is to introduce in the public highway, at the point where complainant's tracks cross it, another public use thereof, under authority of the municipal legislation necessary in such cases. The complainant has no property in the street, and none on it except a few ties and rails. The disturbance of these for the purpose of suiting them to the new use to be made of the public highway is necessary, and results in no invasion of complainant's rights.

But the right to put in crossing frogs does not carry with it the right to change the grade of the railroad. On the state of the case as it is now presented, the frogs and crossing must be so put in as not to disturb the present grade of complainant's track. The restraining order heretofore allowed will therefore be dissolved, and the injunction prayed for denied. An order may be entered accordingly.

INMAN BROS. v. DUDLEY & DANIELS LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1906.)

No. 1,469.

1. SALES—CONSTRUCTION OF CONTRACT—DESCRIPTION OF PROPERTY SOLD.

Defendants contracted to sell and deliver to plaintiff at agreed prices all the lumber they then had on hand at their mill and loading station, which they "estimated" at about 800,000 feet of oak and 300,000 feet of gum. Also their "entire cut" of lumber during the year 1903, "estimated to be 1,500,000 feet, more or less," of oak, including the stock on hand, and 1,000,000 feet, more or less, of gum. *Held*, that such contract was not one for the sale of a definite quantity of lumber, but of defendants' entire stock on hand at their mill and shipping station, much or little, and of whatever quantity they should cut during the year 1903, regardless of departures from estimates, in the absence of fraud.

2. SAME—ACTION FOR BREACH OF CONTRACT—EVIDENCE.

In an action for the breach of such contract by defendants by their failure to deliver the lumber, evidence offered by them to show the quantity actually cut in 1903 was material on the question of damages, and its exclusion was error.

3. APPEAL AND ERROR—ERROR IN EXCLUSION OF EVIDENCE—PRESUMPTION OF PREJUDICE.

Where plain error was committed in the exclusion of evidence on the trial of a case, the judgment should be reversed, unless it is clear that the error was not so prejudicial as to exclude every reasonable doubt.

4. EVIDENCE—LETTER FROM AGENT TO PRINCIPAL—ADMISSIBILITY AGAINST THIRD PERSON.

A letter from an agent to his principal, reporting an interview between the agent and a third person which occurred some time before, is merely a narrative of a past transaction, and is not admissible as independent evidence against such third person, nor to corroborate the testimony of the agent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 354.]

5. WITNESS—CORROBORATION—PREVIOUS STATEMENTS.

The mere fact that there is a conflict of testimony between two or more witnesses does not authorize the corroboration of one by his former statements.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1085, 1284.]

Error to the Circuit Court of the United States for the Western District of Tennessee.

This was an action at law to recover damages for the breach of a contract for the purchase and sale of certain lumber. The contract was as follows:

"Newbern, Tenn., Nov. 24, 1902.

"This contract, entered into this the 24th day of November, 1902, by and between Inman Brothers, party of the first part, of Newbern, Tennessee, and the Dudley & Daniels Lumber Co., of Grand Rapids, Michigan, party of the second part. Inman Brothers, party of the first part, do hereby give the exclusive sale to the Dudley & Daniels Lumber Co., party of the second part, all dry and green lumber they have on hand at their Riverside Mills and also their loading station, Newbern, Tennessee. Their estimate of oak lumber on hand at present being about 800,000 feet, of which 50,000 feet may be quartered red oak, 750,000 feet plain sawed red oak, with possibly a small quantity of white oak. Gum, 300,000 ft., all estimates being log run. Dudley & Daniels Lumber Company, party of the second part, do hereby agree to

accept all lumber f. o. b. cars, Newbern, Tennessee, and settle for the same hereinafter specified, at following prices: 1' and 2' plain sawed red oak f. o. b. Newbern, Tenn., per M. ft., \$25.00. Common plain sawed red oak f. o. b. Newbern, Tenn., per M. ft., \$14.50. 1' & 2' quartered red oak f. o. b. Newbern, Tenn., per M. ft., \$30.00. Common quartered red oak f. o. b. Newbern, Tenn., per M. ft., \$19.50. Gum log run red oak f. o. b. Newbern, Tenn., per M. ft., \$11.50. For surfacing gum or other lumber, one or two sides, per M. ft., \$1.50. Dudley & Daniels Lumber Company agree to settle for all lumber loaded and shipped, at the end of each week with New York Exchange, less 2 per cent. It is also agreed that Dudley & Daniels Lumber Co., party of the second part, are to receive the entire cut of the party of the first part for and during the year 1903, barring accident by fire or otherwise, or as soon thereafter as the cut from this mill can be furnished by the said Inman Brothers estimated to be 1,500,000 feet, more or less, plain and quartered red oak, including the stock on hand, also 1,000,000 feet, more or less, of log run gum at above prices. Inman Brothers, party of the first part, also agree to saw their cut of oak and gum henceforth to order and by specifications of Dudley & Daniels Lumber Co., so long as they may be financially responsible for their contracts during the lifetime of this agreement. Inspection to be mutually satisfactory, all parties to be governed by the National Hardwood Association rules of inspection."

Some 50,000 or 60,000 feet of oak lumber of various grades was delivered when the defendants, as averred, refused to make any other or further deliveries. Thereupon this suit was brought.

The defenses, in substance, were these: First, that the contract by mutual agreement was rescinded; second, that the Dudley & Daniels Lumber Company became financially irresponsible, and defendants therefore justified in refusing to go on with the agreement; and, third, that defendants were not damaged by the breach, if any there was.

There was a jury and verdict for the plaintiff, and a judgment for \$7,565. Defendants sued out this writ of error.

Cockroft & Cabell, N. L. Scoby, J. H. Malone, and T. K. Riddick, for plaintiffs in error.

W. H. Carroll, Johnson & Johnson, S. Grainger Latta, and Albert W. Biggs, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

1. The defendants sought to show the actual amount of lumber cut at Riverside sawmill during the year 1903. This evidence was objected to and excluded upon the ground that the contract was for the sale of a definite amount of lumber, and that it was immaterial whether the lumber actually cut during 1903 was more or less than the amount contracted for. This was error. The contract was for the sale of the lumber which Inman Bros. had on hand at their mill and at their shipping station, and also for the sale of such lumber as they should cut during the year 1903. The lumber on hand was all sold, whether much or little. The contract "estimated" that the quantity so on hand and sold was "about" 800,000 feet, "of which 50,000 may be quartered red oak, 750,000 feet plain sawed red oak, with possibly a small quantity of white oak; gum 300,000—all estimates being log run." By another and distinct provision Inman Bros. agreed to sell their "entire cut for and during the year 1903, barring accident by fire or otherwise, * * * estimated to be 1,500,000 feet, more or

less, plain and quartered red oak, including the stock on hand, also 1,000,000 feet more or less, of log run gum at above prices." Such a contract is not an engagement to sell a definite or certain quantity of lumber; in which case the terms "about" and "more or less" would only provide against immaterial, accidental variations. *Moore v. U. S.*, 196 U. S. 158, 25 Sup. Ct. 202, 49 L. Ed. 428, is an illustration. There the agreement was to furnish and deliver "about 5,000 tons of coal." The contractor delivered 4,634 tons, and then brought and tendered 366 additional tons. This the government refused to receive, when the contractor sold it at a loss and sued for damages. The court said the obligation was to receive "about 5,000 tons," and that the only question was whether 366 tons less than 5,000 tons was "about 5,000 tons." It was held that the difference was too great, and that "the addition of the qualifying words "about," "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, weight, or measure." But the case at bar falls under different principles altogether. The defendants agreed to sell and deliver at an agreed price all their "dry and green lumber" then on hand at their mill and at their shipping station. This lumber so on hand constituted a definite and ascertained pile or stock of lumber, as much so as if the sale had been of all the corn in a particular pen or the cotton in a particular ginhouse. This definite lot of lumber was "estimated" at 800,000 feet of oak and 300,000 feet of gum. But this was not a sale of 800,000 feet of oak or a sale of 300,000 feet of gum, or a sale of "about" 800,000 feet of one kind and "about" 300,000 feet of the other. It was the sale of the entire stock of lumber on hand, much or little, and, in the absence of fraud, the purchaser was bound to take all and the seller to deliver all, regardless of departure from estimates. The same is true about the lumber to be cut during 1903. The sale was not of a definite number of feet to be cut then, but of the "entire cut" of that year. This cut was estimated at 1,500,000 feet of oak, including the 800,000 estimated as on hand already cut, and the cut of gum was estimated at 1,000,000 feet. But this was an agreement to sell and deliver the entire cut of 1903, whatever it should be. The contract applied, therefore, to the specific lots of lumber identified as the lumber green and dry at the mill and the shipping station, and to the "entire cut" of lumber by the mill during the year 1903, and the estimation of the amount of lumber on hand or which might be cut did not constitute a warranty. Good faith was all that was required from the parties in making the estimate, or in the future operation of the mill. *Brawley v. U. S.*, 96 U. S. 168, 24 L. Ed. 622; *Rib River Lumber Co. v. Ogilvie*, 113 Wis. 482, 89 N. W. 483.

The plaintiff in error made more than one effort to show the cut of lumber by its Riverside mill during 1903. One Harrington, who stated that he had hauled all of the logs cut at that mill during that and other years, was asked as to the logs hauled by him to be cut during 1903. Objection was made upon the ground that the contract was for the sale and delivery of a definite number of feet. The court excluded the evidence, saying:

"I think if you are liable at all you would be liable for the amount you sold here, or the difference between the amount you furnished and the amount you agreed to sell. I don't think it would make any difference how much lumber he hauled there."

S. P. Inman, one of the defendants, was subsequently asked to state what the entire cut of the Riverside Mills during the year 1903 was. Thereupon exception was again interposed, Mr. Biggs, attorney for plaintiff, putting his objection upon the ground that "under the contract they were to cut and furnish so much, and what they did cut was immaterial." The ruling made when evidence as to the amount of logs hauled to the mill in 1903 was offered was again repeated and the evidence excluded. The defense now made for this ruling is, not that the court did not misconstrue the contract, and commit error in excluding evidence of actual cut of mill, but that the error was harmless, and therefore not ground for reversal. That error is always presumed to be prejudicial is elementary. Nevertheless, it is an established rule in error proceedings that error which was not prejudicial will not justify a reversal. But in *Deery v. Cray*, 5 Wall. 796, 807, 18 L. Ed. 653, the court said that, "when the application of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights." This language has more than once been repeated in subsequent cases (*Vicksburg, etc., R. R. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118, 30 L. Ed. 299), and was applied by this court in *Standard Life Ins. Co. v. Sale*, 121 Fed. 666, 57 C. C. A. 418.

The argument that the exclusion of evidence as to number of feet actually cut during 1903 at the mill, which was deliverable under this agreement, was immaterial and the error harmless is predicated upon the assumption that the defendants below did not deny that they had on hand at the making of the contract the estimated amount of lumber referred to in the contract, namely 800,000 feet of oak lumber and 300,000 feet of gum lumber, and that the evidence which was offered and which was excluded showed that the cut of oak lumber during 1903 was 714,000 feet, and the cut of gum in excess of the 1,000,000 feet estimated as the cut of the season. The damages recoverable by the plaintiff, if any, were dependent upon the actual quantity of lumber on hand when the contract was made, plus the quantity cut at Riverside Mill during 1903. If there was on hand 800,000 feet of oak, and the cut of 1903 amounted to 714,000 feet or more, plaintiff would be entitled to the difference between the market value of 1,514,000 feet and the contract price of that amount, less only the lumber actually delivered. So in respect to the gum. If the amount on hand was 300,000 feet, and the cut of 1903 was 1,000,000, more or less, the damage would be calculated upon the difference between the market and the contract price of the aggregate of gum on hand and gum cut in 1903. It is most obvious that this was not the view of the learned court or of the counsel for the plaintiff below. Their view then was that Inman Bros. had sold in any event 1,500,000 feet of oak and 1,300,000 feet of gum, and that it was a matter of no moment whether they had on hand any part of this

aggregate, or whether the mill cut any at all during the year. Page after page of the transcript is filled with proffers of evidence to show the cut of 1903, and colloquies between court and counsel as to the relevancy of such evidence. That it was irrelevant if the court's interpretation of the contract was right must be conceded; that it was pertinent and material if the court was wrong is equally evident. But counsel say that the evidence of Harrington, which was excluded, was to the effect that he had hauled 1,500,000 feet of gum logs to the mill during 1903, and that this evidence, if admitted, would thus have shown a larger cut than the aggregate amount of gum lumber claimed by plaintiff under the agreement, and would or might have enlarged the damages recoverable by plaintiff. This may be true as to so much of the contract as related to gum lumber, though there was evidence tending to show that the contract price for gum was in excess of the market price. If this latter contention was credited by the jury, it would have cut down the aggregate damage recoverable for breach of a contract which was an entirety. The witness S. P. Inman testified that the price of the lumber sold or contracted to be sold would depend upon its grade or quality. In reference to the oak lumber receivable under this contract the following occurred during his examination by plaintiff's counsel:

"Q. Under this contract, the timber specified therein, I will ask you, Mr. Inman, what per cent. of that oak lumber was one and two plain sawed? A. What per cent? Q. Yes. A. One and two? Q. Yes, sir. A. I can't tell you without referring to a memorandum I have. A. You may refer to that memorandum. A. I would have to figure out the per cent. Q. Give the number of feet then of each kind? A. I can give it in round numbers, 47,181 feet of firsts and second, plain. Q. Is that oak, A. Oak, and 187,590 feet of No. 1 common plain oak; 322,335 feet of No. 2 plain oak; 27,773 feet of 1 and 2 quartered; 47,049 feet of No. 1 quartered; 89,902 feet of No. 2 quartered—aggregate 714,000. Q. I will ask you the same question with reference to the gum? A. There was 1,748,403 feet of log run, I suppose."

After having thus testified, he was asked by his counsel, Mr. Cockroft, as follows:

"Q. Mr. Inman, this contract now specified that you are to ship to Daniel & Dudley Lumber Company your entire cuts from your Riverside Mill during the year 1903, I will ask you what that cut amounted to in feet and grade, if you have it?"

This was objected to, as before stated, upon the ground that it was immaterial how much the cut amounted to, and the witness was not allowed to answer.

Defendant in error now insists that this evidence shows that the actual cut of 1903 was 714,000 feet of oak lumber, and that in the absence of evidence that the oak lumber on hand at date of contract was less than the quantity estimated (800,000 feet) the court will assume that there was 800,000 feet on hand, which, added to 714,000 feet cut in 1903, would aggregate 1,514,000 feet of oak, and thus exceed the estimate of the contract. There was no admission by counsel that the oak lumber on hand at date of contract was 800,000 feet, nor was there any evidence to that effect. In view of the ruling of the court excluding evidence of the actual cut of the mill during 1903, it

would have been folly to offer evidence of the actual amount of oak lumber on hand at mill and shipping station. If it was immaterial what the actual cut of 1903 was, it was equally immaterial what the actual amount of lumber on hand at date of contract. There is no sufficient ground for assuming that the witness Inman meant that the 714,000 feet of oak lumber about which he had been testifying was lumber cut during 1903. He was called upon to testify as to the different grades of oak deliverable under "this contract," and it is not reasonable to assume that he would confine himself to a detailed description of that which was cut during 1903, and omit all mention of that which was on hand. It was as essential in fixing the damage to know the different grades of that on hand as of that subsequently cut. The subject about which the witness was interrogated was the difference between the contract price and the market price of the lumber sold under "this contract"—a contract which covered lumber on hand and lumber to be cut. It would be most remarkable that he should go into details as to the varying quality and price of that cut in 1903, and omit all reference to that which was stacked at the mill and station, which must have likewise varied in quality and value. Still more remarkable that astute counsel for plaintiffs should struggle with persistence and much argument to exclude evidence of the amount of the cut of 1903 if they supposed the 714,000 feet of oak lumber referred to by Inman was the cut of that year, and that there was no denial of the correctness of the estimate of that on hand. To support their contention that the 714,000 feet classified by the witness Inman included only the oak cut in 1903, and that the absence of direct evidence or the offer of direct evidence as to the quantity of lumber on hand justifies the presumption of the correctness of the contract estimate of the lumber on hand, they refer to an affidavit made by the defendant Inman upon the motion for a new trial. But that by no means settles the question. It is only made the more apparent that when that affidavit was made no such contention as that now advanced was in the minds of any one of the parties. The materiality of the evidence excluded was made to turn upon the meaning placed by the court upon the contract, and not upon its pertinence in arriving at amount of damage, if that was not the right interpretation of the contract. Inman in his affidavit figures out the difference between market price and contract price upon two theories. One, that the agreement was for the sale of lumber on hand and the lumber produced during 1903. Upon that theory he puts down the quantity of oak deliverable at 714,000 feet. Now, if that did not include oak on hand and oak sawed in 1903, his estimate of aggregate difference between market and contract price would be of no importance. The other theory upon which he figures is that plaintiff was entitled to demand 1,500,000 feet of oak and 1,300,000 feet of gum. That he did not make a distinction between the amount of oak lumber on hand and that subsequently sawed was doubtless due to the way in which the future cut of oak is referred to. After specifically contracting for the sale of oak and gum on hand, the oak being estimated at 800,000 feet, the contract then provides as follows:

"It is also agreed that the Dudley & Daniels Company are to receive the entire cut of the first part for and during the year 1903, * * * estimated to be 1,500,000 feet, more or less, plain and quartered red oak, including the stock on hand; also 1,000,000 feet, more or less, of log run gum at above prices."

The inclusion of the estimated 800,000 feet of oak on hand as a part of an estimated mill output of 1,500,000 feet doubtless led to an inclusion of the oak on hand with the mill cut by the witness.

We have no right to speculate as to the prejudicial effect of a plain error. If its nonprejudicial effect is not so clear as to exclude every reasonable doubt, we should reverse. That grave doubt at least exists of the aggregate of oak lumber on hand and cut during 1903 is enough to require a new trial. One of the defenses was that the parties, the plaintiff acting by its agent, D. W. Beard, had, on March 31, 1903, mutually agreed upon a rescission. The plaintiff company, as a part of its original evidence, though after Beard and other witnesses had been cross-examined as to the alleged agreement of rescission of March 31st, offered in evidence a letter written by Beard to plaintiff on the night of that day, purporting to be a report of the occurrences of the day with the defendants, and a statement of certain complaints made by the plaintiff as to the financial responsibility of the defendants. The letter said nothing in respect of an agreement, nor of any proposition to rescind the contract. When offered it was objected to as a mere narration by plaintiff's own agents of the occurrences of the day with defendants. The purpose of offering it was thus stated by Mr. Biggs, counsel for plaintiff, who said:

"The purpose of introducing this letter is this: **As I understand, the contention of these parties is that on that day Mr. Beard went there and canceled this contract, but he denies that he canceled the contract. He also states what occurred there that day—what occurred about his offer to attach sight drafts to bill of lading. The proof is that, as soon as the conversation was over, he went to Dyersburg, and wrote a letter to the Dudley & Daniels Company, which letter we want to introduce for the purpose of showing that he makes this report to the company of what occurred.**"

The court thereupon ruled that the letter was competent. That a letter written by an agent to his principal concerning the business of the latter is not evidence against a third person is elementary. Unless admissible as a part of the *res gestæ*, such a narrative would come within the definition of *res inter alios acta*. Written at a different place, and hence after the interview between Beard and Inman, it was nothing more than a narration of a past transaction. *Freeborn v. Smith*, 2 Wall. 160, 17 L. Ed. 922; *Dwyer v. Dunbar*, 5 Wall. 318, 18 L. Ed. 489; *United States v. Corwin*, 129 U. S. 381, 9 Sup. Ct. 318, 32 L. Ed. 710; *Ins. Co. v. Guardiola*, 129 U. S. 642, 9 Sup. Ct. 425, 32 L. Ed. 802. Such a letter or report by an agent to his principal about the latter's business is neither independent evidence against a stranger, nor admissible to corroborate the evidence of such agent. In case last cited the question was as to the number of hogsheads of sugar shipped. Letters written by the plaintiff's shipping agent to them at the time of their respective shipments, and stating number of hogsheads shipped, were admitted over objection. For this the judgment was reversed, the

court saying that the letters "were incompetent, either in themselves or in corroboration of the testimony of the agents, to prove the facts recited in the letters against third persons." The letter of Beard was not admissible to refresh memory of witness. He had already testified to the matter substantially as detailed in his letter, and needed no refreshment. *Bates v. Preble*, 151 U. S. 149, 14 Sup. Ct. 277, 38 L. Ed. 106.

In *Vicksburg, etc., R. R. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 172, 30 L. Ed. 299, a statement made by a physician as to the nature and extent of injuries received by a passenger, and made when treating him, for the purpose of giving information to others, was held to have been erroneously admitted against the carrier, although attached to a deposition by the physician, who testified that it correctly stated the condition of the passenger at the time referred to. Nor was the letter offered or used to fix a disputed date, as in *Dunlap v. Hopkins*, 95 Fed. 231, 37 C. C. A. 52. There are certain cases in Tennessee holding that when there is a claim that a witness' testimony is a recent fabrication it is admissible to show consistent statements before there was any motive to falsify (*Queener v. Morrow*, 1 Cold. [Tenn.] 124), or when impeached by proof of contradictory statements (*Hays v. Cheatham*, 6 Lea [Tenn.] 1; *Glass v. Bennett*, 89 Tenn. 480, 14 S. W. 1085).

Without considering the question as to the weight of authority touching the admissibility of consistent statements at a time anterior to a motive for not speaking the truth, when a witness has been impeached by contradictory statements, it is enough to say that there was no such impeachment of Beard. There was a conflict between his version of a conversation and that of others, but we do not understand that a mere conflict between two or more witnesses will authorize the corroboration of one by his former statements. 2 *Elliott on Evidence*, §§ 991, 994, and *Vicksburg R. R. v. O'Brien*, cited above, seems conclusive upon such a question.

It has been suggested that Beard was a stranger, and surrounded by friends of the defendants and that they used indefensible threats, and that they have now conspired to testify as to what he did and said when alone and defenseless, and that under such circumstances his report, made shortly thereafter to his principal, should be admitted to corroborate a witness so situated. The suggestion when made in argument seemed to carry some weight, but an examination of the record shows that whatever threatening language may have been used was used long after the occasion when the alleged agreement for a rescission was made, and, moreover, that any such threats were made, not to Beard, but to his principal, Dudley, who, in company with his lawyer and Beard, had gone to the business house of Inman Bros. to learn why they refused to carry out the contract. The parties were then at arms' length, and plaintiff was preparing to enforce its rights. This affair of words was on April 11, 1903. The alleged rescission was on March 31, 1903, and Beard's letter was written on March 31, 1903. It is plain that an occurrence 11 days after the letter can supply no legal ground for admitting it as corroborative evidence.

For the errors noticed, the judgment must be reversed, and a new trial awarded.

SCHIFFER et al. v. ANDERSON.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1906.)

No. 2,240.

1. COURTS—FEDERAL COURTS—DIVERSITY OF CITIZENSHIP.

The requisite diversity of citizenship exists where the plaintiff, a citizen of Iowa, sues a citizen of New York and two citizens of Colorado in the federal Circuit Court of the latter state. The right to object that the citizen of New York is being sued in Colorado is a privilege personal to him and cannot be made by his codefendants; nor is jurisdiction over the defendants, who are citizens of Colorado, affected by the fact that service is not had upon nor appearance made by the citizen of New York, the latter not being an indispensable party.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 856, 857;

Diverse citizenship as a ground of federal jurisdiction, see notes to *Shipp v. Williams*, 10 C. C. A. 249; *Mason v. Dullagham*, 27 C. C. A. 298.]

2. PARTNERSHIP—PLEADING—VARIANCE.

Where a complaint alleged that defendant S. was a member of defendant's firm, and though the other defendants had accurate knowledge of the facts they did not specially traverse such averment, but proved the contrary under a general denial, the variance was not material, and the complaint would be deemed amended to conform to the proof.

3. MONEY RECEIVED—PLEADING.

Plaintiff alleged that he and his associate were informed that N. was the owner of certain land in Colorado; that they deposited with defendants, who were doing a banking business, \$4,200 as earnest money to convince N. that they were acting in good faith in negotiating for the purchase of the property, which money was to be paid to N. when she made a conveyance to plaintiff and his associate, subject to certain mortgages, which were to be distributed among the portions of the land in a particular way, etc.; that N. in fact did not own the land, having contracted to convey the same to defendants for a less sum, and was unable to convey the land with the mortgages distributed according to agreement, whereupon plaintiff and his associate demanded a return of the money, which defendants refused; that plaintiff's associate transferred to him all his right to the money so deposited. *Held*, that the complaint stated a sufficient cause of action.

4. PRINCIPAL AND AGENT—ACTS OF AGENT—SCOPE OF AUTHORITY.

An agent purporting to represent N. as the owner of certain land attempted to negotiate a sale thereof to plaintiff, and as a part of the negotiations induced plaintiff and his associate to deposit \$4,200 in defendants' bank, to be paid to N. on the delivery of title, etc. The agent represented that no one else was making any commission or profit out of the sale, and that the price charged plaintiff was N.'s lowest net price. In fact N. had given defendants a secret contract to sell the land to them for \$3 less per acre, and, the transaction not having been consummated, plaintiffs sued to recover the deposit. *Held* that, whether the agent's acts were within the apparent scope of his authority or not, defendants could not deny his authority, and yet retain the money paid on the faith thereof.

5. EVIDENCE—ADMISSIONS OF AGENT.

Where a real estate agent was the secret but accredited representative of defendants in an attempt to sell certain lands to plaintiff, evidence of what he did and said while in the performance of his duty as agent was admissible against defendants.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 893-907.]

In Error to the Circuit Court of the United States for the District of Colorado.

This was an action by Anderson, a citizen of Iowa, to recover \$4,200 from H. Schiffer, a citizen of New York, and Abe Schiffer and I. W. Schiffer, citizens of Colorado, who were alleged to be copartners as H. Schiffer & Bro., and also under the name of the Bank of Alamosa. H. Schiffer was not served with process, and did not enter an appearance in the cause. The evidence showed that he was not a member of the firm, and no judgment was rendered against him. The complaint was in four counts, each one setting up a different theory of the cause of action for the recovery of the same sum of money. Being required by the order of the trial court to elect upon which he would stand, the plaintiff selected the third. One McInturff, also a citizen of Iowa, was associated with the plaintiff in the transactions that resulted in the cause of action, but he assigned all of his rights to the plaintiff before the action was commenced. The trial was to a jury. The plaintiff secured a verdict and a judgment for the amount claimed, and the defendants, Abe Schiffer and I. W. Schiffer, copartners, as above stated, sued out this writ of error.

L. F. Twitchell (Frank C. Goudy and C. H. Redmond, on the brief), for plaintiffs in error.

T. J. O'Donnell (J. W. Graham, Jr., on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended that the naming of H. Schiffer as a defendant was fatal to the jurisdiction of the trial court. But the plaintiff was a citizen of Iowa as was also his assignor of part of the cause of action. H. Schiffer was a citizen of New York, and the other two defendants were citizens of Colorado, where the action was brought. There was therefore such a diversity of citizenship between the plaintiff and his assignor on one side, and all of those named as defendants on the other, as satisfied the jurisdictional requirement. *Sweeney v. Carter Oil Company*, 199 U. S. 252, 26 Sup. Ct. 55, 50 L. Ed. 178. Had H. Schiffer been brought in by process, the assertion of an objection to being sued in Colorado would have been a privilege purely personal to him. *Railway v. McBride*, 141 U. S. 127, 130, 11 Sup. Ct. 982, 35 L. Ed. 659. It could not have been made by the other defendants. Moreover, had he been discharged by the court upon appearance and objection, the cause would nevertheless have proceeded against the others. He was in no sense an indispensable party. He was not served and did not appear. That there was no formal order of dismissal as to him does not affect the substantial rights of the parties.

It is also claimed that there was a variance between the complaint and the proofs. It was averred in the complaint that H. Schiffer was a member of the defendants' firm. While the other defendants had complete and accurate knowledge of the facts in the matter, they did not specifically traverse this averment in their answer, but under a general denial they furnished proof at the trial that H. Schiffer was not a member, and then contended that there was such a variance as defeated plaintiff's right to recover. The old technical rules as to

variance are now seldom applied in all their strictness. The departure from them is due to the more liberal and enlightened decisions of the courts and the provisions of statutes. A variance between a pleading and the proofs is not now considered to be fatal unless it be of a character to mislead the opposite party in maintaining his action or defense on the merits. *Nash v. Towne*, 5 Wall. 689, 698, 18 L. Ed. 527; *Grayson v. Lynch*, 163 U. S. 468, 477, 16 Sup. Ct. 1064, 41 L. Ed. 230; *Railroad v. Hickey*, 166 U. S. 521, 531, 17 Sup. Ct. 661, 41 L. Ed. 1101; *Moses v. United States*, 166 U. S. 571, 578, 17 Sup. Ct. 682, 41 L. Ed. 1119. This doctrine conforms to the letter and spirit of section 954 of the Revised Statutes [U. S. Comp. St. 1901, p. 696], declaring that judgment shall be given according to the right of the cause, without regard to defect or want of form. It also finds explicit recognition in the Colorado Code (section 78, Mills' Ann. Code), which declares that in every stage of an action the court shall disregard any error or defect in the pleadings or proceedings which shall not affect the rights of the parties, and that if a variance between the allegations of the pleadings and the evidence develops upon the trial of an action the court may authorize an amendment if either party is surprised thereby. In this connection see *Pope v. Allis*, 115 U. S. 363, 367, 6 Sup. Ct. 69, 29 L. Ed. 393. The defendants were not misled by the averment in the complaint that H. Schiffer was a member of their firm, nor were they surprised when it developed through their own showing that he was not. Doubtless, the trial court considered the complaint as having been duly amended, and we should likewise so consider it on appeal.

The third count of the complaint upon which the plaintiff elected to stand states facts sufficient to constitute a cause of action. After the averments of diverse citizenship, amount in controversy, and the partnership of the defendants, it proceeds to say that the plaintiff and McInturff, his associate, were informed that one Mrs. Nelson was the owner of 2,000 acres of land in Conejos county, Colo.; that they deposited with the defendants doing business as the Bank of Alamosa the sum of \$4,200 as earnest money, to convince Mrs. Nelson that they were acting in good faith in negotiations for the purchase of the property, carried on between them and the defendants and one Ambler as the reputed agents of Mrs. Nelson; that the money was to be paid to Mrs. Nelson when she made conveyance of the property to the plaintiff and McInturff by good and merchantable title, subject to a mortgage for \$1,200 on each quarter section of the land, and one for \$600 on the odd 80 acres, the gross amount of the mortgages being \$15,000; that in fact Mrs. Nelson did not own the land, and was unable to convey it by good and merchantable title, and was unable to convey it with the mortgages distributed according to the agreement; that the plaintiff and McInturff thereupon demanded of defendants the return of their money, and the latter refused to return it; that prior to the commencement of the action McInturff, who was a citizen of Iowa, transferred to the plaintiff all of his rights to the money.

The undisputed evidence conclusively established this cause of action. Although Ambler held himself out to be the agent of Mrs.

Nelson, he did not represent her, but in fact secretly represented the defendants Abe and I. W. Schiffer. He stated to the plaintiff and McInturff that Mrs. Nelson owned the property, that her price was \$15 per acre, or \$30,000 for the entire tract, and that no one else was making any commission or profit out of it, whereas the fact was that some months before the commencement of the negotiations between Ambler and the plaintiff and McInturff, the defendants, by the payment of \$100, secured from Mrs. Nelson a written agreement to sell them the property for \$12 per acre, and a renewal of that agreement was in force while the negotiations were going on. Ambler and the defendants were endeavoring to make the difference of \$3 per acre, or \$6,000, by having Ambler represent that he was acting for Mrs. Nelson, and that \$15 per acre was her lowest net price. Both the plaintiff and McInturff testified that the agreement with Ambler was that the \$4,200 paid by them should be deposited with and held by the defendants' Bank of Alamosa until they (the plaintiff and McInturff) secured a deed from Mrs. Nelson, and that the balance of the purchase price when the transaction was closed was to be represented by an existing blanket mortgage for \$15,000, and a second mortgage given by them, both of which should be divided and distributed among the quarter sections of land and an odd 80 acres, so that the land could be advantageously resold in parcels, and the mortgages released as the sales were made. This testimony was not disputed by Ambler, and there was no one else who was competent to dispute it. The real connection of the defendants with the transaction was carefully concealed, and this was according to the agreement between them and Ambler. When the \$4,200, with \$800 additional furnished by Ambler, was deposited in the Bank of Alamosa, it was applied by the defendants upon their own purchase from Mrs. Nelson. In other words, notwithstanding Ambler's agreement with the plaintiff and McInturff that their money should be held until they got a deed from Mrs. Nelson and until the blanket mortgage upon the property was split up and distributed, their money was paid out and disbursed. They never got a deed, the blanket mortgage upon the property was never arranged according to agreement, and their money was misappropriated by the defendants. Demand was made upon the defendants for a return of their money, and it was refused. It was admitted that Ambler was the agent of the defendants to sell the land and that the agency was concealed. It was also admitted that the defendants received the \$4,200.

In view of the foregoing facts, there is no theory of the case that could have defeated the plaintiff's recovery, and the trial court should have directed a verdict for the plaintiff. The contention of the defendants that they did not know of or authorize the agreements and representations of their agent Ambler is not entitled to consideration. Even had he admitted that he was acting for the defendants instead of for Mrs. Nelson, what he did would have been within the apparent scope of his authority. But whether so or not, the defendants would not be permitted to deny his authority, and yet to hold onto the money paid them upon the faith thereof.

Some of the assignments of error are directed to the competency

of the testimony of the plaintiff and McInturff as to their conversations with Ambler. In view of the fact that Ambler was the secret but accredited representative of the defendants, evidence of what he did and said while in the performance of his duties as agent was admissible against them. There are 71 assignments of error, but there is nothing in any of them that affects the necessary conclusion that, in view of the admitted facts and those that were indisputably established by lawful evidence, the plaintiff was entitled to a verdict and to a judgment. Whatever of error there was in the proceedings of the trial court did not prejudice the defendants.

The judgment is affirmed.

MARTIN et al. v. WHITE.

(Circuit Court of Appeals, Ninth Circuit. June 20, 1906.)

No. 1,292.

1. COURT COMMISSIONERS—JURISDICTION—APPOINTMENT OF GUARDIAN.

The jurisdiction of a United States commissioner as ex officio probate judge to appoint guardians for insane and incompetent persons is wholly statutory, and in order to obtain such jurisdiction it must affirmatively appear that the essential provisions of the statute have been complied with.

2. COURTS—JURISDICTION—PROCEDURE.

Code Alaska, § 723, declaring that when jurisdiction is conferred on a court or judicial officer all the means to carry it into effect are also given, and in the exercise of the jurisdiction, if the course of proceeding be not specially pointed out by the Code, any suitable process or mode of proceeding may be adopted most conformable to the spirit of the Code, refers only to the regulation of proceedings had in courts after jurisdiction has been regularly acquired, and applies only where the course of proceedings is not specially provided.

3. GUARDIAN AND WARD—APPOINTMENT OF GUARDIAN—STATUTES.

Code Alaska, § 911, declares that when any person likely to be put under guardianship shall reside without the district, and shall have any estate therein, any friend or any one interested in his estate may apply to the commissioner of any precinct in which any such estate may be, and that a guardian may be appointed by the commissioner after notice. Section 912 declares that every guardian appointed under the provisions of the preceding section shall have the same powers and duties with respect to any estate of the ward that may be found within the district, etc., as are given to any other guardian duly appointed, etc. *Held*, that such sections were only applicable to guardians appointed for persons who reside without the district, having estates within the district where the proceedings are instituted.

4. INSANE PERSONS—APPOINTMENT OF GUARDIAN—STATUTES—PROCESS—SERVICE.

Code Alaska, § 896, declaring that when the relatives or friends of any insane person shall apply to have a guardian appointed for him, the commissioner shall cause notice to be given to the supposed insane person of the time and place of the hearing, etc., contemplates the personal service of such notice on the person affected thereby.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

This is an action of ejectment brought by the plaintiff (defendant in error) Andrew White, by his guardian, H. M. Badger, against the defendants (plaintiffs in error) to recover possession of the premises described in the complaint, being two lots adjoining, end to end, comprising one plot of ground, together with improvements thereon. The complaint alleged that on May 9, 1905, H. M. Badger was duly appointed by the commissioner and ex officio probate judge of the Fairbanks Precinct, in the district of Alaska, as the guardian of the person and property of the said Andrew White, the said Andrew White having been found at the same time by the court to be an insane person, and owning real property in said precinct, and that said Andrew White occupied the same as his residence, and had been in possession at all times since, except as such possession has been interfered with by the unlawful conduct of the plaintiffs in error, and that he is now entitled to the possession of the property; that prior to the bringing of this action the plaintiffs in error wrongfully entered within the inclosure, and broke into the houses, and ousted him from the possession of the property, and have since retained the possession of the property. A demurrer was interposed to the complaint upon the ground that the plaintiff had no legal capacity to bring the suit, and that the complaint does not state facts sufficient to constitute a cause of action against the plaintiffs in error, or any of them. This demurrer was overruled, and the plaintiffs in error filed an answer denying any legal appointment of Badger as the guardian of said White, and denied the right of White to the possession of said real property. They further affirmatively answered that they were in the lawful and peaceable possession of the premises described in the complaint; that the petition for the appointment of Badger as guardian of White was insufficient to warrant his appointment as guardian; that no notice was given of the pendency of the proceedings of his appointment as guardian either to White or any other person; that without such notice the commissioner of Fairbanks Precinct, without authority of law, held a hearing in such proceedings, wherein it was disclosed that White was not a resident of Fairbanks Precinct, and the commissioner was without jurisdiction to entertain the application; that the said White never occupied the premises described, and had wholly abandoned the whole of said premises. Divers objections and exceptions were taken to certain rulings of the court as to the admission of evidence and instructions to the jury. The jury found a verdict in favor of the defendant in error, and upon that verdict judgment was rendered by the court. At the trial the proceedings had before the United States Commissioner were admitted in evidence, and it appears therefrom that on April 27, 1905, one John A. Long, a friend and acquaintance of Andrew White, presented a petition before said commissioner, showing the following state of facts: "(1) That prior to July, 1904, the said Andrew White came to Fairbanks, and became a permanent resident of the town, and in pursuance thereof took up lot No. 1, block No. 2 [the property and premises described in the complaint]; that the improvements put upon the said lot by said Andrew White were of the value of at least fifteen hundred dollars, and the said ground is now worth at least one thousand dollars. (2) That this petitioner in the year of 1904 owned a parcel of ground in the immediate neighborhood of the lot of the said White which he cultivated as a garden during the summer of that year, and in that way became personally acquainted with the said White, and somewhat with his business affairs, and especially with his mental peculiarities. (3) Your petitioner further shows that the said White was a skillful carpenter, and although there was plenty of work for carpenters at Fairbanks, complained that there was none, and expressed his purpose of building a boat, and going down the river to find work, which he did in the latter part of July, 1904, leaving his cabins locked up, with his extra clothing and household utensils therein (presumably, at least), leaving no one in charge of such property, or with any authority in connection therewith. That the said White has never communicated with any one in Fairbanks, as far as petitioner is aware, nor has any word come back from him, direct or indirect, except, perhaps, a vague rumor that he had been drowned at sea. That from petitioner's conversation and acquaintance with said White, from his actions, and from what could be learned of

him from others, petitioner is of the opinion that said White was insane when he left Fairbanks in July, 1904, and is in that condition of mind at this time." It is further alleged in this petition that since the disappearance of the said White the plaintiffs in error had taken possession of the property, and were occupying and making preparations to improve the same, and prayed "the court to order a hearing after such notice as may be deemed sufficient, and after such hearing that the court appoint some suitable person as guardian of the said Andrew White, if it finds that he be indeed insane, to the end that his property may be looked after and his interests conserved."

On reading the petition, the commissioner, on April 28, 1905, "ordered that May 9, 1905, at 10 o'clock a. m., be fixed as the time, and the courthouse in Fairbanks, as the place, for the hearing of said petition, and the said petitioner is ordered to give public notice of the time and place thereof by a notice published in the Fairbanks Semiweekly News once in its issue of April 29, 1905, and by posting a similar notice in three public places in the town of Fairbanks." On May 9, 1905, upon proof that such notice had been published and posted as directed by said order, it was "ordered, adjudged, and decreed that H. M. Badger be, and he is hereby, appointed guardian of the person and property of the said Andrew White to the extent as to property that the said Andrew White may own property in the Fairbanks recording district," and be required to give bonds.

The following provisions of the Code of Alaska have been cited by counsel, and are referred to in the opinion of the court.

Under the miscellaneous provisions respecting the courts and judicial officers, in chapter 71:

"Sec. 723. When jurisdiction is by any law of the United States conferred on a court or judicial officer, all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding be not specially pointed out by this Code, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this Code."

Under chapter 88 of "Guardians and Wards":

"Sec. 888. The commissioner for each precinct, when it shall appear to him necessary or convenient, may appoint guardians to minors and others being inhabitants or residents in such precinct, and also such as shall reside without the district and have any estate within the same."

"Sec. 895. Commissioners in their respective precincts shall have power to appoint guardians to take care, custody, and management of the estates, real and personal, of all insane persons, idiots, and all who are incapable of conducting their own affairs, and the maintenance of their families and the education of their children.

"Sec. 896. When the relatives or friends of any insane person, or any other persons inhabitants of the precinct in which such insane person resides, shall apply to the commissioner by petition in writing to have a guardian appointed for him, the commissioner shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case, not less than ten days before the time so appointed; and if, after a full hearing, it shall appear to the commissioner that the person in question is incapable of taking care of himself, the commissioner shall appoint a guardian of his person and estate, with the powers and duties hereinafter specified."

"Sec. 911. When any minor or other person likely to be put under guardianship according to the provisions of this chapter shall reside without the district and shall have any estate therein, any friend of such person, or any one interested in his estate, in expectancy or otherwise, may apply to the commissioner of any precinct in which there may be any estate of such absent person, and after notice to all persons interested, to be given in such manner as the commissioner shall order, and after a full hearing and examination, if it shall appear proper the commissioner may appoint a guardian for such absent person.

"Sec. 912. Every guardian appointed according to the provisions of the preceding section shall have the same powers and duties with respect to

any estate of the ward that may be found within the district, and also with respect to the person of the ward if he shall come to reside therein, as are prescribed to any other guardian appointed by force of this chapter."

Morton E. Stevens, Claypool, Kellum & Cowles (Edward E. Cushman, of counsel), for plaintiffs in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement, delivered the opinion of the court).

Under the foregoing state of facts, did the commissioner have any jurisdiction to make an order appointing Badger guardian of said White? Did the court have any jurisdiction to hear and determine the case? The jurisdiction of the commissioner as ex officio probate judge to appoint guardians for insane and incompetent persons is derived from the statute, and in order to obtain such jurisdiction it must affirmatively appear that the essential provisions of the statute were complied with. The court below upon the trial of this action proceeded on the ground that the statutes had been complied with in all essential particulars, and that the judgment of the commissioner adjudging White to be insane and appointing Badger as his guardian is conclusive, and cannot be collaterally attacked. That the commissioner had jurisdiction over the subject-matter of the petition of Long is unquestioned. Did he have jurisdiction over the person of White or his property? It is manifest that section 723 of the Alaska Code refers only to the regulation of proceedings had in the courts after jurisdiction has been regularly acquired, and applies only where the course of proceedings is not specially pointed out in the Code. Section 888 simply provides for the appointment of guardians of minors and other persons, either residents or nonresidents, who may have property within the district where the proceedings are instituted, but does not attempt to designate the course of procedure in such cases; that is provided for in other sections. The provisions of sections 911 and 912 apply only to the appointment of guardians for persons who reside without the district, having estates within the district where the proceedings are instituted.

From a careful examination of the various sections of the Code of Alaska, it plainly appears that the validity of the proceedings had in the present case before the commissioner must be determined by the provisions of sections 895 and 896. The commissioner proceeded upon the theory that White was a resident of Fairbanks Precinct, and the District Court, in its opinion overruling the demurrer, said: "Upon the face of the probate record, it is my judgment that White was a legal resident of Fairbanks Precinct when these proceedings were begun, and that the court had jurisdiction to enter the judgment," and further held that the proceedings were regular, and upon their face show "that the probate court had jurisdiction." The mere fact that the commissioner had jurisdiction in such cases to receive and act upon the petition does not by any means establish the proposition that he acted, after receiving the petition, in compliance with

the provisions of the statute, and this is the principal question to be determined by this court.

A commissioner's court is one of limited jurisdiction, and compliance with the requirements of the law must be fully shown. It is undoubtedly true, as claimed by the defendant in error in the court below, that when jurisdiction is established, all presumptions of law and fact are in favor of the judgment. No authorities need be cited on this well-settled proposition. But the point here is, was the jurisdiction of the court established?

Without stopping to criticise the peculiar statements set forth in the petition of Long, and conceding, for the purpose of this opinion, that, defective as it is in almost every essential particular, it was sufficient to authorize the commissioner to proceed according to law to give notice to White of the pendency of the proceedings, and of the time and place when a hearing would be had thereon, was any such notice given? The suggestion is made on behalf of the defendant in error that section 896 does not provide what steps shall be taken to serve the notice on the person supposed or believed by the petitioner to be insane. The statute must receive a sensible construction. The statute says that "the commissioner shall cause notice to be given to the supposed insane person of the time and place appointed for hearing the case." If White, the alleged insane or incompetent person, resided in Fairbanks Precinct, does not this language mean that the notice should be personally served upon the individual to be affected thereby? The language of section 896 is not susceptible of any other construction. There was no notice given to White in compliance with the provisions of the statute under which the commissioner acted. The "public notice" of the time and place of the hearing in a newspaper, or by posting a similar notice in three public places in the town of Fairbanks, was not such a notice as the statute requires. White did not appear at the hearing. The proceedings then had were *ex parte*, without authority of law, and void. *Chase v. Hathaway*, 14 Mass. 222; *Eddy v. Eddy*, 15 Ill. 386; *Smith v. Burlingame*, 4 Mason, 121, Fed. Cas. No. 13,017; *North v. Joslin*, 59 Mich. 624, 626, 26 N. W. 810; *Evans v. Johnson*, 39 W. Va. 299, 19 S. E. 623, 23 L. R. A. 737, 45 Am. St. Rep. 912; *Hunt v. Searcy*, 167 Mo. 158, 67 S. W. 206; *Stewart v. Taylor* (Ky.) 63 S. W. 783; *Martin v. Motsinger*, 130 Ind. 555, 558, 30 N. E. 523; *Woerner*, Am. Law of Guardianship, pp. 392, 393, 445.

In *Smith v. Burlingame*, *supra*, which was a proceeding under a statute which authorized the courts of probate "to appoint guardians of all persons who are delirious, * * * or who, for want of discretion in managing their estates, are likely to bring themselves and families to want and misery," one Cady was appointed guardian by the court of probate, but no notice was given to the plaintiff previous to such appointment, and the objection was made that the want of notice was fatal. Story, Circuit Justice, said:

"My opinion is that the objection is fatal. The courts of probate have no right to put a person under guardianship, as unfit to manage her affairs, without notice to the party and an adjudication on the facts; and until such

adjudication no letters of guardianship can legally be issued. The case of *Chase v. Hathaway*, 14 Mass. 222, is directly in point, and with that case I entirely concur."

In *Evans v. Johnson*, *supra*, the court elaborately discussed the question as to the necessity of giving notice to the alleged insane person, and other questions applicable to the present case, and upon all the points cited numerous authorities. In answering the suggestion made that the notice to an insane man will do him no good, the court said:

"The reply is that his insanity is the very question to be tried, and he the only party interested in the issue. In many cases, if notice be given him, he will be prompt to attend, and in person be the unanswerable witness of his sanity."

The court further said:

"Even though the statute be silent regarding notice, * * * yet the common law steps in and requires it. * * * A statute will not be construed to authorize proceedings affecting a man's person or property without notice. It does not dispense with notice. * * * If the case were one of mere error or irregularity, it might be said that the order was good against collateral attack, and must be reversed by a direct proceeding; but the question is one of jurisdiction—a want of authority to make the order for want of jurisdiction over the person to be affected. * * * A sentence of the court without hearing the party, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to any respect in any other tribunal. Jurisdiction is indispensable to the validity of all judicial proceedings. Jurisdiction of the person as well as the subject-matter are prerequisites, and must exist, before a court can render a valid judgment or decree; and if either of these is wanting, all the proceedings are void. * * * The county court being a court of limited jurisdiction, it must appear, not only that it had jurisdiction as to the subject-matter, but also over the person by service of process or notice. * * * When we say there must be jurisdiction, we mean both that the matter and the person to be affected must be within the jurisdiction of the court by service of notice upon him."

In *Stewart v. Taylor*, *supra*, the court said:

"Although the statute is silent upon the subject of notice, we cannot believe that the Legislature ever intended that one should be declared a lunatic, and have his property and person put in charge of another, without either being present in court, with an opportunity to defend the proceeding, or without having due notice thereof, and thus have an opportunity to appear and defend. Even if the Legislature had so intended, a judgment rendered in the proceeding would not be valid unless the defendant in the writ had been notified by process of the court of its pendency, or was present at the trial, with an opportunity to defend. To adjudge him to be of unsound mind without notice or his personal appearance at the trial would be to deprive him of important and valuable rights without being heard."

In *Martin v. Motsinger*, *supra*, the court said:

"While the statute does not in terms provide for notice, the proceedings are of such a character that they cannot be *ex parte* and be valid. If the statute was to be construed as authorizing proceedings of an *ex parte* character, it would be, to that extent, in conflict with the Constitution of the United States, and void."

Perhaps the most illustrative case bearing upon the injustice that may be done by a judicial proceeding without notice is that of *Scott v. McNeal*, 154 U. S. 34, 40, 48, 14 Sup. Ct. 1108, 38 L. Ed. 896.

This was a suit in ejectment. The facts showed that in March, 1881, the plaintiff mysteriously disappeared, and nothing was heard of him, and he was believed to be dead until July, 1891, when he returned. In 1888, on the presumption that he was dead, letters of administration were granted, and his estate was administered upon and the land in question sold. When he returned he sued the purchaser for the land. The courts of the state of Washington held that the proceedings in administration were conclusive—that he was dead—and directed a verdict for the defendant. The case was appealed to the Supreme Court of the United States, where the judgment below was reversed. Mr. Justice Gray, in delivering the opinion of the court, after citing the fourteenth article of amendment to the Constitution of the United States, said:

"These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. * * * No judgment of a court is due process of law if rendered without jurisdiction in the court or without notice to the party. The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity there must be a tribunal competent by its Constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the state or his voluntary appearance.' *Pennoy v. Neff*, 95 U. S. 714, 733, 24 L. Ed. 565."

See, also, *Hamilton v. Brown*, 161 U. S. 256, 267, 16 Sup. Ct. 585, 40 L. Ed. 691; *New Orleans Water Works v. New Orleans*, 164 U. S. 471, 480, 17 Sup. Ct. 161, 41 L. Ed. 518; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 234, 17 Sup. Ct. 581, 41 L. Ed. 978.

The judgment of the District Court is reversed, and the action dismissed, without prejudice.

LINDBERG et al. v. HOWARD et al.

(Circuit Court of Appeals, Ninth Circuit. June 20, 1906.)

No. 1,219.

INJUNCTION—BONDS—DAMAGES—ELEMENTS—ATTORNEY'S FEES.

In an action on an injunction bond given in a court in the territory of Alaska, attorney's fees expended in obtaining a dissolution of the injunction do not constitute a proper element of damage.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 597.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

This is an action to recover damages upon an undertaking for an interlocutory injunction in the suit of *Lindberg et al. v. Howard et al.* The bond in question was given to defendants in error for the purpose of indemnifying them from loss and damage, if any resulted, from the procuring of the temporary injunction restraining them from discharging or causing to flow into

the Moonlight Springs mud, dirt, tailings, or muddy water, or from in any manner polluting the waters of said springs or creek. In the complaint it is alleged that the defendants in error were, during the winter of 1902 and 1903, engaged in taking out dumps of pay dirt and gravel from the Grant placer mining claim, under a lay thereon from the Pacific Coal & Transportation Company, which expired on June 1, 1903; that at the time the restraining order was served upon the defendants in error they were compelled to cease mining operations by reason thereof; that defendants in error then had out of said Grant placer mining claim and ready to wash out and sluice the gold therefrom dumps of pay dirt and gravel of the value of \$2,500. The restraining order was issued May 18, 1903, and the lay expired on June 15th, following. It is alleged that the said restraining order was wrongfully caused to be issued by the plaintiffs in error. The conditions of the injunction bond are: "If the said plaintiffs shall pay all costs and disbursements that may be decreed to the said defendants, their agents, servants, and employes, and such damages, not exceeding the sum of \$2,500, as they, or any of them, may sustain by reason of said injunction if the same be wrongful, or without sufficient cause, then this obligation shall be void; otherwise it shall remain in full force and effect." The rule to show cause why the injunction should not issue was set for the 19th, and was then heard and taken under advisement, and, on the 9th of June it was dissolved, and the court refused to issue an injunction pendente lite. When the restraining order was issued the defendants in error in this action were using the water caused by the melting snow from the watershed of Anvil Mountain, and the supply of said water was then ample to sluice said dumps and extract the gold therefrom, but at the time of the dissolution of the restraining order there was no water for said purpose, nor was there during the year 1903; that during the year 1903, the said dumps were wasted and destroyed, much of the dirt caving back into the shafts and drifts on said mine, and that, by reason of said restraining order and the loss of said dumps, the plaintiffs claimed damages; they also claimed damages for 22 days' loss of time resulting from said restraining order, and also claimed damages for reasonable attorney's fees incurred by them in defending against said restraining order, and in procuring its dissolution.

The court charged the jury, among other things, as follows: "If you find from the evidence that the plaintiffs had a dump or several dumps of pay dirt and gravel on the Grant placer mining claim * * * during the spring of 1903, and that they were enjoined at the suit of the defendants when engaged in washing out and extracting the gold therefrom, and you further find from the evidence that plaintiffs could have sluiced out said dumps and extracted the gold therefrom between the date when plaintiffs were enjoined from so doing in effect, and the date of the dissolution of the restraining order, and that thereafter said dumps and their values were wholly or partially lost to the plaintiffs as the proximate result of said restraining order, then I instruct you to find for the plaintiffs in such sum as you may find from the evidence plaintiffs were damaged thereby. * * * I further instruct you that the reasonable value of attorney's fees contracted by plaintiffs in moving to dissolve said restraining order is, under the statute of Alaska relating to injunction bonds, an element of damage to be considered by you, and if you find from the evidence that plaintiffs employed an attorney for the purpose of moving to dissolve said restraining order, that you should also find for the plaintiffs in such sum as you may find from the evidence was a reasonable attorney fee for such purpose. * * * The jury are further instructed that the defendants in this action are not responsible for any of the acts of third parties, not in privity with them, who may have sluiced up said dumps for pay gravel, or any parts of the same, and appropriated the proceeds thereof. The jury are further instructed that the plaintiffs are not entitled to compensation for the loss of said dumps of pay gravel or the loss of any part thereof, which was not directly and proximately caused by the issuance and continuance in force of the restraining order mentioned in the complaint. The jury are further instructed that if the disappearance or destruction of the plaintiffs' dumps was caused by the negligence or inat-

tention of the plaintiffs in not sluicing up said dumps, or any part of them, when water became available to them for that purpose, if it did become so available afterward, then the defendants are not chargeable with the loss properly due to the negligence or inattention of said plaintiffs, and that the defendants are not responsible for the disappearance or loss of said dumps or any part thereof, unless such disappearance or loss were directly and proximately caused by said restraining order or injunction. * * * For the breach of the injunction bond or undertaking, it will be your duty to award the plaintiff in your verdict at least nominal damages, and I instruct you that you may assess nominal damages at the sum of \$1, or other like small sum of money. And in determining whether you shall render a verdict for the plaintiff for more than nominal damages you will consider: (1) The loss, if any, accruing to the plaintiffs from the disappearance or destruction of the plaintiffs' dumps, if said dumps were lost to them or destroyed as the natural, direct and proximate result of the issuing of the restraining order and not as the result of the acts of other persons, not parties to this case; (2) the loss of time and the expense, if any, to which the plaintiffs were put in the searching for and procuring of testimony to be used at the hearing of the order to show cause why the injunction pending in the former action should not issue, and of the motion to dissolve the restraining order; (3) what is a reasonable attorney's fee, as shown by the evidence, which the plaintiffs incurred in answering the order to show cause, and in procuring a dissolution of the restraining order. The amount of damages, which you may find, should not in any event exceed the amount prayed for in the complaint, to wit, \$2,500." The jury found a verdict in favor of defendants in error in the sum of \$2,500. Plaintiffs in error make 28 specific assignments of error, many of which are duplicates. They group them in their brief, under seven different heads.

Albert Fink, J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman and Ira D. Orton, for plaintiffs in error.

W. Lair Hill, for defendants in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge (after making the foregoing statement, delivered the opinion of the court).

Did the court err in holding that attorney's fees were an element of damage to be considered by the jury in a case of this character? The statute of Alaska provides:

"Sec. 384. An injunction may be allowed by the court or judge thereof at any time after the commencement of the action and before judgment. Before allowing the same the court or judge shall require of the plaintiff an undertaking, with one or more sureties, to the effect that he will pay all costs and disbursements that may be decreed to the defendant, and such damages, not exceeding an amount therein specified, as he may sustain by reason of the injunction if the same be wrongful or without sufficient cause." Act June 6, 1900, c. 786, 31 Stat. 397.

It will be observed that it is not provided in this statute that attorney's fees incurred by the defendant in procuring the dissolution of the injunction should be an element of damage recoverable in a suit upon the bond. In the absence of such a provision the question arises whether, under the general law and the consideration of sound public policy, such fees are an element of damage proper to be considered by the jury. The terms of the bond are that plaintiffs shall pay "such damages * * * as they or any of them may sustain by reason of

said injunction if the same be wrongful or without sufficient cause." This was not, of course, an obligation to pay damages remote, conjectural, or speculative in character, but only to pay such damages as were the actual, natural, and proximate result of the granting of the restraining order or injunction. 2 High on Inj. (3d Ed.) § 1663.

An examination of the authorities will show that the state courts under similar statutes, or upon similar conditions of the injunction bond, have almost universally held that attorney's fees, under certain limitations, are proper elements of damage. There are some few exceptions to this rule, notably in the State of Pennsylvania.

In *Sensenig v. Parry*, 113 Pa. 115, 119, 5 Atl. 11, 12; the court said:

"There was no error in disallowing the evidence of counsel fee paid by the plaintiff. It was not such a legal damage as is specified in the condition of the injunction bond, as to permit a recovery therefor."

The United States Supreme Court has universally held that such fees cannot be allowed as damages in a suit upon the injunction bond. The views expressed by the state courts are sufficiently outlined and expressed in 2 High on Injunctions, §§ 1685, 1686.

"A reasonable amount of compensation paid as counsel fees in procuring the dissolution of an injunction may be recovered in an action upon the bond * * * if the injunction was improperly or wrongfully sued out, the amount being limited to fees paid counsel for procuring the dissolution, and not for defending the entire case. Counsel fees in such cases are regarded as a proper subject of consideration in estimating the damages incurred, the loss being as direct and immediate as any other. [Citing many cases.] * * * § 1686. The allowance of counsel fees as damages upon dissolving an injunction is based upon the fact that defendant has been compelled to employ aid in ridding himself of an unjust restriction, which has been placed upon him by the action of plaintiff."

On the other hand, the Supreme Court, in *Oelrichs v. Spain*, 15 Wall. 211, 230, 21 L. Ed. 43, 45, said:

"The decree of the court below was preceded by the report of a master, which the decree affirmed and followed. Upon looking into the report we find it clear and able, and we are entirely satisfied with it, except in one particular. We think that both the master and the court erred in allowing counsel fees as a part of the damages covered by the bonds. In *Arcambele v. Wiseman*, 3 Dall. 306, 1 L. Ed. 613, decided by this court in 1796, it appeared 'by an estimate of the damages upon which the decree was founded, and which was annexed to the record, that a charge of \$1,600 for counsel fees in the courts below had been allowed.' This court held that it 'ought not to have been allowed.' The report is very brief. The nature of the case does not appear. It is the settled rule that counsel fees cannot be included in the damages to be recovered for the infringement of a patent. They cannot be allowed to the gaining side in admiralty as incident to the judgment beyond the costs and fees allowed by the statute. In actions of trespass where there are no circumstances of aggravation, only compensatory damages can be recovered, and they do not include the fees of counsel. The plaintiff is no more entitled to them, if he succeed, than is the defendant if the plaintiff be defeated. Why should a distinction be made between them? In certain actions *ex delicto* vindictive damages may be given by the jury. In regard to that class of cases this court has said: 'It is true that damages assessed by way of example may indirectly compensate the plaintiff for money expenses in counsel fees, but the amount of these fees cannot be taken as the measure of punishment or a necessary element in its infliction.' *Day v. Woodworth*, 13 How. 370, 371, 14 L. Ed. 181. The point here in question

has never been expressly decided by this court, but it is clearly within the reasoning of the case last referred to, and we think is substantially determined by that adjudication. In debt, covenant, and assumpsit, damages are recovered, but counsel fees are never included. So, in equity cases, where there is no injunction bond, only the taxable costs are allowed to the complainants. The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the *expensa litis* to which he may have been subjected. The parties in this respect are upon a footing of equality. There is no fixed standard by which the honorarium can be measured. Some counsel demand much more than others. Some clients are willing to pay more than others. More counsel may be employed than are necessary. When both client and counsel know that the fees are to be paid by the other party there is danger of abuse. A reference to a master, or an issue to a jury, might be necessary to ascertain the proper amount, and this grafted litigation might possibly be more animated and protracted than that in the original cause. It would be an office of some delicacy on the part of the court to scale down the charges, as might sometimes be necessary. We think the principle of disallowance rests on a solid foundation, and that the opposite rule is forbidden by the analogies of the law and sound public policy."

In *Tullock v. Mulvane*, 184 U. S. 497, 511, 22 Sup. Ct. 372, 46 L. Ed. 657, the case was brought before the court by writ of error to the Supreme Court of the state of Kansas. The bond was given in a suit in the Circuit Court of the United States. The Supreme Court held that the claim of immunity from liability for attorney's fees as one of the elements of damage under the injunction bond presented a federal question, which was incorrectly decided by the court below in holding that it was proper to award the amount of such fees in enforcing the bond; that a bond given in pursuance of a law of the United States is governed, as to its construction, not by the local law of a particular state, but by the principles of law as determined by this court, and operative throughout the courts of the United States.

Regarding the questions under review in that case, the court said:

"It remains only to consider whether the attorney's fees were properly allowed by the court below as an element of damages on the bond. That they were not, is settled."

And then quotes at length from *Oelrichs v. Spain*, *supra*.

In the further course of the opinion the court held that this question was a matter of general law. It said:

"It is at once conceded that the decision by a state court of a question of local or of general law involving no federal element does not as a matter of course present a federal question. But, where, on the contrary, a federal element is specially averred and essentially involved, the duty of this court to apply to such federal question its own conceptions of the general law we think is incontrovertible." *Avery v. Popper*, 179 U. S. 305, 315, 21 Sup. Ct. 94, 45 L. Ed. 203.

The judgment of the Supreme Court of Kansas was reversed. The case of *Missouri, Kansas & Texas Ry. Co. v. Elliott*, 184 U. S. 531, 22 Sup. Ct. 446, 46 L. Ed. 673, affirmed, and followed the rules announced and views expressed in *Tullock v. Mulvane*, *supra*.

As was said by the court in *Greer v. Richards*, 3 Ariz. 227, 232, 32 Pac. 266:

"The state courts are subordinate to the Supreme Court of the United States only in cases involving federal questions, and not in those involving only local questions. The territorial courts are completely subordinate to

the United States Supreme Court. It is the court of final resort, and its decisions are binding and conclusive upon us. The Supreme Court of the territory is really but an intermediate appellate court, and this is in pursuance of the theory that the governments of territories shall always be subject to the supervision of the national authority."

Alaska is one of the territories of the United States, and its district court is the Supreme Court of the territory of Alaska. *Steamer Coquitlam v. United States*, 163 U. S. 346, 352, 16 Sup. Ct. 1117, 41 L. Ed. 184. Its judgments and decrees can only be reviewed by appeal or writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, or by the Supreme Court of the United States. Our conclusion is that the court below erred in following the rule announced by the state courts, instead of being guided by the decisions of the Supreme Court of the United States. It is proper to add that in the rulings of the court in other respects, which are complained of, we find no reversible error.

The judgment of the District Court is reversed.

NORTHWESTERN STEAMSHIP CO. v. GRIGGS.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1906.)

No. 1,214.

1. TRIAL—MOTION FOR NONSUIT—WAIVER.

Where defendant moved for a nonsuit at the close of plaintiff's case, but afterwards proceeded to introduce evidence on its own behalf, instead of resting on the motion, the motion was waived.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 982.]

2. MASTER AND SERVANT—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where plaintiff, who was employed on a vessel to feed sheep, had knowledge of the danger of going along the pens on a platform from which he fell, without looking to see that a protecting netting, which alone afforded protection when the hold was open, was properly in place, plaintiff was bound to use such extraordinary care and caution as the known dangerous conditions of the place required.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 674.]

3. SAME.

Plaintiff, who was employed on a steamship to feed certain sheep in stalls erected on the main deck, had knowledge that there was nothing between an 18-inch walkway and the hatch but a rope netting to protect him from falling into the hold when the hatch was in use. Before using the runway he had previously been careful to see that the netting was securely in place, but, on the occasion in question, he had been looking at other employes raising the carcass of a horse from the hold, and with knowledge that the netting was not in place, attempted to use the runway while feeding the sheep, and fell therefrom into the hold. *Held*, that plaintiff was guilty of such contributory negligence as precluded a recovery.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 723-742.]

In Error to the District Court of the United States for the Second Division of the District of Alaska.

John P. Hartman (Dudley Dubose and Joseph K. Wood, of counsel), for plaintiff in error.

W. Lair Hill, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. It appears from the record that the defendant in error was employed by one Cox to feed and care for a lot of sheep that were shipped by Cox on the ship of the plaintiff in error from Seattle to Nome, Alaska. Some horses and cattle were also shipped by the same vessel, stalls for which were erected on the main deck. Above those stalls, on what is spoken of in the record as a "false deck," pens for the sheep were built; the top of the stalls being the floor of the pens. The outer side of the pens was flush with the railing of the ship, and, running along the inner side thereof was a walkway, from 15 to 18 inches wide, between which and the hatchway of the ship was no railing, rope, or other thing. This walkway was placed in order that the sheep might be fed and watered, and it was while employed in feeding them that the defendant in error fell through the hatchway into the hold of the ship, sustaining the injuries for which he sued. On the trial in the court below the plaintiff in error offered to prove, among other things, that it had made other plans for the pens and for the feeding of the sheep, but that Cox insisted that they should be constructed as they were, which proof, however, the court refused to permit the plaintiff in error to make. For protection against the danger of falling from the false deck, a netting made of rope about three inches in diameter was put across the hatchway at the level of the main deck, fastened at the corners, and intended to be kept in place except when the hatchway was in use for the raising or lowering of commodities, or the raising of such dead animals as was necessary to cast overboard. According to the plaintiff's own testimony, he well knew of the danger attending his going upon the walkway, protection against which lay only in the netting, and well knew that the netting had to be removed when the hatchway was in use, and that when not in use that the netting should be in place, and firmly fastened at the corners. The defendant in error testified distinctly and unequivocally several times that he knew it was dangerous to go upon the walkway, and was liable to fall from it and get hurt, and that the netting was the only protection against the danger; that it was necessary to take the netting off when the hatch was in use; and that at first he always looked to see that it was properly in place before going up to feed the sheep, which he did twice each day. Shortly before the accident a dead horse had been hoisted through the hatch, after which the netting had not been properly put in place and fastened at the corners. The plaintiff went up to feed the sheep without looking to see that the netting was in place and properly fastened, fell from the walkway, and was injured. From his own testimony he had evidently become somewhat accustomed to the danger, and, at the particular time in question, he permitted his attention to be distracted by curiosity; for he himself testified:

"I suppose it would be perfectly natural for a person coming from the hatch in the main deck, knowing that the position was a dangerous one, to look and see if the hatch was protected, and that I would have done so if I had not been looking at them raising the horse."

There was also testimony on behalf of the plaintiff tending to show that complaint had been made to an officer of the ship of the dangerous condition of the walkway, and testimony on the part of the defendant tending to show that the sheep pens were covered with canvas tightly fastened down except at one or more of the corners, and that the sheep could have been, although less conveniently fed by raising the fastened corners without going upon the walkway. On the conclusion of the evidence on behalf of the plaintiff, the defendant moved for a nonsuit, on the ground that it appeared therefrom that the plaintiff was guilty of such contributory negligence as precluded a recovery by him. If the motion be treated as proper in form, it was waived by the defendant's proceeding to introduce evidence on its own behalf, instead of resting upon the motion, and the action of the court in respect to the motion cannot, therefore, be assigned for error here. *Union Pacific Ry. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Runkle v. Burnham*, 153 U. S. 216, 222, 14 Sup. Ct. 837, 38 L. Ed. 694. But the same point arises upon the ruling of the court in respect to certain instructions given and refused, to which rulings exceptions were duly reserved by the plaintiff in error, and which are duly assigned for error by it.

On behalf of the plaintiff, the court instructed the jury, among other things, as follows:

"And if you find from the preponderance of the evidence in this case that the netting between the false deck and the main deck was placed there for the purpose of preventing any accident to any of the passengers on board the defendant's steamship, and further find from a preponderance of the evidence that the employes or any of the employes of the defendant in charge of the hatchways had knowledge that such netting had been removed and failed to replace the same, then I instruct you that you should find for the plaintiff if you further find that his injuries resulted from the carelessness and negligence of the defendant or its employes in failing to replace the netting, and you also find that the plaintiff was using and exercising an ordinary degree of reasonable care and diligence under the circumstances, considering his duties in attending and feeding the sheep on the false deck of said steamship."

While giving the foregoing among other instructions, the court refused to give these instructions requested by the defendant, to wit:

"The court instructs the jury that if they believe from the evidence that the hatchway through which the plaintiff fell and was injured was left or maintained by defendant in an unsafe or insecure manner, and that the same was known to plaintiff, and that complaint had been made to defendant of its condition; yet, notwithstanding such knowledge or complaint, the defendant failed to repair or remedy the same, and the plaintiff continued to feed the sheep and go into the vicinity of such hatchway, when another or more safe yet difficult means was available, and was injured thereby, then plaintiff is deemed to have assumed the risks incident to going about such place, and is guilty of such contributory negligence as bars his recovery in this action, and the verdict should be for the defendant. The court instructs the jury that where it is the duty of the servant to perform the work and labor in and about places known by him to be dangerous and unsafe, then it is

incumbent upon such servant in the performance of his duties to exercise such extraordinary care and caution, or such increased care and caution, as the known dangerous condition and circumstances require, and, failing to do so, must be deemed to have assumed the risk incident to such danger and guilty of such contributory negligence as bars a recovery for any injury sustained by him."

The action of the court below in each of these respects was accepted to by the defendant, and has been assigned for error.

It will be seen that by the instruction given the jury was told in effect that, if they found that the plaintiff was injured through the negligence of the defendant, they should find for the plaintiff if they also found that the plaintiff "was using and exercising an ordinary degree of reasonable care and diligence under the circumstances, considering his duties in attending and feeding the sheep on the false deck of said steamship;" and this, when it appeared from the plaintiff's own testimony that he well knew of the danger attending his going upon the walkway unless the netting was in place and properly fastened at the corners; and, further, that at first he always, before going to feed the sheep, looked to see if the netting was properly in place, and, at the particular time in question, would have done so if he had not been looking at the people raising the horse. Certainly the steamship company should not be made to pay for the gratification by plaintiff of his curiosity. The knowledge that the plaintiff had of the danger in going to the place from which he fell, without looking to see that the netting that alone afforded him protection was properly in place, cast upon him, not the duty of "exercising an ordinary degree of reasonable care and diligence" merely, but such extraordinary care and caution as the known dangerous conditions required, failing to do which, he must be deemed to have assumed the risk and to have been guilty of such contributory negligence as precludes a recovery by him of damages; for it is the well-established rule of law that one who knows of a danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. *Fitzgerald v. Connecticut River P. Co.*, 155 Mass. 155, 29 N. E. 461, 31 Am. St. Rep. 537; *Missouri Pacific Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641, *Clark v. Wright*, 79 Fed. 744, 25 C. C. A. 190; *Seymour v. Chicago, B. & Q. Ry. Co.*, Fed. Cas. No. 12,685; *New Jersey Express Co. v. Nichols* (N. J.) 97 Am. Dec. 722; *Shearman & Redfield on the Law of Negligence*, p. 938, par. 513a.

The judgment is reversed, and the cause remanded to the court below for a new trial.

CARLSON et al. v. SULLIVAN et al.

(Circuit Court of Appeals, Ninth Circuit. June 19, 1906.)

No. 1,246.

1. PARTITION—DENIAL OF TITLE—ADVERSE CLAIM—ISSUES.

The bare denial of complainant's title on information and belief by defendants in a suit for partition, defendants not claiming adverse title in themselves, does not put title in issue, so as to require the court to stay the suit until title has been established at law.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 53-59.]

2. SAME—OUSTER—REMEDIES—EJECTMENT.

While a common possession is always implied from a common title until the contrary is shown, in cases where an ouster is made by one tenant in common with his co-tenants, there is no longer a common possession, and the remedy by the ousted tenant is by ejectment to recover possession of his individual moiety, and not by petition for partition.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, §§ 60-63.]

3. JURY—RIGHT TO TRIAL BY JURY.

Under Const. U. S. Amend. 7, securing the right of trial by jury in suits at common law where the value in controversy exceeds \$20, a party in possession of land, claiming the whole title, is entitled to a right of trial by jury of the issue of title.

4. SAME—FEDERAL CONSTITUTION—AMENDMENT—APPLICATION TO TERRITORIES.

Const. U. S. Amend. 7, securing the right of trial by jury in suits at common law where the value in controversy exceeds \$20, applies to judicial proceedings in the territories of the United States.

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

This is a suit for a division of a certain mining claim according to the respective rights of plaintiffs and defendants therein, and, if partition cannot be had without material injury to those rights, then for a sale of the premises and division of the proceeds between the parties, etc. It was brought under the provisions of the Alaska Code, which reads as follows: "When several persons hold and are in possession of real property as tenants in common in which one or more of them have an estate of inheritance, * * * any one or more of them may maintain an action of an equitable nature for the partition of such real property according to the respective rights of the persons interested therein and for a sale of such property or a part of it, if it appears that a partition cannot be had without great prejudice to the owners." 31 Stat. 399, c. 786, sub. c. 43, § 397. In the complaint it is alleged that plaintiffs and defendants "own and possess as tenants in common" the property in question; that the interests of all the parties, plaintiffs and defendants, were derived from the same source by mesne conveyances from the locator of the claim, one A. Samuelson, and his assigns. In paragraph 12 it is alleged: "That in order to preserve the interests of the said owners of said property and mining claim it is necessary to represent said claim by performing assessment work thereon each year of the value of at least \$100; that plaintiffs have offered to do said assessment work for the year 1903, but the defendants have refused to permit them so to do, and by threats of violence to plaintiffs have prevented and threatened in the future to prevent the plaintiffs from enjoying the beneficial use of said premises, and from prospecting or otherwise working said claim, unless enjoined and restrained from so doing by the order of this court," etc. George Sullivan filed a separate answer. The other defendants filed an answer denying "that

the plaintiffs, or either of them, own and possess, or own or possess, either as tenants in common or otherwise, any interest whatever" in the property in controversy; "deny that each of the plaintiffs, or either of them, has an estate of inheritance, or any estate or interest whatever, in said mining claim, or any part thereof." In answer to the twelfth paragraph of the complaint they "admit that in order to preserve the interest of the owners of said property and mining claim it is necessary to represent said claim by performing assessment work thereon each year of the value of at least \$100, but said defendants deny all the other allegations of said paragraph 12, except that the said defendants other than George Sullivan have refused to permit the plaintiffs or either of them to enter upon or work said mining claim or any part thereof."

Upon the trial the plaintiffs offered a deed from A. Samuelson of an undivided one-third interest in the mine, and a deed from Carlson to his co-plaintiff, Loman, to a one-sixth interest therein. On the cross-examination of Carlson the "bill of transfer" from Carlson to J. Venes of an undivided one-sixth interest, set forth in the record, was admitted. There was no evidence with regard to the actual possession of either party. At the close of plaintiffs' testimony the defendants moved to dismiss the action on the following grounds: "(1) That it does not appear that the plaintiffs and defendants, or any of the defendants, hold and are in possession of the real property involved in this action as tenants in common. (2) That an action or suit in partition is not the proper form of action in which to litigate disputed questions of title to lands. (3) That this action should be brought in ejectment, under the statute, and not a suit in partition. * * * (4) That the issues raised in this action are issues which should be tried by an action at law, before a jury." The court granted said motion and dismissed the cause without prejudice, on the ground that the defendants have the right to have the question of the disputed title determined in an action at law before a jury, to which ruling the plaintiffs excepted, and claim that the court erred in dismissing the suit. The appeal is taken from the judgment of dismissal.

Chas. E. Naylor, for appellants.

G. J. Lomen, pro se.

J. C. Campbell, W. H. Metson, F. C. Drew, and Ira D. Orton, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Did the court err in dismissing the suit? In *Heinze v. Butte & B. Con. M. Co.*, 126 Fed. 1, 61 C. C. A. 63, this court held that the bare denial of complainant's title on information and belief, by defendants in a suit for partition, who do not allege adverse title in themselves, does not put such title in issue, so as to require the court to stay the suit until it shall be established at law. That case is the principal one, among many others, relied upon by appellants to sustain their assignments of error herein. If identical in its facts, it might be considered binding upon the court in this case; but is it identical? We think not. In that case Judge Gilbert, delivering the opinion of the court, said:

"In none of the pleadings so far filed in the case was any defect or infirmity in the complainant's title alleged, nor was it asserted that any of the parties had adverse claims against the alleged title of the complainant, or adverse possession of the property sought to be partitioned. All the information that was conveyed by the pleadings at that date was that the complainant al-

leged a title in fee simple, and that the defendants and the intervener all denied, on information and belief, that the complainant was the owner of the interest which it asserted in its bill. In other words, by their answer they said to the court: 'We own an undivided one-half of one claim, and an undivided one-third of the other, but we deny, on information and belief, that the complainant owns the other interests.'"

It was while the pleadings were in that condition that the motion was made to stay the proceedings until complainants established their case at law. This motion was denied. In the present case plaintiffs show in paragraph 12 of their complaint that the defendants denied their right of possession, and had virtually ousted them from the mine; and the defendants in their answer deny that the plaintiffs, or either of them, own or possess any interest whatever in the property. It is in the light of these facts that the present case must be determined.

1. We are of opinion that a common possession is always implied from a common title until the contrary is shown; but, in cases where an ouster is made by one tenant in common with his co-tenants, there is no longer a common possession, and the remedy is, not by petition for partition, but by ejectment to recover possession of the individual moiety. In *Rich v. Bray* (C. C.) 37 Fed. 273, 277, 2 L. R. A. 225, the court said:

"There is no question of the jurisdiction of a court of equity to make partition of lands, in which action all the equities between the coparceners may be considered and adjusted. But I understand the rule to be likewise inflexible that, in a partition suit, either at law or in equity, the title to the land cannot be litigated. Where there is an adverse holding under claim of exclusive right, amounting to an ouster among tenants in common, it destroys the unity of possession, and takes away the right of partition. Resort must first be had to the action of ejectment at law. 'If one coparcener disseise another, during his disseisin a writ of partition doth not lie between them for "non tenant insimul et pro indiviso."'"

In *Brown v. Cranberry I. & C. Co.* (C. C.) 40 Fed. 849, Judge Dick held that where defendant in partition denies complainant's title, it is proper to stay proceedings so that complainant may establish his title by an action in ejectment. In the course of the opinion he said:

"Questions pertaining to a legal title and the nature of possession are matters of law, and should be decided by a judge and jury in a legal tribunal. This was the method of practice and procedure that prevailed in the courts of equity in this state before the abolition of such courts by our new Constitution, and the adoption of a Code system, which required all legal and equitable remedy and relief to be sought by civil action or special proceedings."

The Alaska statute, heretofore quoted, is taken verbatim from the Oregon Code. In *Savage v. Savage*, 19 Or. 112, 116, 23 Pac. 890, 891, 20 Am. St. Rep. 795, which was an action for partition of lands, the court, after construing the provisions of the Code, said:

"Seisin and possession, as now understood, mean the same thing. To constitute seisin in fact, there must be an actual possession of the land; for a seisin in law there must be a right of immediate possession according to the nature of the interest, whether corporeal or incorporeal. 1 Wash. Real Prop. 62. Under this view there can be no seisin in law where there is not a present right of entry. And where the life tenant is in possession, there being no present right of entry in the remainderman or reversioner, they are not constructively seised, and neither can maintain a suit as plaintiff for partition. The authorities generally sustain this view"—citing cases.

In *Windsor v. Simpkins*, 19 Or. 117, 23 Pac. 669, which was a suit for the partition of lands, the court said:

"The circuit court properly dismissed the appellant's complaint. The parties to the suit were not holding and in possession as tenants in common of the premises in controversy. There was no unity of possession between them regarding the said premises. * * * The appellant had no seisin of the premises, either in law or in fact, and must recover possession of them in a proper action before he will gain such a standing in court as will enable him to maintain a suit for the partition thereof."

In *Moore v. Shannon*, 6 Mackey, 157, 165, the court said:

"Mr. Freeman in his work on Co-tenancy and Partition, states the law thus, in section 446: 'It is a general rule prevailing in England, without exception, and also throughout the majority of the United States, that no person has the right to demand any court to enforce a compulsory partition unless he has an estate in possession—one by virtue of which he is entitled to enjoy the present rents or the possession of the property as one of the co-tenants thereof.' And so are all the authorities." *Chapin v. Sears* (C. C.) 18 Fed. 814; *American A. Limited v. Eastern K. L. Co.* (C. C.) 68 Fed. 721; *Bearden v. Benner* (C. C.) 120 Fed. 690, 693; *Deery v. McClintock*, 31 Wis. 195; *Hoffman v. Beard*, 22 Mich. 59; *Criscoe v. Hambrick*, 47 Ark. 235, 238, 1 S. W. 150; *Conter v. Herschel*, 24 Nev. 152, 50 Pac. 851.

2. We are of opinion that, under the provisions of the seventh amendment to the Constitution of the United States, a party in possession of real estate, claiming the whole title, is entitled to a right of trial by jury, and that this rule is settled by the decisions of the Supreme Court. *Whitehead v. Shattuck*, 138 U. S. 146, 151, 11 Sup. Ct. 276, 34 L. Ed. 873; *Scott v. Neely*, 140 U. S. 106, 109, 11 Sup. Ct. 712, 35 L. Ed. 358; *Lacassagne v. Chapuis*, 144 U. S. 119, 12 Sup. Ct. 659, 36 L. Ed. 368. It is contended by appellants, however, that the right of trial by jury is not a fundamental right, and that the seventh amendment to the Constitution has no application to the territorial legislation, nor to the jurisdiction of the courts thereunder, and that the federal courts will not decline equity jurisdiction simply because legal questions are involved, when the action is brought under a state or territorial statute, and not under the general equity powers of the court; and numerous authorities are cited in support of these propositions.

That the Constitution of the United States applies to Alaska is settled by the reasoning and decision of the court in *Rasmussen v. United States*, 197 U. S. 516, 525, 25 Sup. Ct. 514, 49 L. Ed. 862 et seq. In that case the court refers to *Black v. Jackson*, 177 U. S. 349, 363, 20 Sup. Ct. 648, 44 L. Ed. 801, where the court, in speaking of a law of the territory of Oklahoma and of the contention of appellant, said:

"But the same reason could be urged to justify the extraordinary remedy of a mandatory injunction in order to put a defendant out of possession, even where the plaintiff was entitled to maintain ejectment or an action in the nature of ejectment. The suggestion referred to leaves out of view the distinction made by the Constitution of the United States between cases in law and cases in equity. *Robinson v. Campbell*, 3 Wheat. 212, 223, 4 L. Ed. 372; *Payne v. Hook*, 7 Wall. 425, 19 L. Ed. 260; *Van Norden v. Morton*, 99 U. S. 378, 25 L. Ed. 453; *Smyth v. Ames*, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819. And it also fails to recognize the provisions of the seventh

amendment securing the right of trial by jury in 'suits at common law' where the value in controversy exceeds \$20. That amendment, so far as it secures the right of trial by jury, applies to judicial proceedings in the territories of the United States. *Webster v. Reid*, 11 How. 437, 460, 13 L. Ed. 761; *American Publishing Co. v. Fisher*, 166 U. S. 464, 466, 17 Sup. Ct. 618, 41 L. Ed. 1079; *Springville v. Thomas*, 166 U. S. 707, 17 Sup. Ct. 717, 41 L. Ed. 1172. So that a court of a territory, authorized, as Oklahoma was, to pass laws not inconsistent with the Constitution of the United States (26 Stat. 81, 84, c. 182, § 6), could not proceed in a 'common-law' action as if it were a suit in equity and determine by mandatory injunction rights for the protection or enforcement of which there was a plain and adequate remedy at law according to the established distinctions between law and equity."

In *Whitehead v. Shattuck*, *supra*, the court said:

"The right which in this case the plaintiff wishes to assert is his title to certain real property; the remedy which he wishes to obtain is its possession and enjoyment; and in a contest over the title both parties have a constitutional right to call for a jury."

The court did not err in dismissing the case without prejudice. Such a dismissal saved all of plaintiffs' rights in the premises, and was in effect the same as an order to stay proceedings in the suit until the plaintiffs established their right to the property by an action at law.

The judgment of the District Court is affirmed.

FORDERER v. SCHMIDT et al.*

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,245.

PARTITION—MINING CLAIMS—EQUITY—EJECTMENT.

Where plaintiff brought suit for partition of a mining claim alleging ownership in common with defendants of the property in controversy, and defendants' answer expressly conceded plaintiff's original ownership of an undivided one-half of the claim and only sought to defeat that ownership by alleging forfeiture for plaintiff's failure to contribute to the performance of assessment work, the action was properly triable in equity under Code Civ. Proc. Alaska, c. 43, §§ 397, 398, 403, providing for the partition of lands, and it was therefore error for the court to dismiss the cause and remit plaintiff to his action in ejectment.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Partition, § 190.]

'Appeal from the District Court of the United States for the Second Division of the District of Alaska.

G. J. Lomen and Charles E. Naylor, for appellant.
Gordon Hall, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This action was brought under chapter 43 of the Code of Civil Procedure of Alaska, for the partition of a certain specifically described mining claim situated in that territory. The statutory provisions applicable to the case are as follows:

*Rehearing denied October 29, 1906.

"When several persons hold and are in possession of real property as tenants in common, in which one or more of them have an estate of inheritance * * * any one or more of them may maintain an action of an equitable nature for the partition of such real property according to the respective rights of the persons interested therein, and for a sale of such property, or a part of it, if it appears that a partition cannot be made without great prejudice to the owners."

"The interests of all persons in the property, whether such persons be known or unknown, shall be set forth in the complaint specifically and particularly as far as known to the plaintiff. * * *

"The rights of the several parties, plaintiffs as well as defendants, may be put in issue, tried, and determined in such action, and where a defendant fails to answer or where a sale of the property is necessary, the title shall be ascertained by proof to the satisfaction of the court, before the judgment of partition or sale is given."

Sections 397, 398, 403, c. 43, Code Civ. Proc. Alaska.

In the complaint filed by the appellant, who was the plaintiff in the court below, he alleges that he and the defendants to the action own and possess as tenants in common the mining claim in question, and that he is desirous of a partition thereof; that the plaintiff has an estate of inheritance in the claim "of an undivided one-half interest therein, subject only to the fee of the United States after location and before patent of said claim"; that each of the defendants have a similar estate of an undivided one-fourth interest, and that the said parties own no other land in common in the district of Alaska; that the claim is valuable only for the gold deposited therein, but that such gold is so distributed and the claim so situated with reference to such deposits that partition thereof cannot be made without great prejudice to the owners, and that therefore it will be necessary to sell the claim and divide the proceeds of such sale between the parties, in accordance with their respective interests; that in order to preserve the interests of the alleged owners it is necessary to represent the claim and perform assessment work thereon each year of the value of at least \$100, and that the defendants, by threats of violence, have prevented the plaintiff from representing the claim or doing such assessment work thereon for the year 1903, and threaten to continue to so prevent the plaintiff, and to refuse him the beneficial use of the premises; that the defendant Schmidt has, during the two years then last past, mined and extracted a large amount of gold dust from the claim, of the value, according to the plaintiff's information and belief, of more than \$10,000, and refuses to account to the plaintiff for his share thereof; that the defendant Schmidt continues to mine and extract gold from the premises, and unless enjoined from so doing by the court will continue so to do, by which alleged unlawful acts it is alleged the plaintiff will suffer great and irreparable injury in his said property, and complications in the adjustment of the respective interests of the parties will thereby arise. The prayer is for a judgment of partition according to the respective rights of the parties, or, if a partition cannot be had without material injury to those rights, then for a sale of the premises and a division of the proceeds of such sale between the parties in accordance with their respective rights, after the payment of costs, and that pending the action the defendants be enjoined from interfering with the

plaintiff in representing or prospecting the claim, and be enjoined from mining or extracting gold therefrom, and also for an accounting for the gold already extracted, and for such other relief as may be proper.

In their answer, the defendants, among other things, in effect admit, by affirmatively alleging, that from November 2, 1900, until the alleged forfeiture afterwards mentioned, the plaintiff was the owner of the undivided one-half interest in the mining claim sought to be partitioned, and then proceed to allege that the defendant Schmidt performed the assessment work on the claim for the years 1901 and 1902, and that the plaintiff did not at any time contribute his proportion of such expenditure, nor in any way reimburse the defendant Schmidt, whereupon the defendant Schmidt "published in a weekly newspaper called 'The Council City News,' at Council City, Alaska, that being the newspaper nearest the aforesaid mining claim at said time, for once a week for ninety days, the first publication appearing in the issue of said paper published on the 27th day of September, 1902, a notice directed to said plaintiff, requiring him (the plaintiff) to contribute his proportion of the aforesaid expenditures within 90 days after the expiration of the publication of said notice, in which notice it was set forth that the defendant Schmidt had expended \$100 in performing the annual labor and making the improvements hereinbefore mentioned for the year 1901, and also that said defendant Schmidt had expended \$100 for the performance of the annual labor and making the improvements aforesaid for the year 1902, and said notice also contained a statement that, if the said plaintiff did not contribute his proportion of the expenditures aforesaid, as co-owner, plaintiff's interest in said claim would become the property of said defendant Schmidt, under section 2324 of the Revised Statutes of the United States" [U. S. Comp. St. 1901, p. 1426]; that the plaintiff did not, within 90 days after the publication of the notice, contribute or pay his share of the expenditure for either of the years mentioned; that no patent has been issued by the government for the claim; and that by reason of such neglect the plaintiff, prior to the institution of his action, ceased to have any interest as owner or otherwise in the mining claim, and his former interest therein thereupon vested in the defendant Schmidt. And "for a further and separate defense, and by way of accounting," the defendants set up in their answer that, if the plaintiff has or should be adjudged to have an interest in the mining claim, then and in that event the defendant Schmidt is entitled to have charged against the claim, as a lien upon any interest which may be adjudged the plaintiff, certain expenditures made by him in working and making improvements thereon, resulting in the expenditure, according to the allegations of the answer, by the defendant Schmidt, of the sum of \$17,607.14 during the years 1902 and 1903, during which time it is alleged he received from the claim \$3,800 in gold dust, leaving a balance expended upon the claim by Schmidt of \$13,807.14, for one-half of which it is alleged the interest of the plaintiff, Forderer, is liable, no part of which, it is alleged, has been paid, and for which it is charged the defendant Schmidt is entitled to a lien against the interest of the plaintiff in the

claim. The answer of the defendants also alleges that, in addition to the amount last specified, the interest of the plaintiff, should he be adjudged to have any interest in the claim, should be charged with \$100 expended by Schmidt in the annual work thereon. The prayer of the answer is that the action be dismissed and the plaintiff adjudged not to have any interest therein, and that, if he be adjudged to have an interest, then that the defendant Schmidt be adjudged to have a lien upon that interest in the full sum of \$6,903.57, and that such lien be enforced.

The reply of the plaintiff to the answer put in issue all of its allegations except such as are specifically admitted therein, among which is the admission that since the 2d day of November, 1900, the plaintiff "was, and he still is, the owner of an undivided one-half interest in and to the placer mining claim described in the complaint," and the further allegation that the defendant Schmidt performed the assessment work thereon for the years 1901 and 1902, of the value of \$100 for each year, but alleges that he (the plaintiff) contributed to the cost of said work and labor more than his share thereof, to wit, more than \$100, and in the month of April, 1901, at San Francisco, Cal., advanced to and paid the defendant Schmidt, for the purpose of said assessment work, and for other services to be performed, and improvements to be made upon the claim, and in outfitting and transporting the defendant Schmidt from San Francisco to the claim, the sum of \$1,730, and in addition thereto made to the defendant Schmidt a personal loan of \$100, no part of which has been repaid. In his reply the plaintiff further alleges, upon his information and belief, that the defendant Schmidt has not expended any money for work or labor or materials or improvements made upon the claim, except such money as was furnished to him by the plaintiff, and such as was extracted by him from the claim, one-half of which belongs to plaintiff, and for which he has at no time had any accounting. In his reply, the plaintiff also admits the publication by the defendant Schmidt, on or about the 27th day of September, 1902, in The Council City News, of a notice of forfeiture, a copy of which is attached, and which notice, the plaintiff alleges was published "wrongfully, unlawfully, and in bad faith on the part of said defendant Schmidt, with intent then and there fraudulently to divest the said plaintiff of his interest in said claim, notwithstanding the advances aforesaid made by the plaintiff; that the plaintiff, notwithstanding his said advances, and in order to prevent a cloud upon his title to said mining claim, on the 12th day of October, 1902, by his agent, Adolph Niemann, tendered to said defendant Schmidt the full sum of \$200, the amount demanded by said defendant Schmidt in his said notice of forfeiture, all of a legal tender money of the United States, but that said defendant Schmidt then and there refused to accept said sum or any part thereof." In his reply the plaintiff also admits that no patent to the claim has been issued by the government, and denies that any greater sum than \$3,500 has at any time been expended by the defendant Schmidt in working and improving the claim, and alleges that the gross output derived by him during the years that he worked the ground greatly exceeded his expenditures.

The issues thus presented by the pleadings on the part of both the plaintiff and the defendants are clearly of an equitable nature, and properly triable by the court under the provisions of the Alaskan statute above set out. The court therefore erred in dismissing the cause and remitting the plaintiff to an action in ejectment. The defendants in their answer expressly concede the original ownership by the plaintiff of an undivided one-half of the claim in question, and only seek to defeat that ownership by an alleged forfeiture thereof, which is itself a matter of equitable cognizance.

The judgment is reversed, and cause remanded for further proceedings.

AMERICAN CIGAR CO. v. UNITED STATES.

G. FALK & BRO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. January 17, 1906.)

Nos. 69, 70.

1. CUSTOMS DUTIES—PROTEST ON GOODS IN WAREHOUSE—TIMELINESS.

As to each of two importations of merchandise entered in bond for warehousing, the importers filed a protest, contending that duty should be assessed on the basis of the weight of the merchandise at the time of its withdrawal for consumption. As to one importation the protest was filed within 10 days after liquidation but prior to the time of withdrawal, and as to the other more than 10 days after liquidation but within 10 days after the refusal by the collector of a demand made at the time of withdrawal that allowance should be made for loss of weight. Under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], providing that protests shall be filed within 10 days after, but before the "ascertainment and liquidation of duties, as well in case of merchandise entered in bond as for consumption," held that the latter protest was duly filed, but that the former was invalid as premature, because filed before the cause of action had arisen.

2. SAME—PROTEST—CONSTRUCTIVE LIQUIDATION OF GOODS IN WAREHOUSE.

As to merchandise entered in bond for warehousing, held, that if upon withdrawal for consumption there has been a change in the condition of the merchandise which entitled the importers to a reliquidation of duty, and a demand for such reliquidation is made upon the collector at the time of withdrawal and is refused, such refusal constitutes a definite and final ascertainment and liquidation of duties which entitles the importers to file a protest under Customs Administrative Act June 10, 1890, c. 407, § 14, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933], which provides that a protest shall be filed within 10 days after, but not before the "ascertainment and liquidation of duties, as well in case of merchandise entered in bond as for consumption."

3. SAME—MERCHANDISE IN WAREHOUSE—ALLOWANCE FOR LOSS—SHRINKAGE IN WEIGHT.

Section 2983, Rev. St. [U. S. Comp. St. 1901, p. 1958], prohibiting the abatement of duties "for any injury, damage, deterioration, loss, or damage," sustained by merchandise while in warehouse, does not include a case of shrinkage in weight through evaporation of moisture. The loss provided for relates to actual reduction in the value or quantity of the merchandise.

4. SAME—ACCRUAL OF DUTY—CONDITION PRECEDENT—ACTUAL IMPORTATION.

The general rule is that revenue can be collected only upon the quantity or weight of the taxable subject-matter which is actually imported

and received by the importer so as to come into the consumption of the country.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 178.]

5. SAME—MERCHANDISE IN WAREHOUSE—DUTIABLE WEIGHT.

Tariff Act July 24, 1897, c. 11, § 33, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701], provides that duties based on the weight of merchandise in warehouse shall be levied on the weight at the time of entry. Customs Administrative Act June 10, 1890, c. 407, § 20, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950], as amended by Tariff Act October 1, 1890, c. 1244, § 54, 26 Stat. 624 [U. S. Comp. St. 1901 p. 1950], provides that merchandise withdrawn from warehouse shall pay the duty to which it is subject at the time of withdrawal. Act Dec. 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 420], provides that duty shall be imposed at the same rate as may be imposed upon like articles imported at the time of withdrawal. *Held*, that the duty on tobacco entered for warehouse should be based on its weight at the time of withdrawal and not of entry.

6. SAME—COMPLETION OF IMPORTATION—CUSTOMS CUSTODY.

The importation of merchandise is not complete while the goods remain in the custody of the officers of the customs.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 12.]

7. SAME—LIQUIDATION—FINALITY.

The liquidation of duties by the collector of customs is not necessarily final until after the goods have been delivered to the importer.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Customs Duties, § 197.]

Appeals from the Circuit Court of the United States for the Southern District of New York.

These causes come here upon appeals by the importers from a decision of the United States Circuit Court for the Southern District of New York (145 Fed. 574) affirming a decision of the Board of General Appraisers, G. A. 5,695 (T. D. 25,353), which sustained the action of the collector.

Hatch, Keener & Clute (J. Stuart Tompkins, of counsel), for importers.

Henry A. Wise, Asst. U. S. Atty.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

TOWNSEND, Circuit Judge. In the case of American Cigar Company v. United States the merchandise in question, leaf tobacco, imported under the provisions of the act of July 24, 1897, was duly placed in bonded warehouse, properly classified for duty under paragraph 213 of said act (chapter 11, § 1, Schedule F, 30 Stat. 169 [U. S. Comp. St. 1901, p. 1648]), and assessed for duty on the basis of weight "at the time of its entry," under section 33 of said act (chapter 11, 30 Stat. 213 [U. S. Comp. St. 1901, p. 1701]). There is nothing in the record to show that this assessment was not based upon the actual weight of the tobacco upon its arrival at the port of New York. Some time afterwards, when the importer made a withdrawal of tobacco from the warehouse, it was ascertained that it weighed considerably less than at the date of entry. The importer,

however, within 10 days after liquidation and before withdrawal of the tobacco from bond, had filed a protest, claiming that under the provision of Customs Administrative Act June 10, 1890, c. 407, § 20, 26 Stat. 140 [U. S. Comp. St. 1901, p. 1950] it should be required to pay only the charges to which such merchandise should be subject at the time of its withdrawal for consumption. No other ground of protest was stated or is claimed herein. The Board overruled the protest, on the ground that it was prematurely filed, because no cause of action could arise—

“Until the withdrawal of the merchandise from bond, for, until then, it could not be assumed that the collector would refuse to reliquidate the entry upon the basis claimed by the importer, nor could it be known or ascertained that there was any change in the weight of the tobacco until withdrawn and actually weighed.”

Furthermore, the original liquidation might be subject to revision by reason of alteration of the law, or of such changes in the character or condition of the merchandise as would make it the duty of the collector to revise his original classification. Section 14 of the customs administrative act (chapter 407, 26 Stat. 137 [U. S. Comp. St. 1901, p. 1933]) provides that all objections of this kind in the nature of protests must be filed within 10 days after “but not before such ascertainment and liquidation of duties, as well in case of merchandise entered in bond as for consumption.” If upon such withdrawal it should appear that there was a change in the weight of the merchandise, and the collector should refuse to reconsider his previous action or to acquiesce in the claim of the importer, such refusal would constitute a definite and final ascertainment and liquidation of duties, against which a protest might be filed, thereafter, but not before.

The decision of the court below in *American Cigar Company v. United States* is affirmed, on the ground that the protest was prematurely filed.

In *Falk v. United States* the tobacco was duly entered under bond for warehousing without payment of duty. When it was subsequently withdrawn, the importer claimed that the tobacco had lost weight by reason of evaporation of moisture, and demanded that it be reweighed, claiming that it was dutiable upon the basis of the weight on withdrawal and not on entry. The collector refused the demand of the importer, and assessed duty on the weight of the tobacco as returned by the United States weigher at the time of importation. Within 10 days after such refusal this protest was filed, and the questions as to the propriety of the action of the collector, of the Board in affirming his action, and of the court below in sustaining the decision of the Board are properly before this court for review. The court below reached its conclusion, on the ground that the case was governed by the provision of section 2983 of the Revised Statutes [U. S. Comp. St. 1901, p. 1958] that:

“In no case shall there be any abatement of the duties or allowance made for any injury, damage, deterioration, loss or leakage sustained by any merchandise, while deposited in any public or private bonded warehouse.”

We are unable to concur in this conclusion. There is no claim herein for any injury or loss sustained by the merchandise in ques-

tion. None of the taxable subject-matter has been lost. All of the other terms, "injury, damage, deterioration, leakage," refer to actual reduction in the value or quantity of the merchandise itself. That the loss provided for in this section relates solely to the loss of the merchandise subject to duty is further indicated by the language of section 2964 [U. S. Comp. St. 1901, p. 1946], which provides for an abatement or refund of duties in case of "actual injury or destruction, in whole or in part, of any merchandise by accidental fire or other casualty" when in a warehouse. Thus, by these two sections, the importer is protected in case of loss of warehoused merchandise by casualty, the government is protected in case of loss of merchandise from any other cause. It is clear that evaporation of moisture is not "loss * * * sustained by * * * merchandise." This merchandise was dutiable under the provisions of paragraph 213 of the act of 1897, as wrapper tobacco unstemmed, at 1.85 cents per pound. The difference between its weight when entered in the warehouse and when withdrawn for consumption was due to evaporation of moisture while in the warehouse. The general rule is that revenue can be collected only upon the quantity or weight of the taxable subject-matter which is actually imported and received by the importer so as to come into the consumption of the country. *Marriott v. Brune*, 9 How. 619, 13 L. Ed. 282; *Lawder v. Stone*, 187 U. S. 231, 23 Sup. Ct. 79, 47 L. Ed. 178. We have seen that the provision as to leakage and loss has no application to evaporation of moisture. This case is analogous to *Seeberger v. Wright & Lawther Co.*, 157 U. S. 183, 15 Sup. Ct. 583, 39 L. Ed. 665, where the difference in weight and consequently in rate was due to the removal of nontaxable accidental impurities. There, the United States Supreme Court held that where the amount of such impurities could be fixed at a certain percentage it should be deducted from the taxable product and allowance made therefor.

Section 33 of the act of 1897 provided as follows:

"That when duties are based upon the weight of merchandise deposited in any public or private bonded warehouse, said duties shall be levied and collected upon the weight of such merchandise at the time of its entry."

Customs Administrative Act June 10, 1890, c. 407, § 20, 26 Stat. 140, as amended in Tariff Act October 1, 1890, c. 1244, § 54, 26 Stat. 624 [U. S. Comp. St. 1901, p. 1950], provided as follows:

"Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within three years from the date of original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal."

This section was amended by Act of December 15, 1902, c. 1, 32 Stat. 753 [U. S. Comp. St. Supp. 1905, p. 420], by the addition of the following:

"Provided, that the same rate of duty shall be collected thereon as may be imposed by law upon like articles of merchandise imported at the time of the withdrawal."

In *Mosle v. Bidwell*, 130 Fed. 334, 65 C. C. A. 533, in discussing this act as amended, this court held that the amendment of 1902 was declaratory of the meaning of the statute prior to said amendment,

and that its meaning as thus declared was that no greater or different duties could be imposed than those to which other like goods imported at the time of withdrawal would be subject. We think this decision is conclusive upon the question herein. If other like goods had been imported at the time when these goods were withdrawn, duty would have been assessed thereon according to their weight at such time. That this language should not be construed to mean the duties assessed on the original entry is shown by the language of section 2,970 of the United States Revised Statutes, which is as follows:

"Any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of the original importation on payment of the duties and charges to which it may be subject by law at the time of such withdrawal; and after one year from the date of the original importation, and until the expiration of three years from such date, any merchandise in bond may be withdrawn for consumption on payment of the duties assessed on the original entry and charges, and an additional duty of ten per centum of the amount of such duties and charges."

Section 20 of the customs administrative act, as shown above, reenacted the provision as to payment of duties on withdrawal. But in section 2970 the distinction is sharply drawn between "duties * * * to which it may be subject by law at the time of withdrawal" and "duties assessed on the original entry."

It is well settled that the importation is not complete while the goods remain in the custody of the officers of customs (*Fabbri v. Murphy*, 95 U. S. 191, 24 L. Ed. 468), and that the liquidation by the Collector is not necessarily final until after the goods have been delivered to the importer (*Hartranft v. Oliver*, 125 U. S. 525, 528, 8 Sup. Ct. 958, 31 L. Ed. 813).

The decision of the court below in *G. Falk & Bro. v. United States* is reversed.

PAINE v. WILLSON.

(Circuit Court of Appeals, Eighth Circuit. June 8, 1906.)

No. 2,317.

1. COURTS—FEDERAL COURTS—STATE RULES OF PROPERTY PREVAIL IN.

Rules of property established by the decisions of the highest judicial tribunal of a state prevail in the federal courts in the determination of the rights of parties to property situated therein where no question of right under the Constitution and laws of the nation and no question of general or commercial law is involved.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 958-968.

State laws as rules of decisions in federal courts, see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. TAXATION—DESCRIPTION IN ASSESSMENT IN NORTH DAKOTA—SUFFICIENCY.

The decision in *Sheets v. Paine*, 86 N. W. 117, 10 N. D. 103, established the rule that in North Dakota a description of land in an assessment roll, which is headed "Real Estate Assessment of Osago Township," etc., but which omits from the particular description the numbers of the government township and range in which the land is situated, is fatally

defective, although the fact is admitted or proved that the township of Osago was organized from the government township in which the land is situated, and this rule prevails in the federal courts in determining rights to property in that state.

[Ed. Note.—For cases in point, see vol. 45, Cent. Dig. Taxation, §§ 720-735.]

3. TRIAL—EVIDENCE—WAIVER OF OBJECTIONS MAKES EFFECTIVE.

Parties may by stipulation, by silent acquiescence, or by failure to except to admitting rulings waive objections to inadmissible evidence, on the ground that it is not the best, on the ground that it was not properly taken, and on other grounds. Evidence thus received may establish the fact in controversy as conclusively as the best evidence regularly procured.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 260-266; vol. 20, Cent. Dig. Evidence, § 2420.]

Hook, Circuit Judge, dissenting.

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the District of North Dakota.

Seth Newman, Daniel B. Holt, and John S. Frame, for appellant.
C. J. Murphy and Fred S. Duggan, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This is a suit in equity brought by Frank A. Willson to remove the cloud of certain tax deeds and of certain certificates of tax sales held by the defendant, Paine, from his title to the southwest quarter of section 10, in township 150 north, of range 60 west, in Nelson county, in the state of North Dakota, and to quiet the title thereto in the complainant. A decree to that effect was rendered. In reaching its conclusion the court below held that two certificates of tax sales were void because the following description in the assessor's roll, upon which the levies and sales were based, was fatally defective:

Real estate assessment of Osago Township, Nelson County, North Dakota, for the year 1892:

Owner's Name.	Description.	Section or lot.	Twp. or Block.	R.
			150	60
Frank A. Willson.	S. W. ¼	10		

Opposite the name of Willson there was no number of any township or of any range, and there were no ditto marks. The court below was of the opinion that the absence of the number of any township or of any range and of any ditto marks in this description was fatal to the certificates of sale, under the decision of the Supreme Court of North Dakota in *Sheets v. Paine*, 10 N. D. 103, 105, 86 N. W. 117, and this ruling is assigned as error.

The question which this specification of error presents is not whether or not this court would be of the opinion that the description here presented was sufficient in the absence of controlling authority. It is whether or not the Supreme Court of North Dakota has decided that such a description is fatally defective, for the decision of that court upon such a question establishes a rule of property in that state which

must prevail in the federal courts. *Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260; *Percy v. Cockrill*, 4 C. C. A. 73, 82, 53 Fed. 872, 877; *Madden v. Lancaster Co.*, 12 C. C. A. 566, 570, 65 Fed. 188, 192; *Union Pac. R. Co. v. Reed*, 25 C. C. A. 389, 394, 80 Fed. 234, 239; *Traer v. Fowler* (C. C. A.) 144 Fed. 810, decided by this court at the December term, 1905. Counsel for the appellant deny, and counsel for the appellee assert, that the Supreme Court of North Dakota has so decided in *Sheets v. Paine*, and that this court has so held in *Paine v. Germantown Trust Co.* (C. C. A.) 136 Fed. 527. Let us, in the first instance, present clearly to our minds the question decided in these cases and the way in which it was presented.

In *Sheets v. Paine* the description in the assessment roll was under the heading: "Real property assessment in the town of Field, county of Nelson, North Dakota, 1890," and it disclosed the same defect as that which appears in the case at bar. The land there in controversy was in township 150, range 58. These numbers did not appear in the description of this land upon the assessment roll. Counsel for the appellant sets forth in his brief a portion of the record in that case, which is conceded to be correct, and from which it appears that the counsel for the defendant asked this question: "Now, Mr. Gordon, the township of Field is composed of what congressional township?" The plaintiff objected to the question, "on the ground that it is incompetent, irrelevant, immaterial; the assessment book cannot be varied or explained by parol testimony." There was no ruling or exception, and the witness answered, "It is township 150, range 58, known as Field township." After the examination had proceeded through two pages of printed testimony, the defendant asked the witness this question: "Is it a fact that that congressional township was organized into the civil township of Field?" No objection was made to this question, and the witness answered "Yes." When the case was presented to the Supreme Court of North Dakota upon this record, it held that the description was fatally defective.

In *Paine v. Germantown Trust Co.* (C. C. A.) 136 Fed. 527, the description in the assessor's roll was headed: "Real property assessment for the township of Dahlen, county of Nelson, and state of North Dakota, for the year 1894." The land was in government township 154, range 57, and these numbers did not appear in the description of the complainant's land in the assessor's roll. The parties stipulated at the trial that "the township of Dahlen, Nelson county, North Dakota, named in the heading of each of said assessment rolls, is and was at the time said assessments were respectively made the government township numbered 154 in range 57 in said county," and that the stipulation was "made for the purpose of use as evidence of the facts herein stated upon the trial of this action, and to dispense with the necessity of introducing the records or certified copies of the records bearing upon said matter." That portion of this agreement which contained the contract that Dahlen township was government township 154, range 57, was objected to by the defendant on the grounds "that the same is immaterial, incompetent, and that the assessment roll cannot be aided in determining the description of the land attempted to

be described by oral or other testimony than the assessment roll itself, but must be determined from the face of the assessment roll itself." These objections were overruled, and an exception was reserved, so that when the case came to this court all objections to the character of the evidence of the fact that the civil township of Dahlen was the government township 154 of range 57 had been carefully eliminated by the stipulation, that fact had been admitted, and the only question left was its effect. This court held that the decision in *Sheets v. Paine* was controlling, that under it the fact that the government township was the civil township was immaterial, and that the description was fatally defective. These decisions appear to rule the case in hand. Counsel for the appellant, however, attempt to distinguish them. They say that in the *Sheets* case the fact that the civil township of Field was the government township 150, range 58, was proved by parol testimony over the objection of the plaintiff, and that in the *Germantown Trust Company Case* the stipulation that the civil township of Dahlen was the congressional township 154, range 57, was received in evidence over the defendant's objection, while in the case at bar the stipulation of the fact that Osago township is government township 150, range 60, was received in evidence without objection. But while the court held in the *Sheets Case* that the identity of the civil township and the government township could not be proved by parol, this was not all of its decision, nor was it the basic rule declared by the court in that case upon which the objection to the evidence was sustained. The gist of that decision was that the fact of the identity of the townships could not be proved to modify or aid the assessment by any evidence outside the record of the assessment itself. The court quoted its own words in *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, where it declared that "the law requires a definite record, and no other evidence of the assessment is competent," said that: "To this it may be added that the rights of a purchaser at a tax sale are fixed at the time of his purchase, and his title depends upon the validity of the proceedings had anterior to the purchase. Nor can his rights be enlarged by any evidence introduced to supply fatal omissions which constitute defects which are fundamental and jurisdictional to the tax," and decided that the absence of the numbers of the township and range was fatal to the description. In the case of the *Germantown Trust Company* the defendant expressly stipulated that the agreement that the civil and congressional townships were identical should take the place of, and obviate the production of, the records which proved that fact, and thereby limited his objection to his contention "that the assessment roll cannot be aided in determining the description of the land attempted to be described by oral or other testimony than the assessment roll itself, but must be determined from the face of the assessment roll itself." This stipulation left the fact of the identity of the townships conclusively established in that case, for there was no evidence to the contrary, and no question of the character of the proof remained for consideration when the case reached this court. Forms and rules for the taking and introduction of evidence are prescribed by statutes and de-

cisions, which give to the opposing party the right to the production of the best evidence of a fact, but he may waive these rules, permit the introduction of inferior evidence, or stipulate the existence of the fact, and when he does so that fact is deemed established by the best evidence by which it is provable. *U. S. v. Homestake Min. Co.*, 54 C. C. A. 303, 311, 117 Fed. 481, 489; *Walton v. Railway Co.*, 6 C. C. A. 223, 225, 56 Fed. 1006, 1008; *National Loan & Investment Co. v. Rockland Co.*, 36 C. C. A. 370, 372, 94 Fed. 335, 337. The result is that the alleged distinction between the former cases and that in hand is not founded in fact. Every question of the competency of the evidence in the Germantown Trust Company Case to prove the identity of the townships had been extracted before that case reached this court, and the only question presented for decision by the record was whether or not the description could be aided by any proof or agreement of the fact of the identity of the townships de hors the description itself, and whether or not the description was sufficient. This court answered both these questions in the negative.

Attention is called to the fact that the stipulation in the case at bar recites not only that Osago township is government township 150, range 60, but also that it was duly organized as a civil township under that name by the board of county commissioners of Nelson county in 1884 from government township 150, range 60, while the proof and stipulation in the former cases are limited to the fact that the civil townships are the government townships, respectively. There is, however, but one way in which civil townships can be brought into being under the laws of North Dakota, and that is by their organization, in accordance with the statutes of that state, by the boards of county commissioners of the counties in which they are respectively situated. Hence an agreement or proof of the fact that a civil township is a government township without more is a stipulation or proof, as the case may be, of the fact that it was duly organized from the government township by the proper board of county commissioners.

Finally, counsel contend that the decision that the absence of the numbers of the township and range from the description in the Sheets Case was a fatal defect is not controlling, because the court also decided in that case that the description was defective for another reason. The position is untenable. Where a court places its ultimate adjudication upon two or more propositions of law which it properly discusses and decides, either one of which is sufficient to sustain its conclusion, each decision of each of the propositions is within the limits of the case, and is a conclusive and binding adjudication of the court. *Union Pac. Ry. Co. v. Mason City & Ft. Dodge R. Co.*, 64 C. C. A. 348, 354, 128 Fed. 230, 236. The Supreme Court of North Dakota held in the Sheets Case that the absence from a description in an assessment roll headed with the name of the civil township, which had been organized from the government township in which the land was situated, of the numbers of the government township and range was a fatal defect. 10 N. D. 105, 86 N. W. 117. It is true that it also held that parol evidence that the plaintiff's land was located in the government township was incompetent. This, however, was not the

gist of its decision. The essence of it was that no evidence was effective to cure the absence of these numbers from the description, and that the fact that the government township had been duly organized into the civil township whose name headed the list was immaterial.

In *Paine v. Germantown Trust Company*, where the fact that the civil township of Dahlen, whose name headed the roll, had been organized from the government township in which the land was situated had been admitted, and all objections to the character of the proof of this fact had been eliminated by a written stipulation, this court so construed the decision in the *Sheets Case*, and held in deference to it that the absence of the numbers of the government township and range was fatal to that description. In every essential feature pertinent to the sufficiency of the description in the case at bar its facts are identical with those in the *Sheets Case* and in the case of the *Germantown Trust Company*, and the description in hand cannot be sustained without disregarding or overruling the decisions in those cases. The conclusion is that the decision in the *Sheets Case* is controlling in this case, that the description in the assessment roll was fatally defective, and that the decree below must be affirmed.

HOOK, Circuit Judge (dissenting). I am constrained to express my dissent in this case, not alone because I think that the opinion of the Supreme Court of North Dakota in *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117, has been misapprehended, but also for the reason that the rule of the foregoing opinion may seriously interfere with the taxing machinery of that state. In effect, it is said that the original descriptive designations of lands by section, township, and range as made at the survey thereof by the national government are sacred and unalterable, and are not subject to a rechristening by the state authorities for purposes of taxation; that the tax rolls must describe the lands as the national government described them, although a change of descriptive designation has been made by the lawfully constituted authorities, acting under the laws of the state, and recorded in the public records of the counties in which the lands are located. With equal reason it may be said that, if after a quarter section of land adjacent to a town has been platted into outlots, with a selected name for the subdivision specified upon the plat, the plat duly certified and acknowledged as required by law, and recorded in the office of the register of deeds of the county, should any particular numbered lot in the subdivision so created and made matter of public record get upon the assessment roll for taxation without designation of the section, township, and range in which it is located, the tax imposed would be absolutely void because of a fatal defect in description. This would be so obviously at variance with well-established modes of procedure in assessment and taxation as to attract attention. But it is very properly observed that the question is not what the opinion of this court would be in the absence of controlling authority, but it is whether such a description as that before us has been held to be fatally defective by the Supreme Court of North Dakota. It is therefore important (1) to examine the description before us and the proof of-

ferred to sustain it, and (2) to ascertain what was determined by that court in the case of *Sheets v. Paine*. In the case now before us Willson sued Paine to remove the cloud of certain tax claims upon his property, which he described in his bill of complaint as the southwest quarter of section 10, in township 150, of range 60 west, in Nelson county, North Dakota. The assessment roll which was at the foundation of Paine's tax claim showed that the land was in Osago township, Nelson county, but it did not show in specific terms that it was in township 150 of range 60 of the government survey. Thereupon Paine, to uphold his tax claim, offered a stipulation by counsel that prior to the tax proceedings in question Osago township had been duly organized as a civil township out of township 150 of range 60 of the government survey by the board of county commissioners of Nelson county, and it is said that upon the authority of *Sheets v. Paine* the stipulation was incompetent. There was statutory authority for the action of the board in giving the township a new name. A North Dakota statute provided that, upon petition of a majority of the legal voters of a township according to government survey to be organized as a civil township, the board of county commissioners should forthwith proceed to fix and determine the boundaries of such new township, to name the same, and to make a full report of all its proceedings in relation thereto, and file the same with the county auditor. Therefore the action of the board created a legal identity between Osago township and township 150, range 60, of the government survey. It was an official rechristening of the township under the authority of law, and the evidence of it was upon the public records of the county. The proof tendered covered the acts and proceedings of the board. There was no attempt whatever to use oral evidence to supplement a defective assessment roll. Osago township and township 150 of range 60 were the same in law, and it was entirely proper for the taxing officers to adopt either description. The land owner who contested the validity of the tax could not destroy the effect of what was lawfully done and shown by the public records by describing the land in his bill of complaint according to the government survey.

As to *Sheets v. Paine*, 10 N. D. 103, 86 N. W. 117. The closest scrutiny of the opinion in that case does not disclose that such a question as that before us was presented or decided. Not a word of discussion of it can be found. The court there held that to make the figures 150 under the word "township" and 58 under the word "range" applicable to a description of a quarter section further down on the page, there should have been ditto marks opposite it and under the figures above; and then the court said:

"To cure this glaring omission in the assessment, the defendant, against objection, introduced oral evidence tending to show that the lands opposite the name of Andrew Lewis were in fact located in congressional township numbered 150 of range 58. This evidence was wholly incompetent to supply a radical defect in description in an assessment."

Again, in considering the tax of another year, as to which there was a similar defect in the assessment roll, the court said:

"This assessment was sought to be bolstered up by oral evidence to the effect that the lands in question were in fact situated in congressional township numbered 150 of range 58. The evidence was incompetent for reasons already advanced in this opinion."

The syllabus of that case, prepared by the court, as required by law, contains further indication, if any is needed, of what it intended to and did decide. The first paragraph, after reciting the condition of the assessment roll as I have described it so far as it related to the point now before us, thus proceeds:

"Against objection, defendant offered oral evidence tending to show that the lands were in fact situated in township 150 of range 58. *Held*, that the description was fatally defective, and could not be cured by oral evidence. The assessment was totally void, and the defect in the description was one going to the ground work of the tax, and jurisdictional."

Now what is the fair construction of that opinion? It is that oral evidence is not admissible to cure a defective description of a tract of land in a jurisdictional step in a tax proceeding. And while courts may differ in the application of it, the doctrine as so expressed is not new. It finds support everywhere. But to fit it to the case before us it needed and has received from my associates a radical extension and amplification, for there was no attempt here to introduce oral evidence. The opinion in *Sheets v. Paine* does not disclose what the oral evidence was that was offered, but excerpts from the record in that case furnished by counsel show that Paine sought to prove by the testimony of a witness that township 150 of range 58 government survey was identical with Field township, Nelson county. The Supreme Court of North Dakota held that this evidence was incompetent, and it is as clear as the language of an opinion can make it that stress was placed upon the fact that the evidence was oral, and that being oral it was inadmissible. That such is the point of the opinion of that court seems to me to be obvious from the most cursory reading.

Attention is directed by my associates to the fact that there were no rulings of the trial court in *Sheets v. Paine* upon the objections to the oral evidence, and no exceptions of counsel; the inference to be drawn being that the case on appeal was considered in the same light as though the best evidence of which the case was susceptible had been received. This, I take it, is without significance for two reasons: (1) The Supreme Court of North Dakota in its opinion attached no importance to those omissions at the trial, and did not even direct attention to them. It assumed that the question whether oral evidence was admissible was properly presented, and it certainly is not our province to search the record before that court for facts and conditions not recited or referred to in its opinion. We should take that opinion as we find it. The inquiry here is, what did the Supreme Court of North Dakota decide in *Sheets v. Paine*? It expressly said that the evidence was oral, that it was objected to, and that because it was oral it was inadmissible. And this presents the true meaning, scope, and purport of that case in its relation to the case now before us, which does not involve the admissibility of oral evidence. These observations apply with equal force to the one question to which an

objection was not noted at the trial of *Sheets v. Paine*. Other questions of similar purport had been asked and properly objected to, on the ground that the matter was not a proper subject for oral testimony. Even if counsel should have incumbered the record with the constant repetition of the same objection to like questions, which is doubtful, the Supreme Court of the state ignored the omission, and expressly recited that the evidence was objected to.

2. The trial of *Sheets v. Paine* was to the court of first instance without a jury. The defendant was defeated, and he appealed to the Supreme Court. The North Dakota practice in cases tried without a jury is similar to that in equity in the federal courts, in that all of the evidence, whether objected to or not, must be received. Either party may have his objections to the evidence noted as it is offered, but the trial court does not rule on them, and consequently no exceptions are taken. On appeal to the Supreme Court the defeated party may demand and receive a trial anew of the entire case, in which event all incompetent and irrelevant evidence properly objected to at the trial is disregarded by the Supreme Court. Section 5630, Rev. Codes N. D. 1899. In the opinion in *Sheets v. Paine* it is specifically recited that Paine demanded a trial anew of the entire case. In the prevailing opinion in the case at bar reference is made to *Power v. Bowdle*, 3 N. D. 107, 54 N. W. 404, 21 L. R. A. 328, 44 Am. St. Rep. 511, as having been followed in *Sheets v. Paine*. The question in that case was as to the admissibility of evidence (necessary parol) to show the existence of a general usage of language in designating lands by certain symbols, which the court had previously decided to be without intelligible signification. The court held that it took judicial notice of the general usage of language, and that since the symbols relied on to furnish a good description of lands upon an assessment roll were unintelligible, the evidence was not admissible. There is much in this that is in accord with the later case of *Sheets v. Paine*, but nothing that is pertinent to the case at bar. There is, however, an observation in *Power v. Bowdle* which indicates that even the rule excluding parol evidence which that court announced was not deemed to be of unvarying application. It said:

"It is also true that where premises have acquired a name or description by repute, though not technically correct, the same will suffice for purposes of taxation, and parol evidence is competent to show the name acquired by repute coincides with the proper description of such land."

As authority for this doctrine, which it approved, the North Dakota court cited *Gilfillan v. Hobart*, 34 Minn. 67, 24 N. W. 342, in which it was said:

"We understand the defendants' position to be that the description of the lots as being in Bottineau's addition was sufficient, if that was a designation by which they were commonly known. This is in analogy, we take it, to the rule in accordance with which a person may, by reputation, acquire a name, which, although not the name originally given to him in baptism or otherwise, will be a good name for and against him in business transactions and in legal proceedings. No reason is perceived why this rule should not be applicable to the names of things as well as of persons, nor why the owner of property, upon which he has failed to pay taxes, should not be bound to know

that by common repute his property has acquired a well-known designation, differing from its original or technically accurate designation, nor why such reputed designation should not be sufficient in tax proceedings. A description or designation which ascertains the premises, as a well-known and commonly reputed one does, must be sufficient."

As to the case of *Paine v. Germantown Trust Company* (C. C. A.) 136 Fed. 527, decided by this court upon the authority of *Sheets v. Paine*, the opinion in that case discloses nothing indicating that the evidence offered to explain a defective description upon the assessment roll consisted of records of the county in which the land was located. On the contrary, Judge Philips, who spoke for the court, said in the opinion:

"The appellant here sought to show by parol evidence that Dahlen township embraced the government surveyed township 154 of range 57. Of this the court said in the *Sheets Case*"

—And then followed the quotation from the decision of the Supreme Court of North Dakota in *Sheets v. Paine* that oral evidence was inadmissible.

Recourse is had to parts of the record in the *Germantown Trust Company Case* not shown in the opinion, for the purpose of indicating that the evidence there in question was really record evidence or its equivalent, although I think that the above quotation from the opinion demonstrates quite clearly that the court treated the evidence as oral, and therefore decided the case upon the authority of *Sheets v. Paine*. It is said that the parties to the *Germantown Trust Company Case* stipulated at the trial that:

"The township of Dahlen, Nelson county, North Dakota, named in the heading of each of said assessment rolls, is, and was at the times said assessments were respectively made, the government township numbered 154 in range 57 in said county."

And that the stipulation was "made for the purpose of use as evidence of the facts herein stated upon the trial of this action, and to dispense with the necessity of introducing the records or certified copies of the records bearing upon said matter."

An inspection of the stipulation from which the above parts were excerpted discloses this situation: It consists of 12 separately numbered paragraphs relating to matters of evidence pertinent to the case. Most of them, but not all of them, refer to public records concerning the levy and collection of taxes. The extract above quoted as to the identity of Dahlen township is embodied in the third paragraph. The eleventh paragraph is exclusively a recital that, aside from a tender in the bill of complaint, there had been no tender or offer to repay to the tax title holder the taxes paid by him. This paragraph does not and could not pertain to a matter of record. Its subject-matter rested in parol. The twelfth and last paragraph of the stipulation contains the recital above quoted that the stipulation was made for the purpose of use as evidence of the facts therein stated, and to dispense with the necessity of introducing the records or certified copies of the records. Now, in the prevailing opinion in the case at bar this last paragraph is brought into immediate juxta-

position with the excerpt from the third. Almost any construction of a written instrument may result from a hitching together of widely separated clauses. It seems to me to be doubtful that the intention of the parties to a writing is correctly shown by taking a clause from the end, and bringing it forward to a connection with one near the beginning, when there are passed on the journey other matters which may show the sense of the combination to be inexact. In none of the parts of this stipulation referring to official records is there the slightest mention that they relate to or afford proof of the fact that the township of Dahlen was identical with the government township. These things being true, I question whether it is a reasonable inference that the stipulation in that case was one that the records of the county showed the identity between the civil township and the township of the government survey. Again, the stipulation in that case is not like the one now before us. At the most, the former is merely a stipulation that a certain civil township was identical with the township according to the government survey. This might mean that the identity was merely casual or accidental. It is not a stipulation that the public officers, acting under the express authority of law, have duly and purposely made them identical. It is familiar doctrine that where the law requires certain facts of a jurisdictional character to be shown upon the records, and not to rest merely in parol, a stipulation of counsel that the facts exist is not sufficient. But, however all this may be, the question always turns back to the proper construction of *Sheets v. Paine*, and that, it seems to me, is not doubtful. When lands adjacent to a city are platted into outlots, or lands within a city are platted into blocks and lots with streets and alleys, how do the descriptions of the various minor parcels get upon the assessment rolls for purpose of taxation? The taxing officers find them upon the public records when the plats are recorded, as required by law. May a court do less when a plaintiff chooses to describe the land claimed in his petition by the numbers of the government survey, instead of by the new name appearing upon the records?

When the Supreme Court of North Dakota decides that the description by government survey of lands assessed and taxed cannot be changed by official acts of public officers, though authorized by state law, that the description of such property upon the assessment roll must be in every respect according to original numbers of township and range, and that resort cannot be had to the public records of the county showing a change of designation or description, such decision will of course be binding upon this court in a case arising in that state. But I take it that while that court may so decide, it has not yet done so.

MISSOURI, K. & T. RY. CO. v. KIDD.

(Circuit Court of Appeals, Eighth Circuit. June 23, 1906.)

No. 2,293.

1. COURTS—RULES—DISCRETION IN ENFORCEMENT.

Parties to an action cannot, without the consent of the court, stipulate for the abrogation of rules which are formulated for its own benefit and are designed to facilitate the proper discharge of its own duties; when rules of such a character are disregarded, it is discretionary with the court whether it will enforce the prescribed penalty, and, in the absence of gross abuse of such discretion, its order in the premises will be respected on appeal or writ of error.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 294, 295; vol. 44, Cent. Dig. Stipulations, § 2.]

2. APPEAL—DISMISSAL—FAILURE TO FILE BRIEFS.

The dismissal of an appeal on the ground that the appellant did not file its brief until nearly three years after the time fixed therefor by the standing rule of the court and by its order made in the cause was within the discretion of the court, and the case was not altered by the fact that the delay was authorized by a stipulation of the parties made without the court's consent nor because a brief was filed a short time before the dismissal.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. §§ 3129, 3104—3108; vol. 44, Cent. Dig. Stipulations, § 2.]

In Error to the United States Court of Appeals in the Indian Territory.

For opinion below, see 88 S. W. 308.

From a judgment by Kidd against the railway company in a trial court the latter appealed to the United States Court of Appeals in the Indian Territory. The record on appeal was filed May 15, 1901. The rules of that court require the filing of briefs within short periods of time near to the day of submission and provide that in case of default the cause shall be dismissed when it is reached upon the regular call of the docket. On October 1, 1901, counsel stipulated that appellant's brief should be filed November 1, 1901, that of appellee within 30 days thereafter, and the reply brief of appellant within 15 days after the brief of appellee was filed. On October 5, 1901, the cause was reached in the appellate court, and was submitted upon oral argument for the railway company. The court ordered that the briefs be filed within the times specified in the stipulation. Thereafter counsel agreed among themselves for an indefinite postponement of the time for filing briefs but the consent of the court thereto was never obtained. Nearly three years afterwards, September 29, 1904, the appellant railway company filed its brief, but on the 19th of the following month the appeal was dismissed for failure to comply with the rules of the court (88 S. W. 308). In a brief opinion the court recited that no briefs had been filed by either party, evidently overlooking the belated brief of appellant. In a petition for rehearing this fact was presented to the court, and it was also asserted that the agreement of counsel for the indefinite postponement of the time for filing briefs was with the concurrence of the judge to whom the cause had been assigned for opinion. This assent of the judge was implied from the fact that he indorsed an order upon the petition for a rehearing which resulted in its filing with the clerk and its presentation to the full bench. Notwithstanding this, the petition for rehearing was denied by the court. To review the action of that court this writ of error was prosecuted. The railway company also seeks a review of alleged errors in the trial court in which the original judgment was obtained.

Clifford L. Jackson, for plaintiff in error.

William T. Hutchings, for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

HOOK, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Parties to an action may by stipulation waive rights that are personal to them, but they cannot without the consent of the court stipulate for the abrogation of those rules that are formulated for its own benefit and are designed to facilitate the proper discharge of its own duties. When rules of the latter character are disregarded it is discretionary with the court whether it will enforce the prescribed penalty and in the absence of a gross abuse of such discretion an order of the court in the premises will be respected on appeal or writ of error.

The rule of the Court of Appeals in the Indian Territory requiring the filing of briefs within stated times is a reasonable one. It is designed to assist that court in its labors and to facilitate the dispatch of its business; and so of the special order of that court relaxing the rule in this case in definite and specified particulars. Manifestly, if counsel without the consent of the court could dispense with compliance with such rules and orders the speedy and orderly dispatch of its labors might be seriously interfered with. The fact that courts generally observe the convenience and desires of counsel as expressed in their stipulations gives rise sometimes to the impression that conformity with the rules of procedure is solely a matter for the determination of the parties litigant. This may be so in some cases but certainly not in all. There is a well-defined line of distinction between those rules that are for the benefit of the court and to aid it in the discharge of its duties and those that are for the benefit of parties litigant. *Reynolds v. Lawrence*, 15 Cal. 360; *Spangler v. San Francisco*, 84 Cal. 12, 23 Pac. 1091, 18 Am. St. Rep. 158; *Manns, etc., Co. v. Templeton*, 149 Ind. 706, 44 N. E. 1108; *Lehigh, etc., Co. v. Scallen*, 61 Minn. 63, 67, 63 N. W. 245; *Gittings v. Baker*, 2 Ohio St. 21, 23; *Hughes v. Kelly*, 2 Va. Dec. 588, 30 S. E. 387; *Falkenberg v. Gorman*, 71 Wis. 8, 36 N. W. 599; *Moulder v. Kempff*, 115 Ind. 459, 17 N. E. 906; *Spencer v. McMaster*, 3 Wyo. 105, 3 Pac. 798.

The railway company did not file its brief until nearly three years had elapsed after the time fixed therefor by the standing rule and the order of the court. We cannot say, therefore, that in dismissing the appeal the court was not exercising a sound discretion. That a brief was filed shortly before the dismissal cannot alter the case. It is claimed that the delay was with the assent of one of the judges of the court. Assuming this to be true, though it is based on implication, the necessary answer is that it was the court of several members that made the rule and the order and it was the court that enforced them as it was its province to do. These conclusions prevent the consideration of the questions relating to the merits of the case.

The order of dismissal is affirmed.

PHENIX ASSUR. CO., Limited, of London, v. MARYLAND GOLD MINING & DEVELOPMENT CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,244.

1. TRIAL—PLEADING—VERDICT.

Where a policy declared that in the event of loss the insurer should only be liable for three-fourths of the actual cash value of the property insured at the time of the loss, and in an action on the policy the complaint alleged that after the loss it was adjusted and fixed at the sum of \$10,335.75, a verdict assessing plaintiff's damages at \$10,000, with interest, was erroneous, as not responsive to the issues.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 774-776.]

2. WRIT OF ERROR—DISPOSITION OF CAUSE—MODIFICATION OF JUDGMENT.

Where a judgment sought to be reviewed on writ of error had for its sole support a verdict which was not only beyond the issues, but in direct conflict with the complaint, the court could not remit the excess of the verdict, so as to reduce the judgment to the amount plaintiff was entitled to recover and affirm the same.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 4498-4505.]

In Error to the Circuit Court of the United States for the Central Division of the District of Idaho.

George G. Pickett and Goodfellow & Fells, for plaintiff in error.
N. M. Ruick, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The policy of insurance upon which this action is based and which is set out in the complaint of the defendant in error, who was the plaintiff in the court below, covered \$4,000 on certain quartz mill buildings described in the policy, \$3,000 on its boiler and engine, and \$3,000 on the fixed and movable machinery contained in the buildings—\$10,000 in all. The policy contained, among others, this provision:

"It is understood that in the event of loss or damage under this policy this company shall not be liable for more than three-fourths the actual cash value of the property hereby insured, as of the time immediately preceding such loss, and in the event of other insurance permitted thereon then liable for its proportion only of three-fourths of such value."

The policy also provided that, in the event of loss or damage, the same should be ascertained or estimated by the insured and the insurance company, and in the event that they should differ then by appraisers to be appointed in a prescribed way, and further provided that, the amount of loss or damage having been thus determined, the sum for which the insurance company is liable pursuant to the policy shall be paid at a certain time after due notice, etc.

The trial in the court below, which was with a jury, resulted in this verdict:

"We, the jury in the above-entitled cause, find for the plaintiff and assess the damages at the sum of \$10,000, interest from the 1st of May, 1904, at 7 per cent. per annum."

Based upon such verdict the court entered judgment in favor of the plaintiff and against the defendant insurance company for \$10,-617.20, with legal interest thereon from the date of the judgment, and costs of suit. The case is brought here by writ of error, the sufficiency of most of the assignments of error on which are questioned by the defendant in error. These we do not think it necessary to consider, for the reason that the unquestioned assignment that the verdict and judgment are contrary to law raises the point of the sufficiency of the complaint to sustain the judgment, even if any assignment in respect to that matter be necessary; but, as said by Chief Justice Marshall in *Slacum v. Pomery*, 6 Cranch, 221, 3 L. Ed. 204:

"It is not too late to allege as error in this court a fault in the declaration which ought to have prevented the rendition of a judgment of the court below."

The complaint itself, after pleading the policy and the destruction of the insured property by fire, alleges that:

"On and between the 26th day of August, A. D. 1903, and the 31st day of August, A. D. 1903, at the county of Blaine, state of Idaho, the plaintiff furnished the defendant with due and full proof of its said loss and interest, and otherwise performed all of the conditions of said policy of insurance on its part; and at said time and place, after a full and complete examination of all matters and things in, about, and concerning said property, and its destruction and value, it was stipulated and agreed in writing by and between the parties herein, to wit, Maryland Gold Mining & Development Company, Limited, and the Phoenix Assurance Company, Limited, of London, that the loss and damage to the property described in said policy No. 5,912,347 was \$10,335.75, and the same was fixed, adjusted, and agreed to by said parties at said time and place in writing."

This stipulation so pleaded, and afterwards introduced in evidence according to the bill of exceptions, fixed the actual cash value of the property at the time of the loss, the aggregate insurance upon which was, according to the policy, \$10,000 for three-fourths of which only was the insurer liable according to its express provision. The verdict and judgment were, therefore, in excess of what they could legally be under the averments of the complaint itself; for they not only went beyond the issues in the case, but are in direct conflict with the express averments of the complaint itself.

The suggestion on the part of the defendant in error that this court may remit the excess and affirm the judgment for three-fourths of the ascertained loss, cannot be sustained, for the reason that the judgment brought up for review has for its sole support the verdict of the jury, which verdict, as has been said, is not only beyond the issues, but is in direct conflict with the express averments of the plaintiff's complaint. It is apparent that the rule under which courts at times grant a new trial unless the plaintiff consents to a remission of a part of a verdict which is within the issues is not authority for

this court to change the verdict which is the sole basis of the judgment in question.

It results that the judgment must be, and is, reversed, and the cause remanded to the court below for a new trial.

PRICE et al. v. CONNORS.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,215.

RELEASE—RESCISSION—TENDER OF CONSIDERATION.

Where, in an action for injuries to plaintiff by a gunshot wound, defendants put in issue all the allegations of the complaint, pleaded a release executed by plaintiff in consideration of a payment of \$500, which plaintiff sought to avoid on the ground that it was executed while he was intoxicated and the jury might have found that the whole of the damages suffered by plaintiff did not in fact amount to \$500, plaintiff was required to have repaid or tendered the money received by him as a condition of his right to avoid the release.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

Ira D. Orton, Albert Fink, W. H. Metson, J. C. Campbell, and F. C. Drew, for plaintiffs in error.

L. H. Brewer, F. L. Morgan, Ben Sheeks, Geo. D. Schofield, and Albert H. Elliot, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This case is brought here by writ of error to the United States District Court for the District of Alaska, Second Division. The action was for damages for personal injuries sustained as the result of a gunshot wound, and resulted in a verdict and judgment for the plaintiff.

The defendants to the action, after putting in issue the allegations of the complaint, set up as an affirmative defense in their answer that the plaintiff, for and in consideration of the sum of \$500 paid to him by them, had released and discharged them from all liability for the alleged cause of action. The plaintiff replied to that affirmative defense, and in his reply alleged that if such release, discharge, and satisfaction was in existence, the instrument was obtained by the defendants collusively acting together for the purpose of cheating and defrauding the plaintiff out of his rights, and by then and there taking advantage of the plaintiff while he was intoxicated to such an extent as to be wholly unfit for the transaction of any business. On the trial the defendants introduced in evidence a written release executed and acknowledged by the plaintiff, to the effect stated in their answer. The plaintiff denied all knowledge of the execution of the release. In respect to the question whether or not the plaintiff was intoxicated at the time of the execution of the release, the evidence was conflicting, but he himself testified on the trial that Hoxsie, who represented the defendant in the negoti-

ations, approached him twice. "He sent for me," said the witness, "first on the 13th [of October]. The second time, when he offered me the \$500, I went up and told Mr. Schofield [plaintiff's attorney]. I went right away, I guess. I think I went and seen him and told him the same day this proposition was made to me to settle for \$500. I told him I had been offered \$500 to settle the case, and from that time I don't believe I saw Mr. Schofield again until I went out."

The court below instructed the jury, among other things:

"That if a person who has been injured by the willful, wanton, or negligent act of another is fraudulently induced to sign a release for the damages sustained, such release will not operate as a bar to the prosecution for damages to recover for such injuries; and, in this case, if you believe from the evidence that the written release offered in evidence by the defendants was signed by the plaintiff at a time when he was not in a condition to understand what he was doing, then such release would not be binding upon the plaintiff, and would constitute no defense against the cause of action set forth in the complaint. And it would be immaterial whether such condition of mind was brought about by the plaintiff or by the connivance of others. I also further instruct you in this connection that if you believe from the evidence that plaintiff received the sum of \$500 from one Charles Hoxsie, acting as agent for defendants, or any of them, such fact would be immaterial if you further believe from the evidence that the release was fraudulently obtained, or was signed at a time when plaintiff did not realize what he was doing, and, under these circumstances, it would not be necessary that plaintiff should tender back said money, or repay the same to the defendants, but the jury should, in case they return a verdict for plaintiff, deduct such sum of \$500 from the damage assessed, if they believe from the evidence that such sum was paid to plaintiff."

The giving of these instructions to the jury were excepted to at the time by the defendants, and are assigned for error here, as also the refusal of the court to give the following instruction requested by the defendants:

"A release executed, even though it be executed by one who is wholly incompetent by reason of intoxication to legally execute such release, is not thereby rendered void, but merely voidable. In such case, if the plaintiff desired to avoid said release, it was his duty to restore, or offer to restore, within a reasonable time, everything of value which he received as a consideration for such release, and in the event of such failure to do so, he will be bound by the release, even though the jury should believe he was so intoxicated at the time of signing it as to be incompetent of executing it."

We are of the opinion that the court below erred in giving the instructions complained of. The case was not one of that class wherein the court, having it within its power to fully protect the interest of the adverse party in case of rescission, might proceed to a hearing without requiring the repayment or tender of the money received in consideration of the release, illustrations of which class of cases may be found in *Thackrah v. Haas*, 119 U. S. 499, 7 Sup. Ct. 311, 30 L. Ed. 486, and *Billings v. Smelting Company*, 52 Fed. 250, 3 C. C. A. 69. In the present case the jury might have found that the whole of the damage suffered by the plaintiff did not, in fact, amount to \$500—the amount the defendants paid the plaintiff in settlement. And since the defendants put in issue all of the allegations of the complaint, it might, if the evidence justified it, have been found by the jury that the plaintiff was not entitled to recover at all. Yet the court below ruled that it was

not necessary that the plaintiff should have repaid or tendered the money received by him, as a condition precedent to avoiding the release. That such is not the law upon such a state of facts was distinctly held by this court in the case of *Hill v. Northern Pacific Railway Company*, 113 Fed. 914, 51 C. C. A. 544.

The judgment is reversed, and cause remanded to the court below for a new trial.

BOSTON & M. R. CO. V. STOCKWELL.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 243.

1. CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Intestate boarded defendant's train at a small station, where there was neither station agent nor baggageman. He went into the baggage car with a hamper, according to custom, and, after receiving a check, stepped on the platform, while the train was in motion, to go to the smoking or passenger car, when a gust of wind raised his hat, and, as he relinquished his hold on the door handle of the car, he was thrown from the platform and killed. *Held*, that intestate was not guilty of contributory negligence as matter of law.

2. SAME—NEGLIGENCE—EVIDENCE—QUESTIONS FOR JURY.

Defendant had provided platform gates for its cars which it was the duty of the brakeman to close when the train departed from stations. It was also the brakeman's duty when a train was behind time to protect the rear end. The brakeman was engaged in this duty when the train left a small station at which there was neither station agent nor baggageman, after intestate had boarded the baggage car with his baggage, according to custom. After he obtained a check for his baggage, he started to leave the baggage car, as required, after the train had started, and while he was passing from one car to the other he was thrown from the platform and killed. *Held*, that whether the gates provided were sufficient, and whether the carrier was guilty of negligence in failing to have them closed, were for the jury.

In Error to the Circuit Court of the United States for the District of Vermont.

See 131 Fed. 152.

Writ of error to review a judgment of the United States Circuit Court for the District of Vermont, entered upon the verdict of a jury in favor of the plaintiff. The material facts are stated in the opinion.

W. B. C. Stickney, for plaintiff in error.

Clarke C. Fitts, for defendant in error.

Before WALLACE, LACOMBE, and TOWNSEND, Circuit Judges.

TOWNSEND, Circuit Judge. The assignments of error challenge the action of the trial court in submitting the case to the jury, on the ground that the evidence failed to show negligence on the part of defendant, but showed that plaintiff's testator was guilty of contributory negligence, and are further directed against certain portions of the charge of the court.

On the morning of June 29, 1903, plaintiff's husband boarded defendant's train as a passenger at Northville, a small station where the defendant regularly stopped its train to take on passengers and their baggage, and where there was neither a station agent nor baggageman. He went into the baggage car with a hamper, and, after receiving a check, stepped on the platform, in order to go to the smoking or passenger car, when a gust of wind raised his hat, and, as he relinquished his hold of the rail or door handle of the car to grasp for his hat, he was thrown from the platform and killed. There was considerable evidence tending to show contributory negligence on his part, but this was all submitted to the jury in an admirable charge, reviewing all the material facts, by which the jury were instructed that Mr. Stockwell was bound to look out for himself, as a prudent man should do under such circumstances, and that if the accident was the result of any fault or negligence on his part the plaintiff could not recover.

We are satisfied, upon an examination of the evidence, that the question of contributory negligence was one upon which reasonable men might fairly differ in opinion, and that under the settled rule this question was properly left to the jury. *Grand Trunk Railway Co. v. Ives*, 144 U. S. 408, 417, 12 Sup. Ct. 679, 36 L. Ed. 485.

The serious question in the case is as to whether there was any evidence tending to show neglect by the defendant of any legal duty to plaintiff's testator. The complaint alleged that it was the duty of defendant to provide suitable gates in place to prevent passengers who were passing over the platforms of the cars while in motion from falling off from said platforms, and that defendant failed in its duty in this regard. The facts in regard to the gates are as follows:

"It was the usual duty of the brakeman to open and close the gates, hereinafter referred to, as the train arrived and departed from the stations, and the usual place of the brakeman was at or near the smoking or passenger car as the train stopped at stations; but the rules of the company required that when the train was running behind time and another train following close that the brakeman should take his position at the rear end of the train with the flag, so that in case the train was stopped for any cause he could run back and flag any approaching train, and the brakeman on this train on the day in question did so take his position on the rear end of said train No. 45 at Newbury, as required by the rule, and as was made necessary by the fact that the said express train was running close to train 45 after Newbury was passed, and the brakeman, for said reason, was at the rear end of the said train when the said stop was made at Northville station. The baggage car (which Mr. Stockwell went into upon boarding the train) and passenger and smoker were equipped with gates upon both sides of the platform, strongly built of iron, and standing about the same height as the hand rails on the outside of the cars. Upon the doors of the cars inside was a warning to passengers not to ride on the platform. These gates were not shut at the time of the accident, for the reason that the brakeman was at the rear. It did not appear that Mr. Stockwell had any knowledge of, or any reason to know of, the cause of the train's delay, or of the fact that the brakeman was out of his usual place, at the rear end of the train, nor that the gates would not be shut as the train left the station, as was the usual custom. There was no notice at the station as to how passengers taking the train there could get their baggage checked. The conductor, as the train stopped at Northville, took his usual position at the passenger coach to help passengers on and off the car. There was no employé of the defendant at the smoking car or baggage car, except the baggagemaster inside the baggage car."

It was claimed that these gates were not of a sufficient height to prevent a person from falling off the platform, and that they were not put there for any such purpose, but only to prevent passengers from alighting from cars upon the wrong side at stations, and "that passengers were not expected to pass through the trains when in motion." Whether a jury would be justified in a finding of negligence predicated upon the mere fact, unaccompanied by other circumstances, that gates such as those here in question were not closed while the train was in motion is a question which is not before us, and upon which we express no opinion. But here the evidence showed that defendant failed to provide any facilities for checking baggage at Northville, and failed to establish any rule, or give notice or furnish information to passengers, as to how baggage received there should be checked, and that, while passengers were forbidden to ride in the baggage car, it was frequently a custom, acquiesced in by the defendant, for passengers taking the train at Northville to go into the baggage car, get their baggage checked, and then go back into the passenger car. By virtue of this practice the passenger was permitted to enter the baggage car in order to check his baggage, but by rule he was expressly forbidden to remain therein. We think, therefore, that the defendant must be assumed to have expected that passengers would pass from the baggage car to the passenger car while the train was in motion, and that it was its duty to provide all necessary and proper means for the protection of passengers at such time. On this occasion defendant failed to provide in the usual way for the closing of the gates, because the brakeman charged with that duty was otherwise engaged at the rear of the train, and no one was supplied to take his place. The customary practice, sanctioned by the defendant, constituted an invitation to passengers to pass over the platform leading to the baggage car when the train was in motion, and therefore the questions as to the sufficiency of said gates and as to the negligence of defendant in failing to have them closed were proper ones to be submitted to the jury. The language of the charge on this branch of the case was clear, accurate, and eminently fair. We are satisfied that there was no error in the submission of this question to the jury, and that the charge of the court fully and fairly covered the issues raised in the case, and that there was no error therein.

The assignment of error as to submission to the jury of the question of reasonable advice from the baggageman is not raised by any exception.

The judgment is affirmed.

FAIRFIELD et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. June 15, 1906.)

No. 2,362.

1. CONTEMPT—REVIEW—QUESTIONS UNDECIDED BELOW NOT OPEN TO DETERMINATION IN APPELLATE COURT.

In proceedings for contempt, the federal appellate courts are courts for the correction of the errors of the court below only. Questions not presented or decided in the court below are not open to consideration or decision in the appellate courts.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, § 232.]

2. WITNESSES—DISOBEDIENCE OF SUBPŒNA—INSUFFICIENCY OF PLEADINGS AND IMMATERIALITY OF EVIDENCE NO JUSTIFICATION.

Neither the immateriality of the evidence to be elicited nor the insufficiency of the pleadings will justify a witness in disobeying a subpœna to testify in a suit in equity in a federal court.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, § 37.]
(Syllabus by the Court.)

In Error to the Circuit Court of the United States for the District of Nebraska.

R. S. Hall (Howard Mansfield and J. M. Woolworth, on the brief), for plaintiffs in error.

C. C. Wright (John L. Webster and John P. Breen, on the brief), for defendants in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This writ of error challenges a judgment for contempt of court by which a fine was imposed upon each of the plaintiffs in error for his refusal to appear and testify in obedience to a subpœna which commanded him to appear before the examiner with certain books and to give testimony in a suit in equity which was pending and at issue in the court below. These witnesses were not adjudged guilty of contempt nor fined for their failure to produce the books, but solely because they declined to appear and testify, so that it is not material to the decision in this proceeding whether or not the command to produce the books was rightfully inserted in the subpœna.

Upon a writ of error to review a judgment of contempt this is a court for the correction of the errors of the court below. The circuit court committed no error in overruling the objection to the judgment that the fees of the witnesses were not paid to them, because that objection was not presented to the Circuit Court and it made no ruling whatever upon it. The objection does not appear in the record, nor in the assignment of errors. It is presented for the first time in the brief for plaintiffs in error, and it is not open for consideration here.

The only other reasons suggested why these witnesses should not have testified are that the evidence sought from them was immaterial, and that the court below, in an opinion upon an application for an in-

junction which was delivered before the answer was filed and before issues were joined in the suit, expressed the view that the bill failed to state facts sufficient to entitle the complainant to relief in equity. But it is no justification for the failure of a witness to obey the command of the court to testify in a pending suit in equity that the complainant has stated no cause of action, that the defendant has pleaded no sufficient defense, or that the testimony sought is immaterial. *Nelson v. U. S.*, 201 U. S. 92, 26 Sup. Ct. 358, 365, 50 L. Ed. 673; *Dowagiac Mfg. Co. v. Lochren* (C. C. A.; Jan. 31, 1906) 143 Fed. 211. The duty of a witness to obey the subpoena is not conditioned by his own, or by his counsel's, opinion of the materiality of his testimony or of the issues of law or of fact which the suit in which he is called involves. His personal privilege and a gross abuse of the process of the court are the only sufficient excuses for his failure to obey. Neither of these existed in this case. The court below had jurisdiction of the subject-matter and of the parties in the suit in which this subpoena was issued. It is true that the judge had expressed an opinion that there was no equity in the bill, but neither party had acted upon this expression. The complainant still pursued its suit, the defendant filed no demurrer to the bill, but answered it, and the issues were duly joined.

The subpoena was the order of the court to these witnesses, attested by its seal, to appear and testify in the suit. There was no justification for their disobedience, and the judgment below is affirmed.

THE MINNETONKA.

(Circuit Court of Appeals, Second Circuit. May 22, 1906.)

No. 215.

1. SHIPPING—THEFT OF JEWELRY FROM PASSENGER BY EMPLOYÉ OF SHIP.

Evidence held to sustain a finding that jewelry belonging to libelant was stolen from her stateroom while she was a passenger on a transatlantic steamship by an employé of the ship.

2. SAME—LIMITATION OF LIABILITY—VALIDITY OF CONDITIONS IN TICKET.

Conditions printed inconspicuously upon a steamship ticket, providing that the shipowner shall not be liable for any loss of the passenger's baggage through theft, or any act, neglect, or default of the shipowner's servants or others, which were not known to the passenger nor called to his attention are invalid, and constitute no defense to an action by the passenger to recover for the loss of jewelry stolen by one of the ship's employés.

3. SAME—STATUTORY EXEMPTION FROM LIABILITY.

Rev. St. § 4281 [U. S. Comp. St. 1901, p. 2942], providing that, if any shipper of jewelry, etc., contained in any parcel or package or trunk shall take the same as freight or baggage on any vessel without giving written notice of its character and value, and having the same entered on the bill of lading, the shipowner shall not be liable as carrier, is intended to apply where such goods are received from a shipper by a carrier for transportation in the usual course of business, and does not relieve a shipowner from liability for jewelry worn and carried on board by a woman passenger with the intention of placing it in the custody of the purser, as permitted by the rules of the ship, but which was stolen by an employé of the ship before she had the opportunity to do so.

4. SAME—GENERAL LIABILITY FOR TORTS OF EMPLOYÉ.

A shipowner is liable to a passenger for the value of jewelry stolen during the voyage by a steward employed to perform duties which the carrier owed to the passenger under the contract of carriage.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 554.]

5. SAME—CONTRIBUTORY NEGLIGENCE.

Where a steamship passenger had not retired for the night, and a light was burning in her stateroom, she was not chargeable with contributory negligence for a theft therefrom because of leaving the door partially open for ventilation, and fastened only by a hook provided by the vessel for the purpose.

6. SAME—NOTICE OF CLAIM.

Where a steamship was docked on completion of her voyage at 2 p. m., a notice of loss of effects by theft, mailed by a passenger at the same place at 5:30 p. m. on the second day thereafter, was a substantial compliance with a condition of the ticket requiring notice of claim to be given within 48 hours, especially where the facts of the loss were fully known to the officers of the vessel before the termination of the voyage.

7. ADMIRALTY—AMENDMENT OF LIBEL—UNDERSTATEMENT OF AMOUNT OF DAMAGES.

In a libel by a passenger against the ship to recover the value of jewelry stolen by an employé on the voyage, the value of the jewelry was stated at \$5,000, and the ship was bonded for that sum. Such statement was based on the cost of the articles several years before. Upon a reference the value of the jewelry was fully gone into, and the commissioner found upon the undisputed testimony of an expert who was familiar with the jewels that their present value was in excess of \$7,000. *Held*, that the court had power to permit an amendment of the libel to conform to the proof, and to render a decree in personam against the claimant for the excess.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, § 533.]

Appeal from the District Court of the United States for the Southern District of New York.

On appeal from a decree in favor of Frances M. Barnes, libellant, and against the Minnetonka, for damages sustained by her by reason of the loss of her jewelry, which was, as she alleges, stolen from her while a passenger on the steamship by one or more of the stewards in the employ of the claimant, the Atlantic Transport Company. The decree was against the Minnetonka in rem in the sum of \$5,000 damages and \$237.90 costs, and against claimant in personam for the sum of \$2,139.70. In the libel the value of the jewelry was stated as exceeding \$5,000. In reply to a question asking the libellant to give the value of the articles, the libellant gave their value in detail; the aggregate being \$5,151.50. The stipulation for value and bond in the sum of \$5,000 was given, without objection by the libellant. On the reference the libellant produced an expert jeweler who placed the value at \$2,139.70 in excess of the amount of the bonds and stipulations for value and costs, and the court awarded judgment for the excess against the claimant.

The opinion of the District Court will be found in 132 Fed. 52.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

J. Parker Kirlin, for appellant.

Louis H. Porter, for appellee.

COXE, Circuit Judge. The salient facts are stated in the opinion of the district judge; these need not be repeated.

The question whether the jewelry was stolen by an employé of the ship alone or with the connivance of another employé was one of fact,

and as the trial judge had the advantage of seeing the witnesses, this finding should not be disturbed unless clearly against the weight of testimony. The judge says expressly that he was favorably impressed with the demeanor of the libelant and her niece, and on the contrary the stewards, to whom suspicion pointed, did not make a favorable impression upon the stand. The opportunity of seeing and hearing the witnesses, especially in a case of this character, involving as it does a charge of larceny, gives to the trial court an advantage which can hardly be overestimated. The judge found that the libelant was robbed "as she contends, and probably by one of the stewards. Apparently, no one but Betts knew of the libelant's possession of the valuables, and there seems to be no way of accounting for their disappearance except by supposing that he carried them off, perhaps with the connivance of Phillips."

The reasons which induce us to believe that this finding is correct may be briefly stated as follows: First. That the libelant owned the jewels in question and that they were stolen from her stateroom shortly after 2 o'clock a. m. on the first night she was aboard the Minnetonka is too well established to admit of doubt. Second. Betts was the steward assigned to her stateroom; he had knowledge of the jewels, having seen them deposited in the rack above her berth; he also knew that she was making efforts to deposit the jewels with the purser for safekeeping and had agreed to inform her when the purser was in his room and ready to receive them. There was then a concurrence of knowledge and opportunity. The testimony makes it clear that the situation in all its aspects was known to Betts and to no one else on the steamer. He alone knew that the moment the libelant was put in communication with the purser the chance to take the jewels would be lost. Third. No suspicion attached to any of the passengers. Indeed, if it were shown that the existence of the jewels was known to a passenger the circumstances were such that a theft by him without the knowledge of the employes of the steamer was practically impossible. Fourth. The bag of jewels was taken by some one wearing the uniform of a steward, with brass buttons on the coat or waistcoat; he knew exactly what he wanted; he spent no time in searching for valuables among the articles in the room, but reached over the libelant, seized the bag and in a moment was out of the room. Fifth. It is quite possible that Betts had a confederate in the steward Phillips. The account of what occurred after of the transaction given by Phillips is so hopelessly at variance with the testimony of the other witnesses, including the captain and purser, as to raise a strong presumption that if not an actual participant he knew of the robbery and was endeavoring to protect the robber by delaying an investigation until sufficient time had elapsed to enable him to conceal the jewelry. Sixth. It is, of course, immaterial whether the robbery was the work of Betts or Phillips or both. It is enough that the jewels were taken by an employe of the ship.

The libelant insisted at all times that she was robbed by a steward. On this point she has been consistent throughout. The district judge has so found and we think his conclusion is fully sustained by the proofs.

The conditions on the back of the contract ticket, so far as they relate to the matters in controversy, are quoted in the opinion below. They were printed in agate type, in double columns, and so compactly as to be almost illegible to one whose sight was at all imperfect. The claimant's agent of whom the libellant purchased the ticket did not call her attention to the indorsements or ask her to read them, and she did not, in fact, read them. Assuming that these conditions are applicable to personal jewelry taken on board by the owner, with the intention of depositing it with the purser for safekeeping, we are, nevertheless, of the opinion that they do not constitute a defense to the present action, for the reason that they were not known to the libellant. This proposition is amply sustained by the Supreme Court in *The Majestic*, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, and in *The Kensington*, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190. See, also, *La Bourgogne* (decided by this court February 22, 1906) 144 Fed. 781.

We concur with the District Court in thinking that section 4281 of the United States Revised Statutes [U. S. Comp. St. 1901, p. 2942] is inapplicable to the present controversy. So far as it relates to the facts in hand, this statute provides that if any shipper of jewelry, money, diamonds or other precious stones "contained in any parcel or package or trunk, shall lade the same as freight or baggage, on any vessel, without at the time of such lading giving to the master, clerk, agent or owner of such vessel receiving the same, a written notice of the true character and value thereof, and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form or manner; nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof, so notified and entered." It will be noticed that in order to bring the exemption of this statute into operation the following conditions must exist: First. The libellant must have been a shipper. Second. The jewelry, etc., must have been contained in a parcel, package or trunk. Third. The parcel, package or trunk must have been laded as freight or baggage on the vessel. Fourth. An agent of the vessel must have received the same. Fifth. The libellant must have failed at the time of lading to give a written notice to the agent of the character and value of the jewelry and must have neglected to have the character and value entered on the bill of lading.

If, then, the libellant, as shipper, had loaded the jewelry as freight or baggage and had failed to give the required notice, the master and owner of the *Minnetonka* would not be liable as carriers, but their liability in other respects would have remained unchanged. The Court of Appeals of New York construed this statute in *Wheeler v. O. S. N. Co.*, 125 N. Y. 155, 26 N. E. 248, 21 Am. St. Rep. 729, and this court, concurring in that decision, held in *La Bourgogne*, *supra*, that the statute was intended to remove the liability of the master and owner as carriers, leaving other and lesser liabilities unaffected.

The relation of shipper and carrier did not exist between the libellant and the claimant so far as the jewelry was concerned. It was not contained in a parcel, package or trunk, nor did she lade or intend to lade

it as freight or baggage. Most of it she wore on her person when she came aboard, expecting to deposit it with the purser for safekeeping, as she was invited, or, at least, permitted, to do by the vessel's rules posted in her stateroom. Indeed, had she been able to find the purser, she might, by paying an extra rate, have secured complete indemnity. It seems to us quite plain that the object of this statute was to prevent fraudulent and exaggerated claims, by prohibiting a recovery from a carrier of goods for the exceedingly valuable articles mentioned, unless at the time of loading written notice of the value be given and entered on the bill of lading. The reasons for such a limitation of liability are obvious, but it is difficult to perceive how they apply to the case of a passenger whose jewelry has been stolen from her stateroom by one of the ship's crew before she had had an opportunity to deposit it with the proper officer for safekeeping. In other words, we think the statute was intended to apply to cases where goods, wares and merchandise are received from a shipper by a carrier for transportation in the usual course of business and that it was not intended to limit the liability of a carrier of passengers under such conditions as are shown by the proof.

The liability of the vessel for the willful torts of its own servants committed upon a passenger during the voyage is well established. In *Steamboat Co. v. Brockett*, 121 U. S. 637, 645, 7 Sup. Ct. 1039, 1041, 30 L. Ed. 1049, the Supreme Court says:

"The plaintiff was entitled, in virtue of the contract for safe transportation, to protection against the misconduct or negligence of the carrier's servants. Their misconduct or negligence whilst transacting the company's business, and when acting within the general scope of their employment, is, of necessity, to be imputed to the corporation, which constituted them agents for the performance of its contract with the passenger."

The archaic doctrine that the moment a servant of a carrier commits a wanton assault upon a passenger he acts outside of the scope of his authority and thus releases his employer from liability was long ago renounced by the great preponderance of authority. Pushed to its logical conclusion it led to such deplorable results as are typified by the case of *Isaacs v. The Third Ave. R. R.*, 47 N. Y. 122, 7 Am. Rep. 418, where a passenger who was hurled from the platform of a moving car by the conductor was denied the right to recover for a broken leg and other injuries because the conductor was not in the performance of any duty required by the railroad company at the time. But the doctrine of the *Isaacs Case* was repudiated by the court nearly a quarter of a century ago in *Stewart v. Brooklyn R. R.*, 90 N. Y. 588, 43 Am. Rep. 185, where the court says:

"By the defendant's contract with the plaintiff, it had undertaken to carry him safely and to treat him respectfully; and while a common carrier does not undertake to insure against injury from every possible danger, he does undertake to protect the passenger against any injury arising from the negligence or willful misconduct of its servants while engaged in performing a duty which the carrier owes to the passenger."

To demonstrate the absurdity of the contrary rule the court uses the following illustration:

"If the porter of a sleeping car, employed to guard the car while the passengers sleep, should himself fall asleep or, abandoning his post, allow a pickpocket to enter and rob the passengers, the company would be liable, but if the guardian should himself turn pickpocket, and rifle the pockets of the passengers, the company would not be responsible for his acts. The carrier selects his own servants and agents, and, we think, he must be held to warrant that they are trustworthy as well as skillful and competent."

See, also, *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922; *Adams v. Steamboat Co.*, 151 N. Y. 163, 45 N. E. 369, 34 L. R. A. 682, 36 Am. St. Rep. 616; *Penn. R. R. v. Vandiver*, 42 Pa. 365, 82 Am. Dec. 520; Am. & Eng. Enc. of Law (2d Ed.) vol. 5, pp. 542-5; 6 Cyc. pp. 598-601.

The libelant was not negligent in leaving her stateroom door on the hook, which was used by her precisely as it was intended to be used. To hold that a passenger is guilty of negligence in using an appliance furnished by the carrier, to accomplish the purpose for which it was furnished, involves the implication that the carrier was negligent in furnishing it. There was nothing unusual in the use of the hook. It was a disagreeable night, rainy and foggy, when the portholes would naturally be closed. The libelant had not retired for the night; her light was burning and there was nothing to induce her to suspect that there was a thief among those whose duty it was to guard her and her property.

We think the notice of claim given the transport company or its agents was a substantial and sufficient compliance with the provisions of the ticket.

It remains to consider whether the District Court was justified in allowing a recovery for the value of the lost property over and above the \$5,000 for which the vessel was bonded. There can be no doubt that at the commencement of the action the libelant had fully committed herself to \$5,000 as the value of her jewelry. This was the sum stated in the written notice of claim signed by her proctor; it was again stated in her libel, in her answer to one of the claimant's interrogatories and in the stipulation and bond. If the claimant had been misled to its injury by reason of this mistake, we should be inclined to hold the libelant strictly to the sum thus demanded, but the claimant has not been misled in the slightest degree; the cause has proceeded precisely as it would have proceeded had the value been stated at \$7,500 instead of \$5,000. The mistake was a natural one. The libelant, at the outset, unmindful of the appreciation in value of diamonds and emeralds, gave the value of the cost price 12 or 15 years previous, and not at their actual worth at the time of the theft. If after the decision the claimant had offered to stipulate the damages at \$5,000, a much more difficult question would be presented, but this was not done, and a reference was ordered.

The libelant called a jeweler of high character and long experience who was an expert in precious stones and thoroughly familiar with the lost jewelry, having frequently seen and handled the more valuable pieces. He stated the value of all the lost articles, giving a minimum and a maximum sum. For instance, he stated the value of the most elaborate piece—the diamond crescent—to be between \$3,000 and \$3,500. No testimony was offered by the claimant to dispute this proof,

although the case was remanded for that purpose, and the commissioner made a conservative report, accepting the minimum value given and assessing the libellant's damage, in round numbers, at \$7,000. That the amount of the loss was at least \$7,000 is not disputed and cannot be disputed upon this proof.

In dealing with the question the district judge says:

"No merit appears in the claimant's exceptions. Every opportunity has been given it to contest the question of value. None has been availed of, and the exceptions must be overruled. The libellant moves to amend her libel by changing the allegation of damage so that the same shall read more than \$7,500, instead of more than \$5,000. This motion is granted."

The question, then, is, shall the libellant be precluded from recovering the full amount of her damages because, through inadvertence, she stated them in her pleading at \$2,000 less than they actually are? Were this an ordinary action at common law or in equity, to state the question would be to answer it. Amendments conforming the pleadings to the proof are constantly being permitted under similar conditions. No case has been cited and we have been unable to find one preventing the court, sitting in admiralty, from exercising a sound discretion in allowing amendments where the object is merely to correct an estimate as to value, involving the introduction of no new facts or change in the cause of action. The Atlantic Transport Company appeared in the action as claimant, and it was within the power of the court to direct a decree against it for the balance of the libellant's loss. A court of admiralty has powers akin to those of a court of equity, and should not be hampered in its efforts to reach a substantial justice by the inexorable rules invoked by the claimant. As it was said by the Supreme Court:

"It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libellant if the court can see there was no design on his part in omitting to state them. There is no doctrine of mere technical variance in the admiralty, and, subject to the rule above stated, it is the duty of the court to extract the real case from the whole record and decide accordingly." *The Syracuse*, 79 U. S. 167, 20 L. Ed. 382.

The decree of the District Court is affirmed, with interest and costs.

The libellant has made a motion to rearrest the ship and for a new bond in the sum of \$15,000, but, in view of our decision upon the appeal, we deem it unnecessary to decide this motion.

WEINBERGER et al. v. COMPAGNIE GENERALE TRANSATLANTIQUE.

(District Court, S. D. New York. June 12, 1906.)

1. SHIPPING—DAMAGE TO PASSENGER'S BAGGAGE—EVIDENCE OF NEGLIGENCE.

Proof that a passenger's baggage was delivered to a vessel in good condition, and was damaged by seawater at the end of the voyage, is sufficient to establish the negligence of the carrier.

2. SAME—LIMITATION OF LIABILITY—CONDITION IN TICKET.

A provision printed in a steamship ticket for the carriage of six passengers, limiting the liability of the carrier for loss or damage to baggage to \$100, not read by nor called to the attention of the passengers, is unreasonable and void.

In Admiralty. Suit by passengers for damage to baggage.

Black & Kneeland, for libellants.

Edward K. Jones, for respondent.

ADAMS, District Judge. The libellants, Mr. and Mrs. Julius Weinberger, bring this action to recover the damage caused to their and their children's baggage, while passengers on the respondent's steamship *La Savoie*, during a voyage from Havre, France, to New York, in December, 1905. The passage ticket was issued at the respondent's Paris office to the Weinberger family the evening before sailing. It appears that in addition to Mr. and Mrs. Weinberger, there were in the party covered by the ticket, two children and two maids, six persons in all. They had twenty pieces of baggage, of which a large portion were trunks, including one large wardrobe trunk and ten ordinary trunks, the remainder being steamer trunks and hat boxes. Seven of these trunks were stowed in the baggage compartment in the intermediary of the steamer between decks. They were all shown to have been in good order when delivered to the railroad in Paris and to the steamer at Havre. Upon arrival in New York while the trunks were on the respondent's pier, awaiting examination by the Customs officials, it was discovered that three of the trunks from the intermediary were wet and that the contents of two of them were damaged by what was subsequently proved to be salt water. The attention of the agents of the respondent was called to the condition of the contents of the two trunks. They duly examined the trunks and advised Mr. Weinberger to take them away and dry the contents, rather than leave them on the wharf, and this was done Saturday afternoon. It turned out, however, that some clothing in the trunks was seriously damaged and a timely claim was subsequently made upon the respondent in due form.

The respondent urges that there can be no recovery without proof of negligence and that none has been offered. The answer seems to be that the clothing was in good condition when it went aboard and at the end of the voyage was found to be wet with salt water.

The respondent also strongly urges that under the limitation of the ticket, together with certain conditions printed in connection therewith, there can be no recovery beyond \$100.

The provisions relied upon are:

"II Each adult passenger is allowed free as baggage, 150 kilos or 20 cubic feet. The excess is charged for at the rate of 2 fcs. for each undivided fraction of 10 kilos. * * *

"III Insurance of baggage and valuables may be effected at current rates under floating policy of the Company.

"IV The Company declines any responsibility for baggage not registered, or for effects in the personal possession of passengers, as well as for monies, deeds, jewelry and precious objects, unless they have been declared and paid for as valuables and deposited with the ship's purser against receipt delivered by him.

"V In case of damage or of the total loss of baggage for which the Company or the Captain may be responsible there shall not be allowed to the passenger more than 500 fcs. first class, or 300 fcs. second class, whatever may be the number or the contents, of his baggage, unless he may have had the full value insured under the floating policy of the Company. All claims for baggage lost or damaged must be made and notice given within 24 hours at the latest after the arrival of the ship, under penalty of forfeiture, in conformity with Article 435 of the French Commercial Code which shall apply to such cases."

These clauses although entitled "Conditions of Passage" do not appear to be anything more than notices. They are printed in connection with the ticket but not made a part thereof and are of no greater force than if printed on the back of the ticket. Both Mr. and Mrs. Weinberger have testified that they did not read them nor were they brought to their attention. Moreover, they were not reasonable and are, therefore, not enforceable, especially, although the ticket was designed to cover a number of passages, no provision is made for a greater liability than 500 francs for all and such amount is insisted was the extent of the respondent's liability. The contention can not be sustained.

The following authorities cover the legal aspects of this matter, viz.: The New England (D. C.) 110 Fed. 415; The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039; The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190; The Minnetonka (D. C.) 132 Fed. 52, recently affirmed, see 146 Fed. 509.

There will be a decree for the libellants, with an order of reference.

UNIVERSAL BRUSH CO. v. SONN et al.

(Circuit Court, N. D. New York. July 14, 1906.)

1. PATENTS—INFRINGEMENT—METHOD OF MAKING BRUSHES.

The Morrison patent, No. 717,014, claim 1, for a method of making brushes, which consists in depositing a mass of heated plastic composition, which becomes hard when cooled, within a chambered brush-frame having a contracted aperture, and forcing one end of the groups of bristles into the composition when in the plastic state, is a fundamental one, which made an important and useful advance on the prior art, and is entitled to a broad construction and to the benefit of the doctrine of equivalents. The chamber having a "contracted aperture" is merely one of the means used in carrying the method into effect, and the claim is infringed by the method of the Sonn patent, No. 791,510, which is the same in principle, and, although the chamber used has not such contracted aperture, it has a raised portion in the center, which is its substantial equivalent as such means.

2. SAME—EQUIVALENTS.

A substantial equivalent of a patented device or means which performs the same function does not avoid infringement because it may perform an additional function.

[Ed. Note—For cases in point, see vol. 38, Cent. Dig. Patents, § 374.]

Suit in equity to restrain alleged infringement of United States letters patent No. 717,014, dated December 30, 1902, application filed November 26, 1898, and issued to Universal Brush Company, assignee of William Morrison, the inventor, for improvements in making brushes. Complainant also asks an accounting.

George A. Mosher, for complainant.

Ward & Cameron (John P. Bartlett and Frederick W. Cameron, of counsel), for defendant.

RAY, District Judge. This patent relates to that class of brushes having a chambered back of wood, metal, or other material, and a plurality of bristle-tufts secured in such back or frame by means of a composition. This composition, when heated, is soft and plastic, but becomes hard and firm when cooled. The patent in suit has two claims, the first of which relates to the method of making brushes, and this only is in issue. That claim reads as follows:

"(1) The herein described method of making brushes which consists in depositing a mass of heated plastic composition within a chambered brush-frame having a contracted aperture, forcing one end of a group of exposed bristle-tufts through the aperture and into the composition, and at the same time giving form to the face of the composition by mould-pressure, and supporting the bristles in the desired position, projecting from the composition out through the face aperture, until the composition cools and hardens."

The specifications expressly state that, "in making brushes by my improved method above described, the brush-back or frame may be made of any desired material, and in any known manner." The method claim of the patent, therefore, relates solely to the method of attaching the bristles to the back or frame by means of this composition. In the manufacture of brushes of this description the bristle apertures of a plate or die, made for the purpose, are filled with bristles of suitable length, so that they form a plurality of tufts or knots, each distinct and separate from the others. The heated and therefore plastic composition is then put in the recess or aperture in the face of the brush-back or frame, and the projecting bristles still held in the plate or die are then forced into the composition, and form is given to the face of the composition among these tufts of bristles by contact with the face of the die, and the tufts of bristles are also supported in the proper position until the composition cools and hardens. During this process of pressure of the die upon the plastic material, the one end of the tufts of bristles are in that material, while the other end projects out through the apertures of the die on the upper or outside thereof, and are wholly separated and protected from contact with the composition. When this material has hardened, the pressure and die are removed, and we have the composition filling the recess or aperture in the face of the brush-frame or back,

and adhering to it, holding and retaining these tufts of bristles, and, aside from finishing and polishing, the brush is complete.

In the specifications relating to the object and principal features and novel method of making brushes, the patent says:

"The objects of my invention are to cheapen the manufacture and improve the finish of brushes. The principal feature of my invention consists in the method of making brushes having a chambered or recessed frame or back, consisting in making a brush-head within the frame or back by inserting tufts of bristles into heated plastic composition first deposited in the brush-frame. * * * My novel method of making brushes is as follows: In making the brush-head, bristles of suitable length are first inserted in the apertures, C, of the bristle-plate, C₁, so that they form the tufts or knots, C₂, projecting a short distance beyond the plate to the subjacent stop-plate C₃, having a raised portion, C₄, to support the bristle-plate at the required height. The bristles may be inserted by hand or by mechanism like that shown in United States patent No. 570,604, issued to me November 3, 1896, or in any known manner. After the bristle-plate has been supplied with bristles, a covering-plate, C₅, is placed over the tops of the tufts, and the lower projecting ends of the bristles are pushed through the face aperture down into the heated plastic material, D, previously deposited through the aperture in the chambered frame, as seen in Fig. 7. The lower surface of the perforated portion of the bristle-plate is a molding surface, and may be concaved, as indicated by the curved dotted line in Fig. 7, to give a convexed form to the face of the composition pad forming part of the brush-head. When desired, the covering-plate, C₅, may have an operating handle, C₆. The composition quickly cools and hardens sufficiently to tightly hold the bristle tufts, after which the bristle-plate can be removed from the completed brush; this plate serving to support the projecting bristles in the desired position during the process of cooling and hardening. My improved method of inserting the bristles obviates the necessity and delay of forming a partial bristle-supporting pad on the ends of the bristles projecting from the bristle-plate before inserting the bristles through the face aperture, as heretofore commonly practiced, as I force the exposed and uncovered bristle ends directly into the heated composition first deposited in the chambered frame. By so doing I am able to determine exactly the proper quantity of composition to fill the chamber in the brush-head without having any excess to be forced out of such chamber when the bristles are inserted therein. As heretofore practiced, in order to insure the filling of the chamber in the brush-head, it was necessary to use a slight excess of plastic composition, the surplus being forced out of the chamber when pressure was applied, and frequently leaving evidences of its escape upon the frame and bristles, and detracting from the ornamental and finished appearance of the brush. Should a surplus of composition be used in my improved method, it will be forced out and cleanly cut off by the sharp edges of the metal frame, if made as above described, the metallic surface of the frame permitting no adhesion of the composition thereto, as would be the case with wooden or non-metallic frames."

The defendant alleges the invalidity of the patent if broadly construed so as to cover the method of defendants' manufacture, and also noninfringement in case the claim is sustained within a limited scope, as it is claimed it should be if sustained at all. The defendant contends that complainant's method of making brushes is confined to the use of a "chambered brush-frame having a contracted aperture"; that is, an aperture in the face of the brush-frame having the edges of that part of the frame surrounding it drawn in somewhat, and overhanging the outer edges or sides of the chamber or recess. The metal brush-back or frame shown in the drawings of the Morrison patent and described in the specifications shows a brush-back or frame of this kind; that is, one with an aperture so contracted. But

in the specifications Morrison says: "In making brushes by my improved method above described, the brush-back or frame may be made of any desired material and in any known manner." Does this word "manner" relate solely to the way in which it is made—that is, the process of making it—or to its form when made? It seems to me clear that "manner" refers to its form and shape when completed, and that it is sufficient if the brush-frame has a chamber for containing the composition, with an aperture contracted in any way. Synonyms of "contract" are "lessen," "shorten," "narrow," "diminish," "abridge," "reduce," "draw together." Hence "contracted" means "lessened," "narrowed," "diminished," "abridged," or "reduced," as well as "drawn together." I do not think a proper construction of this patent limits it to the use of a back or frame with an aperture into the chamber contracted in the manner shown and described in the drawings of the patent. But must not this aperture be contracted in some way; that is, made smaller than the surface area of the recess or chamber? The Century Dictionary defines "contracted" thus: "Drawn together or into a smaller or narrower compass; shrunk." "Abridged," "reduced," or "narrowed," would mean made small as compared with something else. The Standard Dictionary gives to the word "contracted" the meaning "not extensive." We frequently speak of a room or space in a building as "contracted" because small as originally constructed, having no purpose to indicate that it was once larger. I do not think the words "contracted aperture" should be construed to mean an aperture once larger, and made smaller by some means, natural or mechanical.

It is quite true that a patentee may limit his claims by the language used therein in such a manner and to such a degree as to deprive himself of his real invention; and it is not the province of the court to enlarge or restrict the scope of a patent which by mistakes of the patentee were issued in terms too narrow or too broad to cover the true invention even when the error of the patentee is plainly and conclusively shown. See *U. S. Repair, etc., Co. v. Assyrian Asphalt Co.*, 183 U. S. 601, 22 Sup. Ct. 91, 46 L. Ed. 342, where the court said:

"It is not within the rightful power of the courts to enlarge or restrict the scope of patents which by mistake were issued in terms too narrow or too broad to cover the invention, however manifest the fact and extent of the mistake may be shown to have been."

In such cases the remedy of the patentee is to seek a reissue. But while this is strictly true, courts are not to be overdiligent or overastute in hunting for constructions of a patent, or of its language, or in giving meanings to its words which will defeat it, when a fair construction of the language used and the giving of the ordinary meaning to the words employed—that meaning, if they have two or more, which is consistent with and in aid of the general idea and purpose evidently intended to be expressed by the patentee—will uphold it. Of course the description of the invention claimed must be so clear and exact as to enable one skilled in the art to which the alleged invention relates to make and use it without experiments of his own. *Mowry v. Whitney*, 14 Wall. 644, 20 L. Ed. 860. But while this is

true, mere changes in form or of the manner of putting together do not avoid infringement if all the means are employed in substantially the same way to produce the same result, or well-known equivalents are substituted. There are cases where, by reason of the express limitations of the claims and in view of the prior art, the patentee is not entitled to the doctrine of equivalents. The main contention of the defendant is that the claim in question calls for the use of "a chambered brush-frame having a contracted aperture," and that, this contracted aperture into the chamber being an essential part of the claim, it must be restricted to that limitation. Also, that as defendant does not use a brush-frame "having a contracted aperture" forming the opening into the chamber or recess in the frame, it does not infringe, as it does not use all the essential elements of complainant's claim. In the patent in suit the aperture in the face of the brush-handle or brush-frame is never necessarily smaller or more contracted than when in its completed state as originally designed and made. The aperture into the recess or chamber may be made by hollowing out the face of the frame, leaving the edges of the frame to somewhat overhang the chamber. When completed the aperture is just as it always was, except as gradually enlarged in the process of making. It is not necessarily made large and then smaller by adding the overhang part, except in the metal construction described. No process of shortening, narrowing, diminishing, abridging, reducing, or drawing it together is necessarily gone through with. It is an aperture not necessarily as extensive or large as it would be if made of the full size or compass in all its parts the largest dimension of the chamber would justify. The defendant uses a brush-back or frame having a chamber with an aperture in its face used for the same purpose as is complainant's, and which, to an extent at least, performs the same function. This recess or chamber in the defendant's brush-frame is "contracted." It is a contracted chamber in the same sense as is complainant's aperture a contracted one. The interior space of the chamber is contracted—made smaller, not so extensive as it otherwise would be—by leaving in the central bottom part thereof a raised unexcavated portion which contracts, lessens, reduces, and abridges the dimensions of the chamber to a lesser extent than they would be if of the full size or compass its larger outer dimensions would justify. But the aperture or opening into the chamber is not necessarily a contracted one. It is of the full circumference and area of the chamber in its largest dimension. Is it a "contracted aperture" in the same sense the words are used in the Morrison patent? Confusion is apt to arise in considering this patent and its method claim from the fact that in describing the brush in the specifications the patentee has described a sheet metal frame or back made of two sections, which is recessed or chambered, the opening into this recess or chamber being spoken of as the "frame aperture," and has also described a pad forming ring inserted within and surrounding this recess, and soldered to its edges before the composition is placed therein. The patent says:

"I have shown in the drawings one form of construction of chambered brush-back or frame adapted to the manufacture of brushes by my improved method, which construction I will proceed to describe in detail."

He then describes this one form of construction of a metal brush-back or frame, and in so doing says of the recessed apertured handle proper, and of the other section which is inserted and soldered to the main frame:

"The two sections are curved near their peripheral edges, as seen in Figs. 4, 5, and 6, to improve the ornamental effect of the external appearance, and at the same time form inwardly-projecting lips, A3, around the brush-head aperture adapted to hold the head in place. Before depositing in the frame the heated plastic composition which forms the pad of the brush-head, a forming ring, B, concavo-convex in cross-section, as seen in Figs. 4 and 7, is inserted through the brush-head aperture, and secured therein by solder or any known means. The forming ring is made to correspond in form with the brush opening, being just a little larger in diameter, and cut, as at B¹, so that, by lapping temporarily the cut ends the ring can be pushed through the opening, after which it is expanded to its normal diameter."

This mode of putting in the forming ring, when used, is made necessary by the curving in of the two metal sections in this particular form of construction near their peripheral edges, as above described. But it must all the time be remembered that this curving in is not an essential of the construction, but ornamental only, while at the same time, when used, serving the useful purpose mentioned. So of the forming ring. That is only used necessarily in the metal construction, the one form only being described. But, after all, in concluding the specifications the patent says, to repeat: "In making brushes by my improved method above described," and the method is described separately from the brush and brush-frame, "the brush-back or frame may be made of any desired material and in any known manner"; that is, as before stated, in any desired form or of any desired construction.

The most serious objection to the construction of claim 1 of the patent, contended for by complainant, is that in describing the "method" the patent says:

"After the bristle-plate has been supplied with bristles, a covering plate, C5, is placed over the tops of the tufts, and the lower projecting ends of the bristles are pushed through the face aperture down into the heated plastic material, D, previously deposited through the aperture in the chambered frame, as seen in Fig. 7."

The patent has before said: "The principal feature of my invention consists in the method of making brushes having a chambered or recessed frame or back," but nothing is said as to the aperture or its form. Hence arises the inquiry, does not the patent throughout contradictingly the cavity, recess, or chamber in the front or face of the frame from the opening into it formed by the upper edges of the frame about such cavity, and when speaking of the aperture does not the patent always refer to this opening? The terms "pushed through the face aperture," and then "down into the heated plastic material, D, previously deposited through the aperture in the chambered frame," are significant. And again, later, is used the words:

"My improved method * * * obviates the necessity * * * before inserting the bristles through the face aperture as heretofore commonly practiced, as I force the exposed and uncovered bristle ends directly into the heated composition first deposited in the chambered frame."

This clearly distinguishes the chamber from the aperture or opening into the chamber, and the words "pushed through" seem to indicate a narrowed or lessened opening or aperture into the chamber. But the aperture is spoken of in such instance as the "face aperture." When we come to the claim the words "contracted aperture" are used. Does this refer to the chamber in which the plastic material is deposited when the brush is complete? Or does it refer simply to the opening into that recess or chamber? "Aperture" is "an opening"; "a hole, orifice, gap, cleft, or chasm; a passage or perforation; any direct way for ingress or egress." I think the words "contracted aperture" refer explicitly to the opening into or mouth of the chamber in which the plastic material is placed, and in which it remains when the brush is completed, and that claim 1 refers to a method of making brushes in which this form of brush-back or brush-frame only is used. The complainant contends that the meaning to be given to the word "contracted" as used in claim 1 is "not extensive," so it would read "within a chambered brush-frame having a not extensive aperture"; that is, an aperture into the chamber not extensive. It cannot be more extensive than the face of the brush-frame or more extensive than the upper surface area of the chamber itself, and hence the irresistible inference is that, giving the word "contracted" the meaning contended for, the claim means a chambered brush-frame having an aperture into same not as extensive as the surface of the chamber itself. Else why use the word "contracted" at all? Are we at liberty to reject it as meaningless or of no importance in the working out of the method described? Or was Morrison referring to the prior art where the aperture of a metal plate used in forming the brush-pad was made flaring and broader and wider than the upper surface of the chamber or recess therein, so as to make the removal of the brush-pad therefrom easy? The specifications of the patent speak of the "brush-head," "brush-head pad" and "head." Evidently the "brush-head" is the plastic material when hardened, with the tufts of bristles fixed therein. The composition when formed is the pad of the brush-head. The specifications also say, to repeat:

"The two sections are curved, * * * and at the same time form inwardly projecting lips, A3, around the brush-head aperture, adapted to hold the head in place."

Evidently, the patentee had in mind the necessity in a metal frame of having something to hold this brush-head when formed and hardened in place within the chamber or recess. These inwardly projecting lips, which in fact contract the aperture into the chamber, do this. Hence the idea of a "contracted aperture," and Morrison may be said to have regarded it as essential in all forms of construction of the brush-back or frame, for he carries the idea into the claim, and provides for a "contracted aperture." He nowhere suggests a substitute or a reliance upon the adhesion of the plastic composition

to the frame, when made of wood, or the substitution of any equivalent, or of an elevated table within and on the bottom of the recess or chamber as found in defendant's brush. But still he says the frame may be constructed in any known manner. This clearly indicates any form of construction for the brush-back or frame. In short, Morrison's idea of means for retaining the brush-head within the metal frame was, and, as expressed, is, to have a contracted aperture overhanging the edges of the brush-pad when formed within the chamber. For this "contracted aperture," so far as it serves to hold the brush-head in place, the defendant has substituted "a raised center portion" in the chamber, as described in letters patent No. 791,510, dated June 6, 1905, application filed December 12, 1902, to Anson L. Sonn, the claim of which reads as follows:

"In a brush the combination of a composition, bristles secured to said composition, a brush-back provided with a raised center portion, a groove between said center portion and a ridge along the rim of the brush-back, said composition secured within said groove, substantially as described."

In describing his purpose he says:

"My invention is to provide a new and more effectual means for retaining the cement in the brush-back and at the same time make the completed brush lighter in weight than has heretofore been accomplished, so far as I am aware, in cement or composition brushes. The cement or composition is heavier than the wood, which is the material of which the brush-back is usually constructed. Therefore it is desirable to have as little composition as is consistent with good construction. I preferably arrange a brush-back, A (shown in Fig. 2), in which a portion, C, is cut out, leaving a central part B of substantially the same thickness as the brush-back, thus forming a groove, C, in the brush-back, extending around the sides of the brush-back. Within the groove, C, and over the portion, B, the plastic cement or composition will extend and will retain in position the pad of cement or composition, K, containing the bristles when the same has become hardened."

The language "within the groove, C, and over the portion, B [the raised portion within the chamber], the plastic cement or composition will extend and will retain in position the pad of cement or composition, K [the brush pad of complainant's patent] containing the bristles when the same has become hardened," shows that Sonn had the idea that some means must be used to retain the brush-pad of composition, holding the bristles, within the chamber or recess which he describes as "a groove, C, in the brush-back." In short, he expressly says that:

"My invention is to provide a new and more effectual means for retaining the cement in the brush-back, and at the same time make the completed brush lighter in weight than has heretofore been accomplished, so far as I am aware, in cement or composition brushes."

To make the brush lighter when of wood he makes the chamber or recess smaller by leaving therein a raised central portion not excavated or cut out, an idea that would occur to any one skilled in the art, and which cannot rise to the dignity of invention. In a metal brush-back such construction would defeat the purpose to make the brush lighter, for metal is heavier than the composition, and therefore the leaving of this raised portion of metal in the chamber to lessen the amount of composition used would make the brush heavier.

Sonn refers to a wood frame only for he says: "The cement or composition is heavier than the wood, which is the material of which the brush-back is usually constructed." To retain the completed and hardened brush-pad containing the bristles within the chamber of a metal frame requires mechanical skill. In the metal back or frame surely it would not adhere. In the wood back or frame it would adhere to an extent. In the complainant's frame of wood actually made and used the undercut is employed, and this makes the aperture into the chamber smaller than the area of the chamber itself, and the overhanging edges of the frame rest upon the edges of and retain the hardened composition or brush-head when unbroken. Sonn dispenses with this manner or form of construction, and substitutes the raised portion in the center of the chamber or recess, to which the plastic material adheres as it hardens, and hence the brush-head is retained by adhesion to it and to the sides and bottom of the chamber. Is this method of holding the brush-pad within the chamber or groove, which is the same thing, the equivalent of the complainant's method of accomplishing that purpose, assuming that complainant's method embraces or includes such a purpose? In describing his method Morrison makes no reference to means for holding or means for retaining the brush-head when hardened in the brush-frame. He refers to the drawings of the metal brush described and illustrated, but says nothing of a contracted opening or aperture into the chamber or recess, and from the specifications describing his method we can only infer he had such an aperture in mind from the use of the words "pushed through the face aperture." From the necessity of pushing the lower projecting ends of the bristles through the face aperture down into the plastic material previously deposited in the chamber through the aperture, we may infer that a contracted aperture, one smaller than the upper surface of the chamber itself, is understood. But is this inference necessary? The claim itself suggests it, for it provides for a "contracted aperture."

The complainant in his brief says:

"It is evident from the language used that there was no intention on the part of the inventor or his attorneys to limit the application of the method any further than was necessary to produce a useful brush; that is, a brush in which the hardened composition, when molded about the bristle tufts within the chamber of the brush-back, would remain there while in use; that is, the aperture of the chambered brush-back must not be so extensive that the bristle pad formed in practicing the method within the brush chamber would fall out without some support other than the walls of the chamber."

Is not this, in effect, a concession that in practicing the method of complainant's patent some means other than the walls of the chamber itself are necessary to retain the brush-pad when formed within the chamber therein. The brief also says:

"It is possible that the adhesion of the composition to the walls of the chamber would be sufficient to retain the composition within the chamber, even if the chamber walls were beveled so as to flare outwardly in a very slight degree, in which case they would perform all the functions of inwardly beveled or undercut walls."

But there is no suggestion of this in the claim or specifications. On the other hand, both suggest a contracted aperture or opening into

the chamber, one smaller than the interior surface thereof, making it impossible for the brush-pad to fall out when hardened.

The complainant argues with some force that the words "having a contracted aperture" serve to distinguish, in terms, the chambered brush-back from the back section of the die, which had been previously employed in the manufacture of composition back brushes. I do not find anything in the claims or specifications that justifies any inference that the words "contracted aperture" were used therein to distinguish the aperture of the chambered brush-back of the patent from the apertures of the dies formerly used in this art. Such dies are not mentioned in the Morrison patent.

But it is contended that the contracted aperture is unnecessary to the invention; that it is an immaterial element, if it may be called that; that the invention of the patent is fundamental or a pioneer; and that defendant cannot, without infringing, appropriate the true invention of the Morrison patent in suit by rejecting or failing to use in his method of construction this contracted aperture or a chambered brush-back or brush-frame which does not have an aperture of lesser area than the surface area of the chamber proper. Complainant contends that practically the elevated portion left in the chamber, and with its sides forming the grooves, is the equivalent of the contracted aperture, giving it the construction claimed by defendants, inasmuch as it serves simply to hold or retain the completed brush-pad within the chamber or grooves.

In Walker on Patents (4th Ed.) § 120, p. 103, it is said:

"In cases where the description relates to a process, the claim should cover all the necessary occurrences in that process, and cover no more. If it covers less, it will be void for want of utility; and if it covers more, it can be evaded by persons who omit any one which is unnecessary when using the others."

This is a process or method for making a brush. The steps are: (1) The depositing of a mass of heated plastic composition within a chambered brush-frame having a contracted aperture; (2) forcing one end of a group of exposed bristle tufts through this aperture and into the composition; (3) at the same time giving form to the face of such composition by mold-pressure; and (4) supporting such bristles in the desired position, projecting out through the face aperture until the composition cools and hardens. Steps 1 and 2 of this process or method are successive, while 3 and 4 take place or are done at the same time as 2, except they continue in operation for a greater length of time. The forcing of the bristles into the composition is done in a moment, while the pressure must continue until the composition hardens. The whole process of making the brush is precisely the same whether the aperture into the chamber be broad and flaring, outwardly-beveled, or contracted as compared with the surface area of the chamber; that is, inwardly-beveled or undercut. The patentee is making a brush, and he not only describes the steps of the operation, but the means or things to be used, acted on, or combined in performing it. Heated plastic composition, not described or limited as to kind, or quality, or ingredients, is

used and deposited. Where? In a chambered brush-frame. This frame is described and limited to one having a "contracted aperture." Also tufts of bristles not described or limited in kind or quality or length. Any bristles formed into tufts will answer the claim of the patent. The means for forcing the bristle tufts through the aperture and into the composition and for applying the mold pressure are neither described nor limited. Any suitable means or mold may be used. Suppose the patent had in the claim itself named a particular kind and quality of composition containing certain specified ingredients, would it infringe to use a composition of another kind and quality with other ingredients, not equivalents? Or suppose in the claim itself, not the specifications, the patentee had described a particular and peculiar form of mold for giving form to the face of the composition, would it infringe to use some other and different form of mold, giving another and different shape or contour to the face of the brush? The completed brush is composed of a brush-frame of wood or metal or other material, bristles and composition to hold the bristles and tufts of bristles. Certain things, in the method described, are to be done with these substances in a certain order. Necessarily certain tools or appliances will be used in doing these things. The mold pressure may be applied by any suitable instrumentality. This is a mere tool, used in performing the operation, and is of secondary importance. *Cochrane v. Deener*, 94 U. S. 780, 24 L. Ed. 139. It is there held:

"A process may be patentable, irrespective of the particular form of the instrumentalities used. If one of the steps of a process be that a certain substance is to be reduced to a powder, it may not be at all material what instrument or machinery is used to effect that object, whether a hammer, a pestle and mortar, or a mill. Either may be pointed out; but, if the patent is not confined to that particular tool or machine, the use of the other would be an infringement, the general process being the same. A process is a mode of treatment of certain materials to produce a given result. It is not an act or series of acts, performed upon the subject-matter, to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, while the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

But the frame and composition and bristles are the substances to be used in putting the method into operation, and if these substances to be used in the process are specifically named and limited to a certain kind and quality, having certain specified ingredients, in the claim itself, there being more than one kind, it would not infringe to use the kind not named, as that kind from which the specified quality and ingredients are absent would not be included in the patented process. *Cochrane v. Deener*, supra. So here the method claimed consists in doing certain things with certain specific substances, and as a chambered brush-frame having a contracted aperture is one of those substances, this particular kind of a brush-frame is a material element of the method, and is made such by the express and specific language of the patentee. And this is further

emphasized by the claim itself, which requires, as a part of the process to be gone through with, one of the things to be done with these substances, that the "group of exposed bristle tufts" are to be forced through the aperture described. We would hardly speak of forcing anything through an aperture into a recess or chamber of the same precise dimensions and surface area as the aperture itself, unless there was some resistance to be overcome, such as air or water within the chamber to be pressed out, which is not the case here. Of course, there might be the friction upon the sides of the aperture in case the thing to be forced through were of the same size or dimensions of the aperture, but such is not the case here, as the tufts of bristles when in the bristle plate and ready to be put through the aperture and inserted in the plastic composition are held within a smaller area than that of the surface of the chamber. Hence the patentee must have known that there was no necessity for "forcing one end of a group of exposed bristle tufts through the aperture" unless such aperture was either less in area or of the same size as the group of bristles.

I think the complainant's patent a fundamental one, and entitled to a broad construction, and that the complainant is entitled to have applied the doctrine of equivalents. Morrison made a great and an important and useful advance on the prior art. He simplified, hastened, and cheapened the process or method of making brushes, especially in so far as it relates to forming and putting the completed brush-pad in the brush-frame, and this is the most essential and important part of the process. He combined several steps before done separately into one, and defendants have appropriated that method, unless it be in the use of a frame having a contracted aperture. But still the claim of the Morrison patent has this self-imposed limitation, and hence, unless the raised central portion of the chamber of defendants' brush is the equivalent of the "contracted aperture" of complainant's patent, giving these words their proper construction, there is no infringement. It serves the same purpose, but not in the same precise way. It serves, in a wooden-handled or wooden-framed brush, another purpose also, for it lessens the weight of the brush—makes it lighter. But if defendant used complainant's method and all its elements, he cannot escape infringement because his method of making brushes serves another purpose also, or because the substituted equivalent is better and improves the process. Nor can he in such case escape infringement by adding another element, which does not destroy the identity of the two processes. *Cochrane v. Deener*, 94 U. S. 780-786-787, 24 L. Ed. 139. At page 787 of 94 U. S. and at page 141 of 24 L. Ed., it is said:

"The defendants admit that the process has produced a revolution in the manufacture of flour, but they attribute that revolution to their improvements. It may be, as they say, that it is greatly due to these. But it cannot be seriously denied that Cochrane's invention lies at the bottom of these improvements, is involved in them, and was itself capable of beneficial use, and was put to such use. It had all the elements and circumstances necessary for sustaining the patent, and cannot be appropriated by the defendants, even though supplemented by and enveloped in very important and material improvements of their own."

In *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 45 C. C. A. 544, it was held:

"One who invents and secures a patent for a machine or combination which first performs a useful function is protected thereby against all machines or combinations which perform the same function by equivalent mechanical devices; but one who merely makes and secures a patent for a slight improvement on an old device or combination, which performs the same function before as after the improvement, is protected against those only who use the very device or improvement he describes and claims, or colorable evasions thereof. The term 'mechanical equivalent,' when applied to the interpretation of a pioneer patent, has a broad and generous signification. When applied to a slight and almost immaterial improvement, it has a very narrow and limited meaning. When applied to that great majority of inventions which falls between these two extremes, its significance is proportioned to the character of the advance or invention under consideration, and it is so interpreted by the courts as to protect the inventor against piracy and the public against unauthorized monopoly."

We come then directly to the question whether or not defendant in making brushes uses the whole of complainant's method or process as described in his claim, for, as held in *National Hollow B. B. Co. v. Interchangeable B. B. Co.*, 106 Fed. 693, 45 C. C. A. 544, while the description in a specification or drawing of the details which are not claimed to be essential elements of the patented device or combination, and are not such, is the mere pointing out of the better method of using it, and does not limit it to those details, "a reference in a claim of a patent to a letter or figure used on the drawing and in the specification to describe a device or an element of a combination does not limit the claim to the specific form of that device or element there shown, unless that particular form was essential to, or embodied the principle of, the improvement claimed." Still it is also true that "the absence from a device that is alleged to infringe a patented combination of a single element of that combination is fatal to the claim of infringement."

Complainant's method for holding the completed and hardened brush-head in place in the chamber of the brush-back or brush-frame is to somewhat contract the upper edges of the frame about the aperture into the chamber, called in the claim the "face aperture." If unbroken the brush-head will not fall out if it becomes wholly detached from the sides and bottom of the chamber, and fails to adhere thereto, for, the aperture being smaller than the brush-head in surface area and both length and width, it is impossible for it to pass through. In the defendants' brush, if the brush-head becomes wholly detached from the sides and bottom of the grooves and the sides and top of the raised portion in the chamber which is surrounded by the grooves, and fails to adhere thereto, it will fall out, for the aperture is no smaller in any of its dimensions than the corresponding dimensions of the brush-pad. But it may be questioned whether the mode or manner of holding and retaining the brush-head within the chamber is made any part of the Morrison method. In describing the method he nowhere refers to this subject. Hence, may not it be held and retained in any known manner or by any known means? Has he limited himself in this respect? In describing his method he does not

mention the office to be performed by the "contracted aperture" mentioned in the claim itself. Is it not as fair and reasonable to infer that in making brushes in which brush-frames of wood are used he intended to rely on the adhesion of the composition to the sides and bottom of the chamber as that he intended to rely on the contracted aperture into it for the purpose of retaining the composition brush-pad therein? I think this is true. But still Morrison has claimed a method in which is used the brush-frame having a contracted aperture only. Hence we are brought back to the question whether or not the defendants use a brush-frame which is the substantial equivalent of complainant's as used in his method. In determining this question it seems to me we are to be guided by the office or function to be performed by the brush-frame in the method pointed out, and not by the shape or contour or size or name of the frame, or even its description. Does it perform the same function, do the same thing, in substantially the same way, and accomplish the same result; that is, to hold or retain the hardened brush-pad in the chamber or recess? The result is the same, the brush-pad is retained by the contracted aperture and adhesion in the Morrison patent and by adhesion in the other. But the holding and retaining is not done in the same way wholly. The substitution of the raised center portion, while it adds to the adhesion surfaces, and in some degree furnishes binding surfaces for that portion of the composition between it and the sides of the chamber, tends to impair the secure and permanent holding of the brush-pad within the chamber, for, as stated, if loosened wholly from the walls and bottom of the chamber and sides and top of the raised portion it will fall out. "There are two tests of equivalency: (1) Identity of function. (2) Substantial identity of way of performing that function." Walker on Patents (4th Ed.) § 362, p. 315. "One thing to be the equivalent of another must perform the same functions as that other. If it performs the same function, the fact that it also performs another function is immaterial to any question of infringement." Walker on Patents (4th Ed.) § 352, p. 309. "The idea covered by the patent must be completely embraced in the idea expressed in the infringement, but the latter may be far more comprehensive than the former." 3 Robinson on Patents, § 893, p. 47.

Here we have the identity of function, and also an additional function performed by the raised portion of defendants' brush-frame which lightens the brush; but, as shown by the authorities cited in Robinson on Patents, *supra*, this is immaterial. Is there substantial identity in the way of performing the function? On this subject Walker on Patents (4th Ed.) § 362, pp. 315, 316, says:

"The second of these tests is somewhat elastic, because it contains the word 'substantial.' That word is allowed to condone more and more important differences in the case of a primary patent than in the case of a secondary one. In the case of a patent narrowed in construction by an extensive state of the preceding art, the word 'substantial' will give but little elasticity to the application of the doctrine. If fewer inventions preceded the one at bar, the word will have somewhat more of carrying power. When the invention at bar is strictly primary, and especially if it is extremely

useful, then the word 'substantial' will be made to cover differences alike numerous and important, and even highly creditable to the infringer who invented them."

In the complainant's method described in claim 1 the office or function of the contraction in the aperture is not stated. The word is descriptive merely. In the specifications describing the method covered by the claim no office is assigned to this contraction of the aperture. Under general rules of patent law in all combinations of a mechanical patent, every element claimed is conclusively presumed to be material. *Shepard v. Carrigan*, 116 U. S. 593-598, 6 Sup. Ct. 493, 29 L. Ed. 723; *Sargent v. Hall Safe & Lock Co.*, 114 U. S. 63-86, 5 Sup. Ct. 1021, 29 L. Ed. 67; *Yale Lock Manufacturing Co. v. Sargent*, 117 U. S. 373-378, 6 Sup. Ct. 931, 29 L. Ed. 950.

I see no reason why this rule should not apply in such a case as this, but still we are not to attach too much importance to the use of that particular word in determining what is a substantial equivalent for the "chambered brush-frame having a contracted aperture"—one of the things to be used in performing the method. Such a brush-frame of various forms was old in the art. In a prior patent to Morrison we find the undercut recess or chamber fully described, and mentioned as "undercut." No novelty is attributed to it in the patent in suit, but the invention resides in the method of putting the bristles into the composition to form the brush-pad, and this into the frame, and there molding and forming it and attaching it to the frame or back—all in one operation. In point of fact, the composition adheres very closely and securely to the sides of the chamber in the wooden frame, and all that was necessary, if necessary at all, and all that was done by defendants to do away with a contraction in the aperture, was to substitute additional binding and adhesive surface to the chamber. This was done by leaving, as stated, the raised portion in the chamber. Otherwise, the brush-frame of wood used by the defendants in performing or putting in operation the method and carrying it on to completion is identical with that used by complainant, and, so far as the method itself used by defendants is concerned, it is identically that described in the patent in suit. True, the defendants claim an inversion of the chambered brush-frame in putting the composition into the recess, and that in their machine or presser used for the purpose they put the composition first onto the ends of the bristles, projecting from the bristle plate, and then bring the two together, and by pressure force the composition and ends of the bristles contained therein into the chamber, and by the continued pressure mold the composition. But this is a distinction without a difference, for, even if this is what defendants do, they have united the several steps of the prior art into one, as did Morrison in the patent in suit before them, and the mode or method by which it is done is substantially that of the complainant. Such a variation in performing or carrying out the method cannot avoid infringement. I think the defendants have copied the principle or mode of operation of Morrison's patent in suit, and have therefore infringed. *Winans v. Denmead*, 15 How. (U. S.) 330-342, 14 L. Ed. 717; *Ives et al. v. Hamilton*, 92 U. S. 426, 430,

23 L. Ed. 494; *Machine Company v. Murphy*, 97 U. S. 120-123, 24 L. Ed. 935; *Hoyt v. Horne*, 145 U. S. 302, 308, 309, 12 Sup. Ct. 922, 36 L. Ed. 713; *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 568, 18 Sup. Ct. 707, 42 L. Ed. 1136; *Columbia Wire Co. v. Kokomo Steel & Wire Co.* (C. C. A.) 143 Fed. 116, 122. In *Westinghouse v. Boyden Power Brake Co.*, supra, the Supreme Court (page 568 of 170 U. S., at page 722 of 18 Sup. Ct., 42 L. Ed. 1136), said: "We have repeatedly held that a charge of infringement is sometimes made out though the letter of the claims be avoided."

In *Columbia Wire Co. v. Kokomo Steel & Wire Co.*, supra, the claims of the patent are found at page 119 of 143 Fed. Some of the things claimed were absent. Some in the form specifically described in the claims were absent and others substituted, but the court said:

"We are of opinion that the means thus transposed in the appellee's machine, if not within the definition of colorable evasions which infringe the patent in any view of its scope, are plain appropriations of the essence of the Bates conception by equivalent means, and infringements of the patent within the well-settled rule referred to. All the elements of the patent combination are employed with substantial identity in their use, and departure appears from the letter of the claims only, in the arrangement of these elements, without substantial difference in the principle of operation. The policy and rules of the patent law require that the patentee be protected against such evasions of the wording of a claim in form or nonessential details, when the substance of the invention is thus used, and is unmistakably shown in the specifications and claims."

In *Winans v. Denmead*, 15 How. (U. S.) 342, 14 L. Ed. 722, the claims of the patent read as follows:

"What I claim as my invention, and desire to secure by letters patent, is making the body of a car for the transportation of coal, etc., in the form of a frustum of a cone, substantially as herein described, whereby the force exerted by the weight of the load presses equally in all directions, and does not tend to change the form thereof, so that every part resists its equal proportion, and by which, also, the lower part is so reduced as to pass down within the truck frame and between the axles, to lower the center of gravity of the load without diminishing the capacity of the car, as described. I also claim extending the body of the car below the connecting pieces of the truck frame, and the line of draft, by passing the connecting bars of the truck frame and the draft bar, through the body of the car, substantially as described."

The patentee expressly claimed the "making the body of a car for the transportation of coal in the form of a frustum of a cone," etc. The defendants made theirs in an octagonal form. The court held, reversing the court below, that defendants infringed, and said:

"It is generally true, when a patentee describes a machine, and then claims as described, that he is understood to intend to claim, and does by law actually cover, not only the precise forms he has described, but all other forms which embody his invention; it being a familiar rule that to copy the principle or mode of operation described is an infringement, although such copy should be totally unlike the original in form or proportions. * * * The reason why such a patent covers only one geometrical form is not that the patentee has described and claimed that form only; it is because that form only is capable of embodying his invention, and, consequently, if the form is not copied, the invention is not used. Where form and substance are inseparable, it is enough to look at the form only. Where they are separable—where the whole substance of the invention may be copied in a dif-

ferent form—it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure. Where that is found, there is an infringement; and it is not a defense that it is embodied in a form not described, and in terms claimed by the patentee.”

In *Ives et al. v. Hamilton*, supra, it was held:

“Where an improvement in sawmills, for which letters patent were issued, consists of the combination of the saw with a pair of curved guides at the upper end of the saw, and a lever, connecting rod, or pitman, straight guides, pivoted cross-head, and slides or blocks and crank-pin, or their equivalents, at the opposite end, whereby the toothed edge of the saw is caused to move unequally forward and backward at its two ends while cutting. The claim is, ‘giving to the saw in its downward movement a rocking or rolling motion by means of the combination of the cross-head working in the curved guides at the upper end of the saw, the lower end of which is attached to a cross-head, working in straight guides and pivoted to the pitman below the saw, with the crank-pin substantially as described,’ the use by another party of guides consisting of two straight lines representing two consecutive cords of the curve of the guides of the patentee, and arranged in other respects in the same manner as this curve, is clearly the employment of a mechanical equivalent, and is an infringement of the patent.”

Here the claim was for curved guides, and they were not used.

In *Machine Co. v. Murphy*, supra, the court said:

“Except where form is of the essence of the invention, it has but little weight in the decision of such an issue; the correct rule being that, in determining the question of infringement, the court or jury, as the case may be, are not to judge about similarities or differences by the names of things, but are to look at the machines or their several devices or elements in the light of what they do, or what office or function they perform, and how they perform it, and to find that one thing is substantially the same as another if it performs substantially the same function in substantially the same way to obtain the same result, always bearing in mind that devices in a patented machine are different in the sense of the patent law when they perform different functions or in a different way, or produce a substantially different result. Nor is it safe to give much heed to the fact that the corresponding device in two machines organized to accomplish the same result is different in shape or form the one from the other, as it is necessary in every such investigation to look at the mode of operation or the way the device works, and at the result, as well as at the means by which the result is attained.”

See, also, *Tilghman v. Proctor*, 102 U. S. 730-731, 26 L. Ed. 279.

I think that defendants have copied and used complainant's method as described in claim 1, and that in so far as there is a change of a thing used in carrying the method into effect the defendants use a substantial equivalent.

I have carefully examined the question of prior use, reading all the evidence, and find that defense is not sustained.

Decree for complainant.

VICTOR TALKING MACH. CO. et al. v. TALK-O-PHONE CO.

SAME v. LEEDS & CATLIN CO.

(Circuit Court, S. D. New York. April 26, 1906.)

1. PATENTS—EXPIRATION OF FOREIGN PATENT—IDENTITY OF INVENTION.

A prior patent in a foreign country for a minor part of a broad or basic invention is not for the same invention as a subsequent United States patent covering both the minor parts and the broad main invention, within the meaning of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], and such foreign patenting of a part does not so affect the whole that the expiration of the foreign patent terminates the whole of the American patent including the broad claims.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 188½–191.]

2. SAME—TERM OF FOREIGN PATENT.

The provision of Rev. St. § 4887 [U. S. Comp. St. 1901, p. 3382], that a United States patent shall expire at the same time as a prior foreign patent for the same invention, has reference to the legal term of the foreign patent as appears on its face at the time of the issuance of the United States patent, and the latter is not further limited by the subsequent lapse or forfeiture of any portion of such legal term of the foreign patent by the failure to comply with a condition subsequent, such as the payment of additional fees at stated intervals.

8. SAME—INFRINGEMENT—GRAMOPHONE.

The Berliner patent, No. 534,543, for improvements in talking machines, claims 5 and 35, held valid as against the claim that they expired with certain foreign patents, and a preliminary injunction granted restraining their infringement on prior adjudication of their validity.

In Equity. On motion for preliminary injunction.

Horace Pettit, for complainant.

Louis Hicks, for defendants.

TOWNSEND, Circuit Judge. The bills allege infringement of claims 5 and 35 of the Berliner patent, No. 534,543. The Circuit Court for the Southern District of New York, in the suit of this complainant against the American Graphophone Company (140 Fed. 860) after an exhaustive discussion of the issues presented, sustained said claims, and its decree was affirmed by the Circuit Court of Appeals on March 1, 1906, after elaborate argument by able counsel and upon voluminous briefs in which apparently every material defense was presented and discussed. The case on this motion is presented by some 500 pages of affidavits and briefs. "Defendants' Exhibit Letters Patent" is a book of some 135 pages. It appears that the machines of these defendants are practically identical with those found to infringe in the former suit. These defendants, however, have set up twelve defenses, claimed either to consist of new matter not before the court on the former hearing or to relate to matters which, while in the record at the former hearing, were not considered or discussed. The court is urged to dispose of these questions at the earliest possible moment, in view of the great financial interests involved, of the advertisements and circulars issued by the respective parties relating to the patent in suit and the machines claimed to

infringe, and of the serious damage involved whether a preliminary injunction be granted or denied.

The new defenses are founded, *inter alia*, on the contentions that the patent in suit has expired by reason of the expiration of prior Berliner German, French, and English patents, and a Berliner-Suess Canadian patent, by reason of Berliner's abandonment of his invention in view of said Berliner-Suess patent; that Berliner was anticipated by an Edison patent; that in the former suit the Berliner patent was not fairly in controversy; that complainant has been guilty of laches; and that defendants do not infringe, in view of the prior art and especially of certain prior Berliner patents. The first and second defenses rest upon prior Berliner German patent, No. 53,622, and French patent, No. 207,090. It is claimed that the Berliner patent in suit covers improvements in details of construction upon the gramophone described and claimed in earlier patents, because his broad invention had been disclosed therein, and especially in 372,786, not before the court in the original suit, and that those details were covered by said prior foreign patents; that the inventions in suit are identical with those of the foreign patents, and that, as they expired prior to the commencement of this suit, the patent in suit expired at the same time under the settled rule. *Bate Refrig. Co. v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601; *Siemens v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153. It is claimed that the language of the specifications of the patent in suit supports this view, where the patentee says that "one feature of my invention has reference to the method of recording sound," etc., and "the other features of my invention have reference to the construction of the details of both the recorder and the reproducer of the gramophone," and that, while he illustrated his reproducing apparatus as a whole, he does not state that it is his invention. It is claimed, further, that unless the claims in suit are limited to certain improvements in details they are anticipated by Edison and Suess.

It is argued that the patent in suit expired prior to the commencement of this suit by reason of the expiration of said prior Berliner German and French patents. The drawings of the German patent are substantially identical with Figures 6 and 7 of the patent in suit, and the specifications describe and the claims cover these constructions. The same is true (barring the claims which are immaterial) of said French patent. The German patent, being a patent of addition to prior patent No. 45,048, expired with the expiration thereof on November 7, 1902. The French patent expired July 19, 1905. The French patent and the claims of the German patent cover improvements in details of the construction of Berliner's recorder and reproducer. It is claimed by complainant that these details differ in construction and operation from those shown in the patent in suit and covered by claims not in issue; but this question can only be determined by expert testimony, and this point does not appear to be material in the determination of the issue herein. The issue here presented, assuming the details to be substantially identical, is whether the prior patenting in a foreign country of a minor part of

a broad or basic invention, such as that covered by the claims in suit, so affects the whole that the expiration of the foreign patent terminates the whole of a United States patent, which includes both the minor parts and the broad main invention. The Circuit Court and the Circuit Court of Appeals in the original suit held that the claims in suit covered the broad invention.

The claims in suit are as follows:

"(5) The method of reproducing sounds from a record of the same, which consists in vibrating a stylus and propelling the same along the record by and in accordance with the said record, substantially as described."

"(35) In a sound-reproducing apparatus, consisting of a traveling tablet having a sound record formed thereon and reproducing stylus shaped for engagement with said record and free to be vibrated and propelled by the same, substantially as described."

The statute provides as follows:

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years." [U. S. Comp. St. 1901, p. 3382.]

The test in each case, under the statute, is whether the inventions are identical, as is said by the Supreme Court in *Commercial Mfg. Co. v. Fairbanks Co.*, 135 U. S. 176-194, 10 Sup. Ct. 718, 724, 34 L. Ed. 88:

"A fair test of the question as to whether the American patent is anticipated by the foreign patents, or is included in them, we think would be: Were a person in this country, after the issue of the present American patent, to commence the manufacture of oleomargarine by the precise process described in the Bavarian or Austrian patents, supposing that process had not been patented abroad, would the courts refuse an injunction to restrain the use of the process on the ground that it infringed that covered by the American patent? We can hardly deem it possible that any intelligent court would deny an injunction, if applied for under such circumstances, and we think this fairly illustrates the relation of the foreign to the American patent."

The cases cited do not satisfactorily settle this question, or at most do not seem to support defendants' contention. Thus in *Siemens v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153, the Supreme Court held that the American patent expired with the foreign patent, saying that:

"The principal invention is in both, and if the American patent contains improvements this fact cannot save the patent from the operation of the law which is invoked."

In *Western Electric Co. v. Citizens' Tel. Co. (C. C.)* 106 Fed. 215, the court said as follows:

"But, what is more directly to the point, the essence of the patent in suit contained in the first claim thereof, namely, the cutting out of the annunciator from the circuit employed for conversation, is embodied in the description of the invention in the foreign patents. The construction given in the speci-

fications necessarily involves it. The case is, therefore, brought under the operation of the rule laid down in *Siemens' Adm'r v. Sellers*, 123 U. S. 276, 8 Sup. Ct. 117, 31 L. Ed. 153, even though it be conceded that there are differences in some details between the foreign and the home patents upon which independent claims might be based."

I fail to find in the numerous cases cited by counsel any authority for the proposition advanced by defendant that, if an article made according to the description of the prior foreign patent would infringe any claim of the American patent no matter how insignificant, then the two patents are for the same invention and the American patent expires in toto with the prior foreign patent. In fact the interpretation placed by the courts upon the decision of the Supreme Court in *Siemens v. Sellers*, supra, seems to be that the test is whether the principal invention of the domestic patent is found in the prior foreign patent. I think, from such brief examination as I have been able to give to the authorities cited, that the rule contended for by the defendant does not apply to cases where the foreign patents which have expired do not cover the broad claims for the basic invention.

It is next contended that the patent in suit expired at the same time with certain other Berliner German and French patents and an English patent, because these patents cover the invention of Berliner's United States patent, No. 564,586. But an examination of the drawings of the prior British patent shows that there is omitted therefrom the Figure 10 of the United States patent, No. 564,586, which was the only figure illustrating the form of the device covered by the claims here in suit. There is nothing either in the specifications or drawings of the said British patent which describes, illustrates, or shows the method or apparatus of the claims here in suit. These considerations apply equally to said earlier German and French patents.

The fourth, fifth, and sixth defenses are founded upon a Canadian patent (No. 41,901) to Berliner, as assignee of Suess, upon which defendant lays great stress. This patent discloses and broadly claims the invention covered by the claims here in suit. It is contended that thereby Berliner admitted that Suess was the inventor of the reproducing apparatus in suit, that by Berliner's application as assignee of Suess he abandoned the broad claims in suit and that, as the said Canadian patent covered said broad invention and expired in 1899, the patent in suit expired with it. The evidence introduced in the original suit showed, and the court found on the Suess patent, 427,279, that Suess was merely an improver of a particular form of swinging arm device, and some of the language used in the specifications of this Suess Canadian patent, which, however, was not before the court in the original suit, seems to indicate that its structure is merely an improvement on the broad Berliner invention, and Berliner himself afterwards applied for and obtained a Canadian patent for the broad invention covered by the claims here in suit. But the Canadian patent in terms describes and claims the broad generic invention of Berliner covered by the claims here in suit, as will be seen from the following claims:

"(5) In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound conveying

tube and a diaphragm and stylus mounted at one end of the tube, of a freely swinging supporting frame for the said reproducer mechanism, substantially as described."

"(7) In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound conveyor, and a diaphragm and stylus mounted at one end thereof, of a supporting frame for the said reproducer, loosely pivoted to swing freely both laterally and vertically, substantially as described."

"(11) In an apparatus for reproducing sounds from a rotating record tablet, a reproducing stylus mounted to have a free movement over the surface of the record tablet, substantially as described."

I think, therefore, that if this patent expired, as claimed, in 1899, the patent in suit expired at the same time, upon the authority of the decisions cited above.

It is contended by complainant, however, that the Canadian patent did not then expire, because it was granted for a term of 18 years from its date, namely, from February 11, 1893. The grant of the patent is for "the period of 18 years from the date, * * * subject to the conditions in the acts" of Canada. The patent grant further provides as follows:

"The partial fee required for the term of six years having been paid to the Commissioner of Patents, this patent shall cease at the end of six years from date unless at or before the expiration of the said term the holder thereof pay the fee required for the further term or terms as provided by law."

The rule in such cases, as I understand it, is that the duration of the United States patent is limited by the duration of the legal term of the foreign patent, and that it is not limited by any lapse or forfeiture of any portion of said term by means of any condition subsequent. *Pohl v. Brewing Co.*, 134 U. S. 386, 10 Sup. Ct. 577, 33 L. Ed. 953.

In *Bate Refrig. Co. v. Sulzberger*, 157 U. S. 1, 15 Sup. Ct. 508, 39 L. Ed. 601, the Supreme Court says as follows:

"But the American patent will be granted upon the condition that, if you obtain the foreign patent first, your invention shall be free to the American people whenever, by reason of the expiration of the foreign patent, it becomes free to the people abroad."

In *Bonsack Mach. Co. v. Smith* (C. C.) 70 Fed. 383, the court, construing the decisions, held that the question in every case was, when does the foreign patent expire? looking to its language when issued. Applying this test here, I conclude with some hesitation that, as the term fixed in the grant was for 18 years, at the time when the United States patent in suit was issued, the latter does not lapse at the end of 6 years because of the failure of the patentee, after the United States patent had issued, to pay the fee for a further term of 6 years. This conclusion seems to accord with that reached by the Circuit Court of Appeals for this circuit in *Welsbach v. Apollo*, 96 Fed. 332. In any event, for reasons hereafter stated, I have concluded to resolve the doubt raised on this point in favor of the complainant.

The defense founded on the prior Edison patent will not be discussed, because said patent was before the court in the original suit.

The contention that by reason of a certain contract between the parties "the prior suit was not * * * a suit in which the Berliner patent in suit * * * was fairly in controversy" is not deserving of notice. The contract and the relations of the parties were fully before the court, and the record and briefs in said case are a sufficient answer to any such contention.

The other defenses of laches and noninfringement need not be considered. I have given all of my time available during the past 10 days to the examination of the various questions presented on this motion, and have reached the conclusion that, except as to the *Suess Canadian* patent No. 41,901, the defendants have failed to introduce any new matter which would in my judgment have led the courts to reach a different conclusion if it had been before them in the original suit. But, even if I am mistaken in this view, and if the expiration of the *Suess Canadian* patent is a complete defense, or if a decision of the questions raised as to the character and scope of the various patents now introduced for the first time should be postponed until final hearing, yet I am constrained to grant the injunction in order to permit an appeal and a determination of the questions at the earliest possible moment.

The motion for a preliminary injunction is granted, with leave to defendants to move for a stay pending the decision of these questions by the Circuit Court of Appeals.

EDISON GENERAL ELECTRIC CO. v. CROUSE-HINDS ELECTRIC CO.

(Circuit Court, N. D. New York. July 20, 1906.)

PATENTS—INFRINGEMENT—ELECTRIC LAMP SOCKETS.

The Metzger patent, No. 489,682, for an electric lamp socket, claims 5 and 7, are valid, and although not entitled to a broad construction, as for a pioneer invention, are, on the other hand, when read in connection with the specification, not so limited as to deprive them of all benefit of the doctrine of equivalents. As so construed, *held* infringed by a structure which contains all of the elements of the claims in substantially the same combination and arrangement, and each performing the same function, although some of them differ in form. Claim 6 held void for lack of invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 372, 373.]

This is a suit in equity to restrain alleged infringement by defendant of claims 5, 6, and 7 of United States letters patent No. 489,682, dated January 10, 1893, and issued to the complainant as assignee of Amandus Metzger, and also for an accounting.

Samuel Owen Edmonds, for complainant.

Hey & Parsons, for defendant.

RAY, District Judge. The patent in question states in its specifications as follows:

"The present invention relates to sockets adapted to receive the bases of electric lamps or other translating devices, and to connect their terminals with a suitable supply circuit. The main object of the invention is to pro-

vide a simple and improved device of this character. The invention consists primarily in a socket having an insulating body, with an extension on which the terminals are mounted in the manner hereinafter set forth, and the invention consists also in the several combinations hereinafter described and claimed. In the accompanying drawings, Figure 1 is a partial section of a socket, having a base adapted to stand on a table, or to be secured to a wall or similar support; Fig. 2 is a plan view of the socket, with the inclosing shell removed; Fig. 3 is a plan view of the base, with the shell and the terminals removed; Fig. 4 is a view of a detail to be described; and Fig. 5 is a partial section of a socket, having a different outline, and adapted to be supported on a bracket or pipe, in a manner common in electric lighting systems. The socket to be described can be adapted for use in various situations and systems, but it will be described herein as adapted to stand on a table, and as adapted to be secured to a bracket or pipe, and to receive a lamp having terminals of the Edison type. In constructing the socket, I form an insulating base, 1, of rubber, porcelain, or other insulating material, having at the center an integral extension, 2, considerably smaller than the main part of the body, and when the socket is to be used as a stand or wall socket a circumferential rib or flange, 3. The extension, 2, is preferably provided on its outer face or end with a depression or ledge, 4, on which an inwardly bent flange, 5, on the bottom of the ring terminal, 6, rests, and said terminal is securely held in place by a U-shaped clamping piece, 7, which is adapted to rest on said flange, and to surround the central raised portion, 8, of the insulating extension. Screws 9 are passed through the base from the rear and into the clamping piece, to cause the same to clamp and hold the sleeve terminal. The piece, 7, is provided with an arm, 10, in which fits a binding screw, 11, by means of which one of the circuit wires, 12, can be secured to the sleeve terminal of the socket. At the center of the raised portion, 8, is preferably formed a depression, 13, of less depth than the depression around the outer edge, and in which the second socket terminal, 14, is adapted to rest, this terminal being secured in place by a screw passed through the insulating base from the rear. A single fastening screw is sufficient, since the terminal is prevented from turning by wall of insulating material around it. Said terminal is bent at right angles, and has a binding screw, 15, by means of which the outgoing wire, 16, of the circuit may be connected thereto. The under surface of the base is preferably provided with grooves, 17, through which the wires may pass to the holes, 18, through which the wires extend to the terminals; 19 are screw-holes, by means of which the socket base may be secured to any desired support; 20 is a sheet metal shell, which rests on the base just inside of the flange, 3; and 21 is a screw-threaded insulating ring surrounding the sleeve terminal, and fitting within the neck of said shell. This arrangement of parts not only gives an ornamental appearance to the socket, but braces and protects the sleeve terminal. By mounting the terminals, as described, it will be clear that they are fully insulated from each other, being separated on the face of the supporting body by a wall of insulating material, and the binding screws being on opposite sides of the extension, 2, and are very easily placed and secured in position. The particular outline of the central extension is not important, neither is it essential in all cases that depressions for the terminals of the socket should be formed in the end of the support in the manner described. In Fig. 5, the insulating base is much smaller than in Figs. 1, 2, and 3, but is larger than the extension, and is supported in a sheet metal shell, having a neck, 22, adapted to screw onto a bracket or pipe. The shell extends from the circumference of the body, and is therefore separated by a considerable distance from the extension and terminals supported thereon. The extension, 2, is formed in substantially the same manner as above described. This figure shows the inwardly turned flange, 5, on the sleeve terminal, with the clamping piece, 7, resting on the same; this view being taken from the opposite side of a socket to that shown in Fig. 1. This view also shows more clearly than the other views the manner in which the terminals are separated by the insulating material of the extension 2."

The claims in issue (5, 6, and 7) read as follows:

"(5) The combination in a socket of an insulating base or body, a sleeve terminal having an inwardly bent flange or projection resting on a part of said insulating body, a clamping piece adapted to fit over said flange, and a screw or similar device passing through the insulating body and clamping piece, and means for securing the circuit terminal to said clamping piece, and through it to the sleeve terminal, substantially as described.

"(6) The combination of the insulating standard having a ledge around a central U-shaped portion, a sleeve terminal having a flange resting on said ledge, and a U-shaped clamping piece on said flange, substantially as described.

"(7) The combination in a socket of an insulating body, a sleeve terminal provided with an inwardly extending flange, a central terminal, and a curved clamping piece on said flange around the central terminal, substantially as described."

It will be noted that the patent calls attention to two forms in which the invention may be employed to advantage. The one comprises a structure in which the insulating foundation is provided with an extension upon which the metallic parts are secured, while the other comprises a structure in which the insulating foundation has no such extension, but the metallic parts are mounted thereon directly. The first four claims of this patent refer to the form first mentioned, where the insulating foundation is provided with an extension upon which the metallic parts are secured, while the three claims in issue are based upon the second form mentioned, in which this extension is dispensed with, and the metallic parts are mounted directly upon the insulating body. The patent also describes and illustrates the invention as applied to a no-key socket, ordinarily adapted to co-act with a chandelier or its equivalent, and to a receptacle usually adapted to be attached to the wall. Therefore, the sockets and receptacles mentioned in the patent are essentially the same, the difference being chiefly in the shape or design of the insulating foundation. The complainant contends that the description in the patent refers to two important features, which, apart from the metallic parts, distinguish this structure broadly from the structures theretofore employed. The complainant contends that the first of these features concerns the use of an insulating base or body or standard, by which is meant insulating material of abundant mass as distinguished from the insulating material of disk form, which characterized the single disk and the double disk sockets of the prior stages in the evolution of the art. The complainant also contends that the second feature concerns the electrically and mechanically separating the two socket terminals of opposite polarity by the use of a wall of insulating material, preventing those oppositely charged terminals from becoming electrically connected, either by the mechanical shifting of their positions, or by an intervening bridge, as of moisture. Claims 5, 6, and 7 are alleged to be drawn upon the second form, in which the invention may be employed as referred to in the two first paragraphs of the specifications above quoted. The contention is that the claims in issue cover an insulating base or body having mounted thereon a screw shell or sleeve terminal, provided with an inwardly bent flange, a U-shaped clamping piece fitting over such flange, screws for securing the clamp-

ing piece, and the sleeve terminal as a necessary consequence to the insulating body, and means for conducting current to the clamping piece and sleeve terminal.

I will not take the time to discuss the question of the validity of claims 5 and 7 of the patent in suit. Presumptively they are valid, and I do not find sufficient evidence in the record and the prior art, after a full and careful consideration of the same, to overcome this presumption, and the finding therefore is that claims 5 and 7 of the patent in issue are valid.

The more serious and difficult question involved in this suit is, does the defendant infringe? In arriving at a satisfactory conclusion on the question of infringement, it is necessary, however, to examine the patent with care. If a pioneer, and entitled to a broad construction accordingly, it is entitled to the application of equivalents in the broad and comprehensive sense.

Claim 5 is a combination claim, with the following elements: In a socket (1) an insulting base or body; (2) a sleeve terminal having (a) an inwardly bent flange or projection resting (b) on a part of said insulating body; (3) a clamping piece adapted to fit over said flange; (4) a screw or a similar device passing through (a) the insulating body, and (b) the clamping piece; and (5) and lastly, means for securing the circuit terminal (a) to said clamping piece, and (b) through it to the sleeve terminal, substantially as described.

Claim 6 consists of the following elements in combination: (1) the insulating standard, having (a) a ledge around a central U-shaped portion; (2) a sleeve terminal, having a flange resting on said ledge; and (3) a U-shaped clamping piece on said flange, substantially as described.

Claim 7 has in combination the following elements: In a socket (1) an insulating body; (2) a sleeve terminal provided with an inwardly extending flange; (3) a central terminal; and (4) a curved clamping piece on said flange around the central terminal, substantially as described.

While claim 6 speaks of "the insulating standard," I assume that the insulating base or body is meant, and whether we use the insulating body of one mass suitably fashioned, or that having an extension or raised portion, upon which the metallic parts are mounted, I discover no substantial difference in the principle involved.

I fail to discover in either the claims or specifications of the patent in suit any reference to an abundant mass of insulating material as distinguished from the disks of insulating material employed in the former art, and I cannot see that any particular importance can be given it, as in the prior art, in the patent No. 251,596, "socket or holder for electric lamps," issued to Edward H. Johnson in 1881, we have an abundant mass of insulating material of wood, and the same is true of the Bergmann patent of 1882, No. 257,277, socket for incandescent lamps. In 1885 Bergmann took out another patent for socket for incandescent lamps, No. 311,100, date of January 20, 1885, and he says:

"My object is to provide a socket of this kind which shall be compact and of as few parts as possible, in which the amount of insulating material used shall be very small, and which shall contain a simple and effective form of circuit controller."

And he also says:

"The socket constructed as described * * * has no useless mass of insulating material, being merely a metal skeleton, with just enough insulation to separate the terminals, all the circuit connections being carried by the single insulating-disk, instead of being divided among two or more insulating portions, as heretofore."

The effort of Bergmann seems to have been to get away from the abundant or superabundant mass of insulating material of the prior art. This is not mentioned as showing anticipation of the patent in suit, but as showing there is nothing new or novel in the use of an abundant mass of insulating material. The question was how to make a neat, compact, light, durable, safe, cheap, and efficient socket, avoiding the dangers of cross-circuiting, etc. Metzger filed his application for the patent in suit in April, 1892, and had the prior art before him, as he is presumed to have been thoroughly conversant therewith. In fact, the patentee (Metzger) says:

"The invention consists primarily in a socket having an insulating body [old] with an extension on which the terminals are mounted in the manner hereinafter set forth; and (2) the invention consists also in the several combinations hereinafter described and claimed."

I can discover no novelty amounting to invention in a mass of insulating material, with one part or portion thereof raised or elevated for convenience and utility in mounting thereon or attaching thereto the other parts of the socket. The invention resides in the mode and manner of attaching the various parts to this central mass of insulating material, or rather the novel and efficient way of arranging them, with reference to each other, so as to accomplish the main purpose. This involved some cutting or rather molding of the insulating material to adapt it to the use intended. Each and every element of each of these claims is old, had been used in the prior art, or at least plainly and distinctly suggested by it, the form or shape and size being changed, but in no way that suggests invention. I think, therefore, the claims of the patent in determining the question of infringement must be limited accordingly in applying the doctrine of equivalents. For convenience in giving a description of the complainant's construction in accordance with the patent in suit, and also of defendant's alleged infringing construction, we will assume that the body of insulating material stands on end before us. We will then speak of the upper end as the one on which the inwardly bent flange on the bottom of the ring terminal rests. Assuming this body of insulation to be first cut or molded, to correspond in shape with the ring terminal—that is, cylindrical—on opposite sides thereof a small portion is cut away from top to bottom to permit the attachment thereto of the arm, 10, of the U-shaped clamping piece, 7, and its binding screw, 11, on the side of the body, and of the second socket terminal, 14, which is bent at right angles so that one-half of its

length, about, rests on top of, or the upper end of, the insulating body, and the other half on the side thereof, and its binding screw, 15, on the side of the body, without their extending out laterally further than the side of the ring terminal. One part of this second socket terminal rests on a part of the upper end of the body, which is made U-shaped, and is higher than the remaining part of the upper end, and made so by cutting (or molding) away a part of the upper end to receive the flange of the ring terminal, and the U-shaped clamping piece resting thereon, the clamping piece above the flange, of course. This cut away portion corresponds in shape and size with the clamping piece, aside from its arm, 10. This cutting away of a portion of the upper end of the insulating body forms what is called in the patent in suit "a ledge," and it is on this so-called "ledge" that the flange of the "ring terminal" rests, and on which flange the U-shaped clamping piece rests. The U-shaped clamping piece, 7, and, consequently, the ring terminal, 6, and the second socket terminal, 14, are held securely in place by means of screws coming through the insulating body from the bottom thereof. These holding screws are distinct from the binding screws, 11 and 15, to which the wires are attached. Attach the wires to the heads of these binding screws, which are on opposite sides of the insulating body, and we have the complainant's socket. In this way the second socket terminal is raised above the clamping piece, 7, holding the sleeve or ring terminal by means of its flange, and, when this second socket terminal is sunk into the raised U-shaped part of the insulating body (a preferable mode of construction) it is separated from the U-shaped clamping piece and the flanges of the ring terminal by a wall of insulating material. Of course, this whole structure may be inclosed in a receptacle or hollow body of insulating material, made integral with the insulating body, before described. Possibly it should be mentioned that the ring terminal is cut away on opposite sides thereof where the binding screws to which the wires are attached are respectively located. Also, this ledge is a preferential construction or formation, as is the depression to receive the second socket terminal. Now what has the defendant done? (1) It has the same ring terminal with flanges and one cut away portion only, but this is not material. It was old in the art. (2) It has the mass or body of insulating material cut or molded to conform in shape to the ring terminal; that is, cylindrical. Old and known to the prior art and to everybody. (3) It has the flanges of the ring terminal resting on the upper end of the insulating body, and held down to it by a U-shaped clamping piece adapted to rest thereon. But this clamping piece is of the "short-horned" variety, and not adapted to surround the raised portion of the insulating body, which raised portion is found in defendant's construction, to the extent the clamping piece of complainant's patent does. In fact it "surrounds it" on one side only, while complainant's clamping piece surrounds his "raised portion" on three sides. This clamping piece is held in position, not by two screws coming through the insulating body from the bottom or lower end thereof, as in complainant's, but by one screw only (a hollow

one), which performs an additional function, described later. This U-shaped clamping piece does not have the arm, 10, or the binding screw, 11, but in lieu thereof makes connection with the corresponding circuit wire by means of a long sharp-pointed screw passing through the barrel of the hollow screw before mentioned, and consequently through the insulating body and into a metal washer, to which washer is attached the proper circuit wire, and the lower end of this hollow screw and the washer holding the circuit wire may be seated in the lower part of the body of the insulating material, or in an added body of insulating material. The other, or second, socket terminal is seated on a raised portion of the upper or top end of the insulating body, not exactly like complainant's, but sufficiently similar, but this second terminal is not bent at right angles, and has no binding screw to receive and hold the other, or, as complainant's patent calls it, "outgoing wire 16 of the circuit." It is wholly on the top of this raised part of the upper end of the insulating material, and is held in place by a hollow screw passing to the lower end of the insulating body. It makes contact with this "outgoing wire" of the circuit by means of a long sharp-pointed screw passing through the hollow screw, as before described, and connected with the other wire in the same manner as does the other long pointed screw before mentioned. This is defendant's socket. The substantial differences are in the shape of the U-shaped clamping pieces and of the "second socket terminals," and in the mode and manner of making connection with the respective wires of the terminals. Are these substantial equivalents?

Unless the specifications of the patent in suit limit the scope of claim 5 as it reads, the defendant's socket reads upon this claim. The specifications of a patent may limit the claims made, or they may, in a sense and to a degree, enlarge or broaden the meaning to be given the terms employed therein. The shape and form of devices of this character are of little consequence unless such shape and form enable the element described to perform some office or function it could not perform but for such shape. In complainant's patent the U-shaped clamping piece, 7, is secured to the insulating body by the two independent screws, while in defendant's socket it is secured thereto by one only, and this is hollow. I regard this as immaterial, as the office or function of the one, so far, is the same as that of the two. But this U-shaped clamping piece of the defendant's socket has no arm at all, and no binding screw fits therein to hold or attach to the wire of the circuit. For this is substituted the long pointed screw which connects with the wire below the body of insulating material or in its lower end, and this screw passes through the single hollow screw which fastens or holds the clamping piece on the flange of the ring terminal, and also to the body of insulation, but it binds on the U-shaped clamping piece, and in fact connects, although not directly, the wire to the clamping piece. The washer is added to the wire, and the lower end of the hollow screw seems to have a washer integral with it at its lower end, and the two washers are brought into immediate contact on their flat broad surfaces. In short, the method and

mechanical device for connecting the ring terminal and clamping piece with the wire and its location on the insulating body is changed. That the one is the electrical equivalent of the other cannot be doubted. The electrical office or function of the one is the same as that of the other, and the general arrangement of the terminals with respect to each other and to the avoidance of cross-circuiting is the same. Mechanically, there is more to this mechanism of defendant than to complainant's, but in this device they serve the same precise purpose—to connect the wire to the clamping piece, flange, and consequently the ring terminal, and hold it in position, separated from the other or second terminal attached to or connected with "the outgoing wire," so-called, in the specifications of complainant's patent. Treating the hollow screw as an arm of the clamping piece, although it is not integral with it, and the long pointed screw passing through it and screwing into the washer attached to the wire as a binding screw, to which the wire is attached, and we have a device "by means of which one of the circuit wires, 12, can be secured to the sleeve terminal of the socket," and, in the broad language of claim 5, "means for securing the circuit terminal to said clamping piece, and through it to the sleeve terminal." Is it, as a whole, "substantially as described"? As a whole, it dispenses with one of the screws of the patented device, not an element of the claim, and also with the arm, 10, integral with it, but it substitutes the long pointed screw and two washers, one of which is, in one construction at least, integral with the hollow screw and the other attached to the wire.

It seems to me that when changes are made substantial equivalents are used, and that in the sense of the patent law the two sockets perform the same functions, with substantially the same means, in substantially the same way. Each does the same thing, in the same way, with substantially the same combination of devices or elements arranged in substantially the same way, making one complete device, to wit, an electric lamp socket, adapted to receive the bases of electric lamps or other translating devices, and to connect their terminals with a suitable supply circuit. I find no element of claim 5 of the patent in suit omitted in defendant's socket, and I think the combination and arrangement of the several parts are substantially the same in every material respect. Change of form in the elements does not avoid infringement, and the words of claim 5, "substantially as described," seem fully to warrant the changes described in "means for securing the circuit terminal to said clamping piece, and through it to the sleeve terminal," and also the other changes mentioned in making complainant's device in accordance with, and within the terms of, the patent in suit. While it is true that every part of a combination claimed is presumed to be material thereto, and that a combination is an entirety, and that if one element is omitted the claim disappears unless a substantial equivalent is substituted, and such substitution is permissible in the particular case, still I think that the language of the specifications of the patent in suit has not limited the claims to the particular forms mentioned, and that it was not necessary to claim equivalents in the claims themselves, or mention them in the

specifications. "The patentee, having described his invention and shown its principles, and claimed it in that form which most perfectly embodies it, is, in contemplation of law, deemed to claim every form in which his invention may be copied unless he manifests an intention to disclaim some of those forms," which, of course, he may do, in certain cases, by mentioning in his claim one particular thing as contradistinguished from all others of the kind. Walker on Patents (4th Ed.) § 363, says:

"Sec. 363. A change of form does not avoid an infringement of a patent unless the form shown in the patent is necessary to the functions which the patent ascribes to the invention, or unless that form is the distinguishing characteristic of the invention, or is essential to its patentability, or unless the patentee specifies a particular form as the means by which the effect of the invention is produced, or otherwise confines himself to a particular form of what he describes. Even where a change of form somewhat modifies the construction, the action, or the utility of a patented thing, noninfringement will seldom result from such a change."

In determining the validity of claim 7 of the patent in suit and the question of infringement thereof, we are to determine the meaning of the words "around the central terminal" in the light of the language of the specifications and a view of the drawings. Clearly, it is not intended that the curved clamping piece shall completely encircle the central terminal, for such a piece is not shown or described. A person may be "around" a house, inside or outside, without encircling it or going all around it. The word "around" means, primarily, "in a circle or sphere; round about"; secondarily "from place to place; here and there; about; as to travel around from city to city"; third, "about; near; as he waited around till the fight was over." Claim 7 calls for a curved clamping piece fixed and near to, and partially encircling, the central terminal; not one moving about from place to place. The defendant has such a clamping piece, but it is curved to a lesser extent or degree than the one shown in the specifications of the patent, and, as before stated, does not inclose this terminal on more than one side. Defendant has a "sleeve terminal" or "ring terminal," and this has an inwardly extending flange, also a central terminal and an insulating body—all the substantial equivalents of the same elements in complainant's patent in suit.

It seems to me clear that the changes in this case in defendant's socket are not as great or as wide a departure from the claims read in the light of the specifications as were those of the defendant in *Cash Register Co. v. Cash Indicator Co.*, 156 U. S. 502 (page 516) 15 Sup. Ct. 434, 39 L. Ed. 511, where infringement was held to be established. It is often very difficult to draw lines of distinction. In *Westinghouse v. Boyden Power Brake Co.*, 170 U. S. 568-569, 18 Sup. Ct. 722, 723 (42 L. Ed. 1136) the court said:

"But even if it be conceded that the Boyden device corresponds with the letter of the Westinghouse claims, that does not settle conclusively the question of infringement. We have repeatedly held that a charge of infringement is sometimes made out, though the letter of the claims be avoided. *Machine Co. v. Murphy*, 97 U. S. 120, 24 L. Ed. 935; *Ives v. Hamilton*, 92 U. S. 426, 431, 23 L. Ed. 494; *Morey v. Lockwood*, 8 Wall. 230, 19 L. Ed. 339; *Elizabeth v. Pavement Company*, 97 U. S. 126, 137, 24 L. Ed. 1000; *Sessions v. Romadka*,

145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Hoyt v. Horne*, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713. The converse is equally true. The patentee may bring the defendant within the letter of his claims, but if the latter has so far changed the principle of the device that the claims of the patent, literally construed, have ceased to represent his actual invention, he is as little subject to be adjudged an infringer as one who has violated the letter of a statute has to be convicted, when he has done nothing in conflict with its spirit and intent. 'An infringement,' says Mr. Justice Grier in *Burr v. Duryee*, 1 Wall. 531, 572, 17 L. Ed. 650, 660, 661, 'involves substantial identity, whether that identity be described by the terms, "same principle," same "modus operandi," or any other. * * * The argument used to show infringement assumes that every combination of devices in a machine which is used to produce the same effect is necessarily an equivalent for any other combination used for the same purpose. This is a flagrant abuse of the term "equivalent." We have no desire to qualify the repeated expressions of this court to the effect that, where the invention is functional, and the defendant's device differs from that of the patentee only in form, or in a rearrangement of the same elements of a combination, he would be adjudged an infringer, even if, in certain particulars, his device be an improvement upon that of the patentee. But, after all, even if the patent for a machine be a pioneer, the alleged infringer must have done something more than reached the same result. He must have reached it by substantially the same or similar means, or the rule that the function of a machine cannot be patented is of no practical value. To say that the patentee of a pioneer invention for a new mechanism is entitled to every mechanical device which produces the same result is to hold, in other language, that he is entitled to patent his function. Mere variations of form may be disregarded, but the substance of the invention must be there. As was said in *Burr v. Duryee*, 1 Wall. 531, 573, 17 L. Ed. 650, 660, 661, an infringement 'is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way. * * * That two machines produce the same effect will not justify the assertion that they are substantially the same, or that the devices used are therefore mere equivalents for those of the other.'

I do not think that defendant has avoided even the letter of claims 5 and 7 of the patent in suit, or the letter of the claims read in the light of, and modified and restricted by, the specifications and drawings. The conclusion is that claims 5 and 7 of the patent in suit are not only valid, but infringed by the defendant.

As to claim 6, which has in combination (1) the insulating standard described, having a ledge around a central U-shaped portion thereof, and (2) a sleeve terminal having a flange resting on said ledge, and (3) a U-shaped clamping piece on said flange, I fail to find invention in view of the prior art. Such a body of material cut away to form a U-shaped ledge wholly or partially around a raised central portion presents no novelty in or outside the art to which this patent relates. This ledge is mentioned in the specifications as a preferential form of construction merely. It is a form of construction that would occur to any one of moderate skill in this art or in the trade of carpentry, and is old in all arts where such a form of construction is desirable. Sleeve terminals having flanges turned inwardly or outwardly were not only old in the art, but would occur to any skilled mechanic who desired to seat them on such a body of

material as has been mentioned. A U-shaped clamping piece—that is, a curved clamping piece—is not only old in this art, but in all arts where clamping pieces are used. Such a form of clamping piece for such a purpose as is described in the specifications and placed on such a ledge above the flange, and resting thereon and fastened to the body of the insulating material by screws or similar devices, would occur to any one skilled in this or any other art involving mechanical skill or discernment. I cannot find invention disclosed in this claim, and hold it invalid.

There will be a decree that claims 5 and 7 of the patent in suit are valid and infringed by defendant, and that claim 6 thereof is void.

GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC MFG. CO. et al.

(Circuit Court, S. D. Ohio, W. D. February 19, 1906.)

No. 5,654.

PATENTS—INFRINGEMENT—ARMATURE CORE.

The Reist patent, No. 508,637, for an armature core was not antedated and discloses invention. Also *held* infringed.

In Equity. Suit for infringement of Claims, 1, 2, 4, 5, 6, and 8, of letters patent No. 508,637, granted to the General Electric Company, November 14, 1893, as the assignee of Henry G. Reist.

Richardson, Herrick & Neave, for complainant.

Stem, Heidman & Mehehope and C. V. Edwards, for defendant.

THOMPSON, District Judge. Claims 1, 2, 4, 5, 6, and 8, read as follows:

“(1) A laminated armature core built up in sections, and separators attached to the laminæ between the two consecutive sections, as and for the purpose described.

“(2) In an armature core the combination with sections built up of laminæ, of separators consisting of ribs of metal between said sections, and in contact with adjacent laminæ whereby ventilating space is afforded between the inner and outer surfaces of said core, as described.

“(4) In a toothed armature core built up of laminated sections, separators consisting of ribs extending outwardly from the teeth on one of said sections to the corresponding teeth on the adjacent section, whereby said sections are mutually supported and air passages radial to the center of said core afforded, as and for the purpose specified.

“(5) An armature core consisting of laminæ arranged side by side and separators attached to certain of the laminæ to form a ventilating space or spaces in the core.

“(6) An armature core consisting of layers of laminæ built up in sections or bundles, and pronged or skeleton separators attached to an outside lamina of each of said sections, whereby ventilating space is provided between adjacent sections, as described.

“(8) In an armature a sheet or lamina having teeth or projections for the reception of the armature coils or armature conductors, and metal separators riveted or otherwise secured thereto, said separators extending toward the points or free ends of said teeth or projections.”

Reist claims to “have invented a new and useful improvement in the contruction of armature-cores * * * whereby ample ventilation is obtained for dissipating the heat generated thereon without detri-

ment to the inductive qualities of the core, and without materially increasing the expense of construction."

The heating of the armatures greatly impairs the efficiency and capacity of the machine and prior to the patent in suit, many patents were granted covering schemes of ventilation, as means for dissipating the heat, none of which proved to be of much value or usefulness, for they usually involved such a reduction of the laminated iron of the core, as to cause a greater impairment of the efficiency and capacity of the machine than before, and the evidence shows, as a consequence, that for five or six years prior to the granting of the patent in suit, their use was practically abandoned.

The Reist method of ventilation supplied the want and furnished a means for dissipating the heat which did not impair, but increased the efficiency and capacity of the machine, without materially increasing the expense of construction, but the defendant contends that, in the light of the prior art, invention was not required to produce this method, but only the skill of the experienced mechanic. This contention cannot be sustained. The prior art fully advised Reist of the difficulties attending the undertaking, but afforded him little aid in overcoming them. In view of magnetic and electrical conditions, which imposed limitations that had theretofore prevented a successful solution of the problem, more than mere mechanical skill was required to fashion the separator, fix its location, and make the adjustments to its surroundings necessary to meet these conditions and establish his scheme of ventilation. Space for the ventilation ducts could only be obtained by the removal of iron from the core, and success depended upon securing adequate ventilation without overbalancing loss caused by the removal of the iron, and the question presented was whether, under these conditions, success was possible. If possible, it required an economical use of space and the employment of devices and appliances consistent therewith, not known to the prior art. Reist answered the question in the affirmative, and supplied the means for accomplishing the desired result, and his contribution to the art was new and useful. His scheme was not anticipated by Kapp, Crompton, Cohen, or Brown.

The evidence shows that the defendant company's construction No. 1 infringes claims 1, 2, 4, 5, and 8, and that its construction No. 2 infringes claims No. 2, 4, and 6. No case is made against the defendant George Bullock.

There will be a decree for the complainant against the Bullock Electric Manufacturing Company, as prayed.

GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC MFG. CO. et al.

(Circuit Court, S. D. Ohio, W. D. February 19, 1906.)

No. 5,655.

PATENTS—INVENTION—ARMATURE.

The Reist patent, No. 573,107, for securing field magnet poles, is void for lack of patentable invention.

In Equity. Suit for alleged infringement of letters patent No. 573,-107 granted to the General Electric Company December 15, 1896, as the assignee of Henry G. Reist.

Richardson, Herrick & Neave, for complainant.

Stem, Heidman & Mehehope and C. V. Edwards, for defendant.

THOMPSON, District Judge. The claims of the patent are as follows:

"(1) The combination with a revolving field magnet structure, of pole-pieces separated from each other, and arranged on the periphery of said field-magnet structure, said pole-pieces being composed of laminated material, and being dovetailed into the periphery of said revolving structure, and means for taking up the play of the parts.

"(2) The combination with a revolving field-magnet structure, of pole-pieces projecting from the periphery of said field-magnet structure and separated from each other, said pole-pieces being each composed of a bundle of laminæ, and outside clamping-plates, the several parts being bolted together, the pole-pieces being dovetailed to the periphery of said revolving structure, and keys for taking up the play of the parts, as herein set forth."

In the specification, the alleged invention is described as follows:

"My invention relates to securing pole-pieces to revolving field-magnet structures, particularly in alternating-current dynamos, where the field-magnet poles are made of assembled laminations of sheet iron. To this end I make the laminations with a dovetailed tenon upon the ends, so that when they are assembled the pole-piece may be slipped sideways into the field-magnet structure. I then insert keys, so as to take up any lost motion between the pole-piece and the field-magnet; the end plates of the poles being provided with overhanging lips or flanges which serve to retain the field-magnet coils in place. I may then remove any field-magnet coil or any pole piece without removing the field-magnet structure as a whole. It is manifest that this invention may take a number of forms, all embodying the same general characteristics."

Four of the many different forms are shown in the drawings. The use of larger machines, in the course of the development of the art, called for stronger means for fastening the pole-pieces to the yoke, but which would be consistent with the maintenance of the magnetic and electric conditions and the advantages secured by such structures as that of the Parcellé patent, No. 463,704. The problem was purely a mechanical one, and the mechanic arts afforded a broad field for the selection of such means, and Reist chose therefrom a well-known method, that of the dovetail and key, which permits the use of many different forms, "all embodying the same general characteristics," four of which he employs, and, in addition, claims the exclusive right to employ the one used by the defendant and necessarily all forms thereof used for the same purpose.

Upon his own showing, the invention claimed lies in the adaptation of the dovetail and key method to the fastening of the pole-piece to

the yoke. The selection of this well-known method did not require the exercise of the inventive faculty and no more difficulties attended its adaptation than usually follow its employment in numerous devices of the mechanic arts. When the conditions are known, the adaptation, usually, may safely be intrusted to the skilled mechanic. It is a problem for the electrical engineer and the skilled mechanic, and not for the inventor.

Patentable invention is not shown, and the bill will be dismissed.

GENERAL ELECTRIC CO. v. BULLOCK ELECTRIC MFG. CO. et al.

(Circuit Court, S. D. Ohio, W. D. February 19, 1906.)

No. 5,653.

PATENTS—INVENTION—ELECTRIC MOTOR.

The Parcelle patent, No. 463,704, for an electric motor and dynamo, is void for lack of patentable invention; the manner of fastening the yoke and the laminated core, which is its essential feature, having been adapted from prior devices without change of form or functions of the parts.

In Equity. Suit for alleged infringement of claim 1 of letters patent No. 463,704, granted to Albert L. Parcelle, November 24, 1891, and now owned by the complainant.

Richardson, Herrick & Neave, for complainant.

Stem, Heidman & Mehehope and C. V. Edwards, for defendant.

THOMPSON, District Judge. Claim 1 reads as follows:

"(1) The combination, with the yoke, of a laminated core, the bar, 'C,' passing through the laminations of the core, and a securing bolt or bolts passing through the yoke and into said bar."

The elements of the combination are the yoke, the laminated core, and the means for securely fastening the core to the yoke. Prior to the date of the patent in suit, the means for such fastening, known to the art, consisted in (1) making the cores integral with the yoke and laminating the whole structure; (2) casting the laminated core into the yoke; (3) screwing bolts directly into the laminated core; and (4) bolting into the side plates of the core. In the device of the patent in suit the fastening is made by bolting directly into the laminated core, and it is claimed that the manner in which it is done shows invention. The instability of the material and the difficulty of forming threads in the hole made the old method inefficient, and to meet this situation Parcelle presented a different method, which furnished a much stronger fastening. The employment of bar, C, of claim 1, is the distinguishing feature of this method, and the one upon which the question of patentable invention turns. Its office and purpose, as defined by the complainant's expert, Bentley, is:

"The maintenance of the form of the pole-piece and the connection of it to the yoke in a manner which will subserve the electrical and magnetic requirements."

In the light of the prior art, as illustrated by the teachings of the inventions of Schmid, Storey, Bradley, and Dreskell, no question of interference, with the prevailing electrical and magnetic require-

ments, was presented, by the employment of the bar, C; and the problem to be solved—namely, how to provide a stronger, more rigid, more reliable union between the yoke and the cores—was merely one of mechanical construction. It was solved by transferring from the mechanical arts a well-known device employed in practically the same manner by Dodge in the pulley covering device of his letters patent No. 348,270, dated August 31, 1886. No change in form had to be made to adapt the device to the new application. No difficulties of adaptation had to be cleared away (see *Standard C. & W. Co. v. Caster S. Co.*, 113 Fed. 164, 51 C. C. A. 109), in order to apply it to the use in question, and it performs the same function in both uses of uniting and maintaining the connection of the parts. Its existence was within the knowledge, and its transference within the capacity, of the skilled mechanic, without invention.

Patentable invention is not shown, and the bill will be dismissed.

UNITED STATES v. COLLINS.

(District Court, D. Oregon. May 14, 1906.)

No. 4,855.

1. CONTEMPT—COMMITMENT—EXPIRATION OF ORDER.

Where accused was committed for contempt for his refusal to appear as a witness before a grand jury and there produce certain records, etc., in response to a subpoena duces tecum, the term during which he could be imprisoned under such order expired on the discharge of the grand jury.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 253-254.]

2. SAME—PURGING CONTEMPT.

Where accused was imprisoned for his refusal to obey a subpoena requiring him to appear and produce records before a grand jury, and he remained recalcitrant until after the grand jury was discharged, he was not thereby purged of his contempt and was subject to sentence to imprisonment for a specified term.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Contempt, §§ 253-254.]

3. WITNESSES—INCRIMINATING QUESTION—BOOKS AND PAPERS—PRODUCTION.

Where accused was subpoenaed to appear before a grand jury, and to produce books, papers, and files of a certain firm, of which he was a member, on the investigation of a charge against the members of such firm for conspiracy to defraud the government, accused could not refuse to appear and produce such books and papers because they were self-incriminating, but was bound to produce the records and, after being sworn as a witness, object that the documents produced would tend to his incrimination, and therefore insist on his constitutional guaranty that their contents be not disclosed.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 1038-1040.]

See 145 Fed. 709.

W. C. Bristol, U. S. Atty.

L. M. Curl and Percy R. Kelly, for defendant.

WOLVERTON, District Judge. The defendant at this time petitions the court to vacate the order heretofore made adjudging him guilty of contempt and directing his imprisonment until he complied with the mandate of the subpoena requiring him to bring the books, papers, files, etc., specified therein, upon two grounds, namely: First, that since entering the order the grand jury has been regularly discharged; and, second, that prior to such discharge of the grand jury the defendant was indicted jointly with his copartners, E. Dorgan and Francis Devine, and others, charged with the crime of violating the statutes of the United States relating to conspiracy to defraud the government. The order referred to, omitting the preliminary statement, is as follows:

"On consideration whereof, the court now finds the defendant to be in contempt. And it is ordered that said defendant shall appear before the said grand jury of this court on Saturday, April 28, 1906, at 11 o'clock in the forenoon of said day, then and there to testify as a witness, and that he shall then and there produce all the records, books, and papers specified in said subpoena. And it is further ordered that if said defendant shall fail so to appear before the grand jury, or shall fail to produce said records, books, and papers, that he be imprisoned in the county jail of Multnomah county, Oregon, until he shall be willing to obey the command of said subpoena and of this order."

It seems clear that, the grand jury having been discharged, the term of imprisonment as limited by the order under consideration has expired. If this is not so, then the order provides for a perpetual imprisonment, because there is no grand jury before whom the defendant can appear—a condition that is unwarrantable, and that the law will not tolerate. To be more exact, I should perhaps say that a condition has been brought about under which it has become impossible for the defendant now to comply with the order, and the law will not require of any person an impossible thing. Under the authorities, therefore, further imprisonment by virtue of that order cannot be insisted upon or enforced. *Ex parte Maulsby*, 13 Md. 625, Append.; *In the Matter of Frederick Hall*, 10 Mich. 210; *Ex parte Rowe*, 7 Cal. 176.

The defendant, however, is himself responsible for the condition—not that the grand jury has adjourned, but that he is unable to comply with the order—because he had abundant time and opportunity to appear and bring with him the documents called for by the subpoena before the grand jury adjourned, and it must be conceded that in the meantime he continued in contempt; and it must be further conceded that the mere fact that the grand jury was discharged does not purge him of his contempt. He continued recalcitrant notwithstanding the order, refusing compliance, and persisted in disobeying the mandate of the subpoena which he was directed to observe. Such conduct could in no sense be construed as purging him of his contempt, and he remains yet in contempt of the original order requiring him to produce the documents under the subpoena. And for this I have no doubt he is still liable for fine and imprisonment—either one or both. As was said in *Ex parte Rowe*, *supra*:

"The prisoner may still be liable to fine and imprisonment for disobeying the original order, but he cannot be further restrained of his liberty under the present warrant."

But it is insisted that the fact that Collins has been jointly indicted with his copartners and others for a conspiracy to defraud the government is tantamount to a showing that the documents called for are self-incriminating, and, being such, that the original order was erroneously made and entered, and that this purges him of his contempt, or, rather, that it shows he never was in contempt, because the matter he was called upon to produce was in reality privileged under the Constitution. I am unable to agree with counsel. It does not follow, because the defendant has been indicted with the other members of his firm and charged with the crime of conspiracy to defraud the government, that the books, papers, etc., called for by the subpoena have any connection with such indictment, or the crime charged, and much less that they would afford incriminating evidence against him. The only circumstance indicating that the documents sought have any such connection whatever is that the requirement of their production and the finding of the indictment are not remotely dissociated in point of time. This is all there is to show to the court that the one is the concomitant of the other, forming but the development of a single transaction. Other than this, there is nothing tangible in the record to indicate any vital relation of the one with the other. Indeed, the indictment was found without the aid of the papers called for; and, if anything is to be inferred from that circumstance, it is that such papers were designed for use other than to inquire into the conduct of the members of the firm as it pertains to the charge preferred. Collins had an opportunity of producing the books before the grand jury, and there developing the fact, if it be a fact, that the books and papers might tend to incriminate him, without the least jeopardy to himself; and, if such a condition had appeared, the court would have been bound, under the Constitution and the law of the land, to protect him, and would, if the matter had been called to its attention, without hesitation have intermitted further inquiry concerning such documents. As I said when the matter was up before, quoting from an eminent jurist:

"To entitle a party called as a witness to the privilege of silence, the court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer," although, "if the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself of the effect of any particular question."

The same principle applies to the production of papers. When it is once made to appear that they will tend to incriminate the witness, he is as much protected from the harm that would befall him by reason of a disclosure of their contents as from divulging incriminating matter by word of mouth. The result is the same in either event.

I said, furthermore, at that time, which proposition is a deduction from the authorities, that:

"Until he [the witness] is called upon to disclose the incriminating matter, involving himself in a transgression of law for which he might be subject to prosecution, he is not in a position to claim the exemption."

The defendant is in no better position now than he was then. He has not made it appear, nor do the subsequent developments indicate such a thing, except possibly by the remotest inference, that the books, papers, etc., of the firm of Dorgan & Devine will incriminate him, and certainly their production under the subpoena, even if they contain incriminating matter, would not jeopardize him in his constitutional right in any particular. As was said in the late case of *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, decided by the Supreme Court of the United States:

"We think it quite clear that the search and seizure clause of the fourth amendment was not intended to interfere with the power of courts to compel, through a subpoena duces tecum, the production, upon a trial in court, of documentary evidence."

The courts have the same authority to compel a production before the grand jury of such evidence. Indeed, in that very case the production was required before that body and the proceeding was upheld. The defendant could readily have purged his contempt by producing the documents required of him before the grand jury. He need not have disclosed their contents, and could have, when questioned, after taking the oath as a witness, developed the fact, if such it were, that such documents would tend to his incrimination; and from that moment he would have had the right to insist upon his constitutional guaranty. But it was not enough for him merely to assert, out of court, that the documents contained incriminating matter to his detriment. This defense was urged on the previous hearing, and found insufficient, and he is in no better condition or position now than he was then.

There is no thought, that I am aware of, of pursuing an inquisition against the defendant or his firm. If there was, it would be promptly checked; the purpose being to obtain legal evidence only in a proceeding recognized by law. The time has gone by when the defendant can relieve himself from further liability to punishment by producing the books, papers, files, etc., under the subpoena, before the grand jury, that body having been discharged; and, not having yet shown that such documents contain matter tending to his incrimination, he has in no way purged his contempt.

Being yet in contempt, he should be punished, and the order of the court will be that he be further imprisoned in the county jail of Multnomah county for the period of four months.

UNITED STATES v. AMERICAN TOBACCO CO.

(Circuit Court, S. D. New York. May 31, 1906.)

GRAND JURY—INVESTIGATION OF CORPORATIONS—RIGHT TO REQUIRE PRODUCTION OF BOOKS.

A corporation may be required to produce its books and papers before a grand jury engaged in investigating its acts within reasonable limits, and a subpoena which requires the production of its minute books for three years and letter copy books covering a period of three or four months is not too broad and sweeping.

On Motion to Vacate Subpoena.

Henry W. Taft, for the motion.

De Lancey Nicoll, opposed.

LACOMBE, Circuit Judge. In *Hale v. Henkel*, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, the Supreme Court expressly held that in the matter of the production of books and papers there is a clear distinction between an individual and a corporation, and that the latter has no right to refuse to submit its books and papers for an examination at the suit of the state. "There is," says the court, "a reserved right in the Legislature to investigate its contracts, and find out whether it has exceeded its powers." It is difficult to see how this declaration can be complied with if subpoena such as the one now under consideration shall be held to be too broad and sweeping. The two clauses complained of are those which call for the "minute books of the McAndrews & Forbes Company from the time of its incorporation to the present day," a period of about three years, and "the copy letter books of the said company from April 1, 1904, to August 15, 1904," a period of about three months and a half. This is very different from the requirements of the subpoena under consideration in *Hale v. Henkel*, which was so "universal in its operation" as practically to put a stop to the business of the company. The amount of documentary evidence now called for is quite restricted. The subpoena is not, it is true, confined to the documents relating to definitely specified transactions; presumably it could not be made thus specific because it is not now known whether or not such transactions took place. Undoubtedly the material it calls for is to be produced in order to enable the grand jury to undertake a fishing excursion, but that is what the opinion cited holds that it may do, and neither in quantity nor in character are the items called for by the subpoena unreasonable.

The motion to vacate the subpoena is denied.

UNITED STATES v. AMERICAN TOBACCO CO. et al.

(Circuit Court, S. D. New York. June 16, 1906.)

GRAND JURY—INVESTIGATION OF CORPORATION—CONTEMPT OF OFFICER FOR DISOBEDIENCE OF SUBPOENA.

The secretary of a corporation cannot be punished for contempt for failure to obey a subpoena duces tecum addressed to him, and requiring him to produce certain books of the corporation before a grand jury,

where such books have never been in his possession nor subject to his control, and it is shown that he cannot obtain them except surreptitiously or by a breach of the peace. The proper procedure in such case is to issue and serve a subpoena on the corporation itself.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Witnesses, §§ 25, 40.]

Motion to punish William E. Ransom for contempt for failure to obey a subpoena duces tecum. The motion is made on presentment of the grand jury.

H. W. Taft, Special U. S. Atty.

Nicoll, Anable & Lindsay and Junius Parker, for the American Tobacco Co.

LACOMBE, Circuit Judge. The question which seemed most prominent when the presentment was handed in, viz., that the books not produced were private and personal, has been eliminated. It is not disputed that they do contain copies of letters written by the president of the MacAndrews & Forbes Co., and concerned with the business of that corporation. Counsel for the government also state that they are not concerned with the covers of the book, nor with any copies of letters contained in it which relate to the purely personal business of any individual, whether he is the president or not, and call attention to the fact that the subpoena itself calls for letters addressed to specific persons or companies therein enumerated, and referring to business of the corporation, so that subpoena can be obeyed without any risk of exposing private correspondence in no ways concerned with such business.

The only question is as to the liability of Ransom, who is the secretary and treasurer of said corporation. He has produced everything called for except the letters contained in two books, which have, at all times since he became secretary, been in the exclusive custody of the president, and kept in the latter's desk. He states—and there seems no reason to doubt the accuracy of the statement—that he could not obtain such books without a breach of the peace, or an attempt surreptitiously to obtain them. Under these circumstances, it is difficult to see how he can be personally punished for failure to produce them. As secretary he has custody generally of all books and papers by virtue of his office and under the by-law which is quoted, but it is within the power of the corporation to place some part of them in the special custody of some other officer, and this it seems to have done. It is thought that this court cannot punish the secretary personally for failing to produce a paper which his employer has intrusted to some other officer. Of course, the corporation can be compelled to produce them, and if called upon to do so it can claim no immunity should it obey the call. Had it been served with a subpoena such as this, it might be held in contempt if it did not send the documents to the grand jury room. But it is doubtful whether the corporation has been served. The subpoena is directed to Ransom, describing him as secretary and treasurer, but it was not addressed to the corporation nor to himself as secretary, and, indeed, no application is now made to punish the corporation for dis-

obedience. The point is formal and technical, but it has some substance, and in a proceeding to punish for contempt it is always well to avoid even technical objections, especially when that can be so easily done as it can be here by serving a new subpoena, directed to the corporation itself.

A similar disposition is made of the other two proceedings against McAllister and Young.

INTERSTATE COMMERCE COMMISSION v. CINCINNATI, H. & D. RY.
CO. et al.

(Circuit Court, S. D. Ohio, W. D. November 22, 1905.)

No. 5,897.

1. COMMERCE—RATES—INTERSTATE COMMERCE COMMISSION—CLASSIFICATION—ORDERS—BURDEN OF PROOF.

Interstate Commerce Act Feb. 4, 1887, c. 104, § 14, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3164] provides that whenever an investigation shall be made by the commission, it shall make a report in writing, which shall include the findings of facts on which the conclusions of the commission are based, together with its recommendation as to what reparation should be made by the carrier to any party found to have been injured, and that such findings shall thereafter be deemed prima facie evidence as to the facts found in all judicial proceedings. *Held*, that where the Interstate Commerce Commission found that a reclassification of laundry soap shipped in less than carloads was unjustifiable, the burden was on the railroad proceeded against, in a suit by the commission to restrain the enforcement of such reclassification, to show that the facts on which the commission acted were not as found.

2. CARRIERS—INTERSTATE TRANSPORTATION—CLASSIFICATION—CHANGE OF RATES.

Where common laundry soap in less than carload lots was assigned to the fourth class in the first classification made under the interstate commerce act, and was voluntarily maintained there by defendant railroad companies for more than 13 years, defendants were not justified in reclassifying such freight so that it would pay 20 per cent. less than third class rates, without changing the carload classification, on the mere claim that the prior classifications had been inadequate to pay the cost of carriage in less than carload lots, there having been no general reclassification which would proximately apportion the cost of the service equally among the different articles of traffic as between carloads and less than carload lots.

In Equity.

L. A. Shaver, William A. Glasgow, Jr., and Sherman T. McPherson, for petitioner.

Lawrence Maxwell, Jr., for Cincinnati, H. & D. Ry. Co. and P. C. C. & St. L. Ry. Co.

S. O. Bayless, for C. C. C. & St. L. Ry. Co. and New York Cent. & H. R. Ry.

Harmon, Colston, Goldsmith & Hoadley, for B. & O. Ry. Co. and B. & O. S. W. Ry. Co.

THOMPSON, District Judge. On February 24, 1900, the Proctor & Gamble Company, a corporation of New Jersey, engaged in the

manufacture and sale of soap and a continuous shipper of its soap over the railways of the defendants herein, by petition, complained to the Interstate Commerce Commission that the defendants herein, having adopted as the basis for fixing rates, a classification of property for shipment over their lines of railway, known as "Official Classification No. 20," wrongfully and in violation of the act of Congress to regulate commerce, placed common or laundry soap in carload lots, in the fifth class, instead of in the sixth class thereof, where it rightfully belonged; and in less than carload lots, in the third class, instead of in the fourth class thereof, where it rightfully belonged, and prayed for an order commanding the defendants herein—

"To cease and desist from refusing to carry common soap in carloads at sixth class rates, and from refusing to carry common soap in less than carload lots at fourth class rates."

Pending the hearing of the complaint the defendants reduced the classification of common soap in less than carload lots, to 20 per cent. less than third class, but not less than fourth class. Upon final submission, the Interstate Commerce Commission dismissed the complaint as to the classification of carloads, and sustained it as to less than carloads, of common or laundry soap, and ordered the defendants, in accordance with a report and opinion then filed—

"To cease and desist on or before the 15th day of June, 1903, from charging, demanding, collecting, or receiving for the transportation of common or laundry soap in less than carload quantities charges or rates per 100 lbs. equal to 20 per cent. less than the rates fixed by them for the transportation of articles designated as third class in the established freight classification called and known as the "Official Classification," which said 20 per cent. less than the third class rate for the transportation of common or laundry soap in less than carloads are found and determined in and by said report and opinion of the Commission to be in violation of the act to regulate commerce."

Afterwards, on the 20th day of July, 1904, this suit was brought by the Interstate Commerce Commission to enforce this order so made, which, it alleges, the defendants have wholly disregarded and set at naught, and have willfully and knowingly violated and disobeyed. And it further alleges that the action of the defendants in changing the classification of common or laundry soap was in violation of the act to regulate commerce; that the rates charged by the defendants since December 29, 1899, for the transportation of common or laundry soap in less than carload quantities, are unreasonable and unjust; that said rates, based upon the classification of March 10, 1900, give undue and unreasonable preference or advantage to other descriptions of traffic, and subject common or laundry soap, in less than carload lots, to undue prejudice and disadvantage; that the classification complained of resulted in unlawful discrimination and prejudice against common or laundry soap in less than carload lots and against localities in "Official Classification" territory and against producers, shippers, dealers, and consumers. The defendants deny these allegations and say that the findings of fact upon which the order was based, were not justified by the evidence submitted to the Interstate Commerce Commission, but were contrary to the evidence.

Section 14 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 384 [U. S. Comp. St. 1901, p. 3164]) provides, among other things:

"That whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

The burden of proof, therefore, rests upon the defendants to show that the facts are not as found by the Interstate Commerce Commission, and that the change of classification complained of, was not made in violation of the act to regulate commerce. At the hearing counsel for the defendants claimed (1) that the change of classification and increase of rates were justified by the cost of service in handling and carrying soap in less than carload lots; and (2) that the present classification maintains the same relative difference in rates between soap in carload lots and soap in less than carload lots, which obtained before the change was made.

1. Testimony taken since the commencement of this suit shows that the cost of service for handling and carrying freight in less than carload lots greatly exceeds the cost of handling and carrying it in carload lots, but it is not shown that as between the two the relative cost of handling and carrying ever increased, one way or the other, either before or since the new classification was made; and the evidence therefore, is not sufficient to rebut the presumption that the original classification of common or laundry soap was and is reasonable and just, arising from the voluntary maintenance thereof by the defendants for 13 years prior to the change complained of. During these 13 years, common or laundry soap in carload lots varied between the fifth and sixth classes; but in less than carload lots, never varied from the fourth class. Nor is the evidence sufficient to rebut the finding of the Commission that the new classification resulted in discriminations among shippers, through—"the application of a fixed percentage to varying and different rates."

2. The question presented is not one involving only the proper relation of soap in less than carload lots, to soap in carload lots, but also its proper relation to other articles in less than carload lots. Freight is carried either in carload lots, or in less than carload lots. This division of freight necessarily attends transportation by rail. Classification, within the meaning of the act to regulate commerce, relates to these divisions separately. The classification of soap in less than carload lots is not controlled by the classification of soap in carload lots, nor its reclassification by the maintenance of the relative difference in rates between the two; but, on the contrary, the classification and reclassification of soap in less than carload lots should be controlled by the relation it bears to other articles in less than carload lots,—that relation to be determined by the degree in which, in comparison with such other articles, its handling and carrying is, or may be, affected by

the cost of service, competitive and commercial conditions, volume, density, distance, value, and risk of loss or damage. It is true that these elements must also be considered in determining the classification of articles in carload lots, but from a different standpoint. A given article of traffic may be more or less desirable when shipped in less than carload lots, than when shipped in carload lots. Bulk, weight, form, manner of packing, etc., may materially affect the classification of different articles to be carried in the same car, when they might have little or no weight in the classification of a single article to be carried in carload lots. A single car may carry many different articles and necessarily, the convenience, or inconvenience and the cost of handling and carrying, must be considered in fixing the rate which each should bear and in determining the class to which each should be assigned, but the elements of disadvantage attending the combination of different articles in one shipment are eliminated from shipments of each article separately, in carload lots, and it follows that rates and classification must be controlled by the character of the shipment; that shipments which include and combine different articles of traffic in less than carload lots, require rates and classification necessary to meet the convenience, inconvenience, and cost of handling and carriage incident to such combination, which do not attend the shipment of a single article in carloads lots. In other words, the classification of soap for carriage in less than carload lots should be based upon its relation to the other articles for carriage in less than carload lots, and not upon its relation to soap for carriage in carload lots. Common soap in less than carload lots was assigned to the fourth class in the first classification made under the act to regulate commerce, and remained there until the reclassification complained of, and did not follow the variations of soap in carload lots; and the replacing of soap in carloads in the fifth class did not justify the displacing of soap in less than carloads from the class in which it had been voluntarily maintained by the defendant for more than 13 years.

If it be claimed that prior classifications and rates have never been adequate to the cost of handling and carrying freight in less than carload lots, then there should be a general reclassification which would apportion the cost of service equally, or approximately so, among the different articles of traffic and between carload lots and less than carload lots thereof. The evidence not only fails to justify the change of classification complained of, but shows that the change resulted in unlawful discriminations between shippers.

A decree will be entered in favor of the complainant, as prayed.

GOLCAR S. S. CO., Limited, v. TWEEDIE TRADING CO.

(District Court, S. D. New York. April 24, 1906.)

1. SHIPPING—CONSTRUCTION OF CHARTER—PAY OF WINCHMEN.

By an express provision of a charter party requiring the ship to provide men to work the winches, she assumed the risk of any difficulty, not created by the charterer, which might prevent the use of her own crew for such purpose at any of the ports where she might rightfully be required to go, and is liable for the cost of extra winchmen which it became necessary to hire because the stevedores at certain ports refused to work with any winchman from the crew, although there were such men who were competent.

2. SAME—DEMISE OF SHIP—LIABILITY FOR CARGO STORAGE.

A charter of a vessel at a monthly hire for vessel and crew which provided that "the captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment, agency, or other arrangements; and the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with the same" constituted a demise of the ship, and not a contract of affreightment with respect to the cargo as to which the charterer became the owner of the ship *pro hac vice*, and he cannot recover from the owner for a shortage in delivery.

[Ed. Note.—Demise of vessel, see note to *The Del Norte*, 55 C. C. A. 225.]

3. SAME—HARTER ACT.

The provision of section 2 of the Harter Act (Act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946]) making it unlawful for the owner of a ship "to insert in any bill of lading or shipping document any covenant or agreement * * * whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo, and to care for and properly deliver the same shall in anywise be lessened, weakened, or avoided," relates to contracts between carrier and shipper, and does not apply to a charter party by which a ship is demised.

[Ed. Note.—Limitation of liability of shipowner, see note to *The Longfellow*, 45 C. C. A. 387.]

In Admiralty. Suit to recover charter hire.

Convers & Kirlin, for libellant.

Wheeler, Cortis & Haight, for respondent.

ADAMS, District Judge. This action was brought by the Golcar Steamship Company, Limited, to recover from The Tweedie Trading Company, certain hire said to be due for the services of the steamship *Cape Corrientes*, under charter dated July 24, 1903. The amount of hire claimed, after allowing for certain offsets, was \$1449.10 and there was a further claim of \$267.30 alleged to be due because of a deficiency of coal on board the steamship when re-delivered on the 8th of October, 1903. The answer denied that there was anything due, but it was subsequently stipulated that the libellant was entitled to recover damages sustained by reason of the matters alleged in the libel and it was referred to a commissioner to ascertain the amount. He has

reported that the libellant is entitled to recover the sum of \$1537.27, with interest, per the following account:

Hire for term of charter,	\$6,228 51
Damages for breach of coal clause,	267 30
	<hr/>
	\$6,495 81
Less the following:	
Payments on account of hire	\$3,337 03
Advances admitted in libel	125 53
Value of 300 tons of coal on board on re-delivery	1,458 00
Consular fees	1 82
Noting protest	1 82
Translating provision list	6 00
Winchmen at Rio Grande do Sul,	10 02
Winchmen at New York,	20 30
	<hr/>
	\$4,960 54
	<hr/>
	\$1,535 27

The libellant excepted to the report because of the allowance of items, as follows:

- "(a) 7s. 6d. (\$1.82) Consular fees for noting protest at Pernambuco.
- (b) 25,000 milreis (\$6.00) for translating the provision list.
- (c) 58,250 milreis (\$13.98) for winchmen's time at Rio Grande do Sul.
- (d) \$20.30 for winchmen's time at New York."

The respondent also excepted to the report, as follows:

"1. Because the Commissioner found that the respondent was not entitled to deduct claims paid because of the failure of the ship to deliver at the port of destination all the cargo laden on board (Commissioner's Report, pp. 28-42).

The Commissioner held as a matter of law that the charter was a demise of the ship and constituted the charterers owners pro hac vice and was not a contract of affreightment. This was error in view of the terms of the charter party."

The questions involved require consideration of various provisions of the charter party, as follows:

"1. That the Owner shall provide and pay for all provisions, wages and Consular shipping and discharging fees of the Captain, Officers, Engineers, Firemen and Crew; shall pay for the insurance of the vessel, also for all the cabin, deck, engine-room and other necessary stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the service.

2. That the Charterers shall provide and pay for all the Coal, Port Charges, Pilotages, Agencies, Commissions, Consular Charges (except those pertaining to the captain, officers or crew), and all other Charges whatsoever, except those before stated.

4. That the Charterers shall pay for the use and hire of the said Vessel (£630) Six Hundred and thirty Pounds British Sterling per Calendar Month, commencing on and from the day of her delivery, as aforesaid, and at and after the same rate for any part of a month; hire to continue until her delivery in like good order and condition to the Owners (unless lost) at a port in the River Plate, at charterers option.

7. That the cargo or cargoes to be laden or discharged in any dock or at any wharf or place that the Charterers or their Agents may direct, provided the Steamer can always safely lie afloat at any time of tide.

8. That the whole reach of the Vessel's Holds, Decks, and usual places of loading, and accommodation of the Ship (not more than she can reasonably

stow and carry) shall be at the Charterers' disposal, reserving only proper and sufficient space for Ship's officers, crew, tackle, apparel, furniture, provisions, stores and fuel.

9. That the Captain shall prosecute his voyage with the utmost dispatch, and shall render all customary assistance with Ship's crew and boats. The Captain (although appointed by the Owners) shall be under the orders and direction of the Charterers as regards employment, agency, or other arrangements; and the Charterers hereby agree to indemnify the Owners from all consequences or liabilities that may arise from the Captain signing Bills of Lading or otherwise complying with the same.

10. That if the Charterers shall have reason to be dissatisfied with the conduct of the Captain, Officers, or Engineers, the Owners shall, on receiving particulars of the complaint, investigate the same, and, if necessary, make a change in the appointments.

11. That the Charterers shall have permission to appoint a Supercargo, who shall accompany the steamer and see that voyages are prosecuted with the utmost dispatch. He to be furnished, free of charge, with first-class accommodations, and same fare as provided for Captain's table.

12. That the Master shall be furnished from time to time with all requisite instructions and sailing directions, and shall keep a full and correct Log of the voyage or voyages, which are to be patent to the Charterers or Agents.

13. That the Master shall use all diligence in caring for the ventilation of the cargo.

16. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, stranding, or damage preventing the working of the Vessel for more than twenty-four consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service; but should the Vessel be driven into port or to anchorage by stress of weather or from any accident to cargo, such detention or loss of time shall be at the Charterer's risk and expense.

17. That should the Vessel be lost, freight paid in advance and not earned (reckoning from the date of her loss) shall be returned to the Charterers. The act of God, enemies, fire, restraint of Princes, Rulers and People, and all dangers and accidents of the Seas, Rivers, Machinery, Boilers and Steam Navigation, and Errors of Navigation, throughout this Charter Party, always mutually excepted.

19. That the Owners shall have a lien upon all cargoes, and all sub-freights, for any amounts due under this Charter, and the Charterers to have a lien on the Ship for all moneys paid in advance and not earned.

23. That the Owners are to provide ropes, falls, slings and blocks necessary to handle ordinary cargo up to two tons (of 2,240 lbs. each) in weight, also lanterns for night work.

24. Steamer to work night and day if required by Charterers, and all steam winches to be at Charterers' disposal during loading and discharging, and Steamer to provide men to work same both day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate."

With respect to the libellant's exceptions the commissioner said, referring to the sums disputed, as follows:

"4. Mr. Tweedie testified that he paid 58,250 milreis (\$13.98) for winchmen's time at Rio Grande do Sul, and a bill against the ship, dated Rio Grande do Sul, October 6th, 1903, was put in evidence, containing a statement, day by day, of the number of hours the winches were used (83½ hours), and time spent by tallymen (33 hours). Tallying was a port charge to be borne by the charterer. Deducting this, the claim for winchmen is \$10.02. The master said that there was a rule among the stevedores at Rio Grande do Sul not to work with winchmen from a ship's crew, and they refused to work with his men, although in his experience at other ports the winches were driven by members of the crew. Clause 24 of the charter party was as follows: 'Steamer to work night and day if required by Charterers, and all steam winches to be at Charterers'

disposal during loading and discharging, and Steamer to provide men to work same both day and night as required, Charterers agreeing to pay extra expense if any incurred by reason of night work, at the current local rate.' This permitted the use of winchmen taken from the crew if they were competent, and there is nothing to indicate that the men offered by the vessel were not competent to do the work required of winchmen at Rio Grande do Sul. It is a fair presumption that the stevedores were governed by some trades union rule, or jealousy of foreigners, or caprice or local sentiment. Libellant argues that it was the charterer's duty to furnish and pay stevedores, and that if the charterer employed stevedores who were unwilling to work with competent men from the ship the extra expense should be borne by the charterer. But I think that by the positive engagement of the ship to 'provide men to work' the winches, she assumed the risk of any difficulty, not created by the charterer, which might prevent the use of her own crew for such purpose at any ports to which it was agreed she might be sent by the charterer. The only engagement which the charterer made in regard to winchmen was to pay the extra expense of the night work, if any.

5. There was a similar item of \$20.30 for winchmen's time at New York, where case oil was loaded. The testimony as to this is more definite. The foreman stevedore testified that it is customary at this port to employ winchmen outside of the crew in loading case oil, because the speedy manner in which the work is done demands a higher degree of skill than men from the crew possess, and the stevedores refuse to work when the winches are run by members of the crew, believing that their personal safety is imperilled unless more skillful winchmen are employed."

This seems to be a satisfactory explanation of the allowance of these items and the libellant's exceptions are overruled.

The controversy respecting the respondent's exception is more important, but it has been fully, and I think correctly, treated by the commissioner. His opinion in this connection is as follows:

"Shortage Claims.

Mr. Tweedie testified that he paid three claims for cargo that had been laden on board but not delivered.

These claims, amounting to about \$60, are interposed by respondent as set-offs, although they are not pleaded in the answer. The chief mate says that there were shortages at Pernambuco and Rio Grande do Sul according to the bills of lading and manifest. He personally tallied out at Rio Grande do Sul, and his junior officers at the other ports. He could recall a small cask of butter and a case of residuum oil as missing at Pernambuco, and two cases supposed to contain small hand trucks at Rio Grande do Sul, but he also says that all cargo was delivered that came aboard. There is no proof that the articles paid for were received by the ship, nor are the circumstances of the settlement shown, but counsel desire me to pass on the question of law, and have made a stipulation which provides, in effect, that I may assume the payments were actual settlements for actual shortages, and may determine respondent's right to offset them notwithstanding they have not pleaded, and without regard to any objections that may have been taken during the reference; and if my decision is in favor of respondent, the reference shall be re-opened to permit and require respondent to make proper legal proof of the facts of the short deliveries and of the settlements; but if it is in favor of libellant, no further proof is to be taken on the subject. This is without prejudice to either party's right to except to my report on the question so decided.

Counsel for libellant concedes that if the charter was a contract of affreightment, the claim would be proper set-offs, but maintains that there was a demise of the ship, and he refers to the terms of the charter as sustaining his contention. The charter is to the effect that the owners 'agree to let,' and the charterers 'agree to hire' the ship from the time of delivery, for one trip, etc., the charterers 'to have liberty to sublet' her for all or any part of the charter

term. She is to be placed 'at the disposal of the charterers' at the port of delivery, to be employed in carrying lawful merchandise on conditions which are set forth. These conditions, so far as they bear on the question, are as follows:"

(These are quoted above and need not be repeated.)

"These clauses, libellant contends, constitute a hiring of the ship as a vehicle which the charterer is to use in carrying cargo on his own account, and clearly indicate that as between the parties the charterer assumes all the obligations of a common carrier, and that the master is the agent of the charterer in carrying out the commercial arrangements which concern the charterer's business, although a third person holding a bill of lading could make the ship liable in rem for a shortage. Reference is made to the fact that under an affreightment contract the dunnage and shifting boards would ordinarily be furnished by the owner, while here the charterer provides them, and to the provision requiring the owner to supply ropes, falls, etc., which, it is argued, it would be unnecessary to mention in a contract of affreightment; and stress is laid upon the various charges imposed upon the charterer that are ordinarily borne by the owner in a contract of affreightment, and which the owner pays out of the freight; while here all the cargo space is placed at the disposal of the charterer, the freight all belongs to the charterer, and the owner gets the hire whether freight is earned or not. Special dependence is placed upon the 9th clause. Libellant's counsel cites, in support of his position, *Young v. Lehmann*, (D. C.) 27 Fed. 383, *The Alert*, (D. C.) 40 Fed. 836; *Ceballos v. The Alert*, (D. C.) 44 Fed. 685; and 61 Fed. 113, 9 C. C. A. 390; *The Centurion*, (D. C.) 57 Fed. 412; *Worrall v. Davis Coal & Coke Co.*, 122 Fed. 436, 58 C. C. A. 418; *The Endsleigh* (D. C.) 124 Fed. 858, and *Auten v. Bennett*, a very recent decision of the New York Court of Appeals, reported in the *Law Journal* of February 16, 1906 (76 N. E. 609). In the first of these cases, the ship had been chartered to respondent and carried a cargo of iron for him. The charter contained a provision that the cargo should be discharged at 'such wharf or place as may be ordered by the consignee on arrival.' Judge Brown held that the ship's agents acted as the agents of the consignee, and not of the ship, in selecting a wharf at the request of the consignee, and that the consignee could not offset against the freight the value of a portion of the cargo which fell into the water by the breaking down of the wharf because of its insufficient strength; the loss not arising from any unreasonable or improper use of the wharf, such as overloading or an improper distribution of cargo, in other words, the ship's own negligence. Both sides admit that in *The Alert*, supra, the form of charter was the same as in the present case. That was a suit against the ship for damage to cargo by the breaking of tackle while discharging, and in 40 Fed. Judge Brown, having made an order bringing in the charterers on the application of the owner, on the ground that the charterer furnished the tackle under a special agreement, discussed and sustained this practice, and said among other things;" (837) "The charterers were in possession of the ship; they were the owners pro hac vice; they were the principals in the contract. The bill of lading was their obligation, not that of the master, who protested against such cargo, and no fault appears in the ship or master. The owners of the ship, who have been obliged to interpose as claimants to prevent the sacrifice of their property, and the master, are under no personal responsibility. They are strangers to the contract sued on, and without any certain means of ascertaining the facts, or producing the evidence of them. Upon the case, as thus far presented, if the ship is liable, the charterers are also liable, and bound to indemnify the claimants.' In 44 Fed. Judge Brown, after the trial of the cause, ordered a decree in favor of libellant against the ship, but the evidence not being clear on the question between the owner and the charterer, directed that the case continue as between them. In 61 Fed. this disposition of the case was affirmed on appeal. It was there argued that the charterer, being deemed to be owner, was alone responsible; also, that if there was a liability on the part of the ship, the decree should have provided that the libellant should collect of the charterer in the first instance, and the deficiency, if any, from the ship. The court said;" (115) "An attempt was made to support the second and third

points, and to assert that a chartered vessel was not liable upon contracts of affreightment made by a special owner, but, in view of the law upon the subject as stated by Mr. Justice Curtis in *The Freeman v. Buckingham*, 18 How. (U. S.) 182, 15 L. Ed. 341, that branch of the case requires no further comment.' Respondent, however, contends that this case, instead of being an authority in favor of libellant, is in favor of respondent, and points out that it is only because of the special agreement referred to that the charterer was held bound to indemnify the owner, and that the inference is that in the absence of this special agreement no such obligation would have been imposed upon him. In *The Centurion*, the libel was filed to recover for a portion of a cargo lost through bad stowage, and the charterer was brought in by the ship-owner as in *The Alert*, on the ground that the stowage had been done by the servants of the charterer, who was bound to pay any damages arising therefrom and to indemnify the owner. Judge Brown held that it was immaterial that the bills of lading were signed by the charterer's agent, and ordered a decree against both ship and charterer, but directed that the damages should be collected in the first instance from the charterer, who was bound to indemnify the ship. He said:" (415) "The charterers by the terms of the charter became the owners pro hac vice as respects all matters pertaining to the handling and delivery of cargo; but not as regards the navigation of the ship, for which, under the expressed terms of the charter, the owners remained the responsible principals.' The charter was apparently on a form similar to that in suit here, except that it contained a provision that" (413) "no claims be made against owners for loss of cargo,' which he held was a stipulation between charterers and owners adjusting their liabilities as between themselves. This case was reversed on appeal (68 Fed. 382, 15 C. C. A. 480), but on the ground that the cargo was properly stowed and the damage arose from excepted perils of the sea. The *Endsleigh* has been referred to supra, and sustains libellant's contention, as do *Auten v. Bennett* and the decision of Lord Ellenborough in *Trinity House v. Clark*, 4 Maule & S. 288, 208, therein referred to. In *Worrall v. Davis Coal & Coke Co.*, Judge Wallace construing a clause similar to the 9th quoted above, said:" (438) "We are unable to assent to the proposition that the master was in such sense the agent of the charterer that he is not to be considered as sustaining any duty to the owners in doing those things while the vessel was in possession of the charterer which its safety and preservation from unnecessary injury required to be done. The agency clause places him under the direction of the charterer as regards the business engagements the latter may choose to enter into for the employment of the vessel, but not under the charterers' orders in the immediate navigation and care and custody of the ship. The owners' undertaking to maintain the vessel in a thoroughly efficient condition at all times during her employment is inconsistent with any other conclusion.'

Respondent maintains that the charter was a contract of affreightment, and relies upon *The Alert*, which has already been referred to, and *The Shadwan*, the latter case particularly, as reported in 49 Fed. 379, affirmed on the opinion of Judge Brown 55 Fed. 1002, 5 C. C. A. 381; and in a brief submitted in another cause in which this question was argued, counsel refers to other cases which he contends sustain his claim. The *Shadwan* was a suit by the owner against the charterer for hire, and the principal question was one of deviation and detention, but there is a brief reference to a counterclaim setting up a small item of damage for misdelivery of part of the cargo. As to the latter, Judge Brown merely says" (383) "that the vessel was liable, 'no sufficient ground being shown to absolve her from that risk.' Libellant maintains that little weight should be given to this decision, as slight attention was paid to the question, and neither in the District Court nor in the Circuit Court of Appeals was it argued in the briefs. In *The Craigallion* (D. C.) 2^d Fed. 747, (Dist Ct. Md.), another case cited by respondent, the ship was held liable under a similar charter because of neglect to close the hatches over a cargo of fruit when the temperature had fallen, whereby the cargo was chilled and injured. The master had been cautioned to protect the cargo against such injury before sailing. Judge Morris held that there was a failure to perform one of the usual and proper duties of those in charge of the navi-

gation of the ship. This decision is criticised in *The Del Norte* (D. C.) 111 Fed. 542 (Hanford, J.), in which the charter was held to be a demise of the ship. In that case the charter contained a provision that the master, chief engineer and steward should be appointed by the owner, and they were to be 'in all respects under the orders and direction of the charterer,' and subject to removal on his complaint, if found to be justified. It was held that the vessel was not liable to the charterer for loss or damage occasioned by the malfeasance or wrongful acts of the master or steward while in the charterer's service, although the charter also contained a provision that on failure of the charterer to pay the hire the master should take and hold possession of the vessel 'for and as the representative' of the owners. Of *The Craigallion*, the court said:" (545) "It is enough to say that one decision by a district court sustaining a suit in rem against a chartered vessel by the charterer for damages to the cargo, caused by the negligence of the officers and mariners in the performance of their ordinary duties, as such, while the vessel was in the possession and control of the charterer, is not sufficient to outweigh the great weight of authority, which, in my judgment, established a fixed rule of law inconsistent with any right in an owner pro hac vice to hold the ship or her general owner liable to him for losses attributable to torts or crimes of the master or crew. *The Daniel Burns* (D. C.) 52 Fed. 159. And the charterer is owner pro hac vice where the master is subject to his orders and directions, though appointed to his position as master by the general owner. *The India* (D. C.) 14 Fed. 476; *The Bombay* (D. C.) 38 Fed. 512. In such a case the charterer is himself responsible for the torts of the master, because, having a legal right to control, he is legally presumed to actually control, the master's conduct. On the other hand, the general owner is not responsible, because he does not have the right to control the master in the performance of his duties. *Wood, Mast. & S. § 281.* This decision was affirmed by the Circuit Court of Appeals, 9th Circuit, 119 Fed. 118, 55 C. C. A. 220. To the same effect is *The Bombay* (D. C.) 38 Fed. 512, in which reference is made to a clause identical with the 9th in the charter in the present case, and it is said:" (514) "But in this case the matter as to the party in whom command, possession and control should be vested is not left to inference, but is settled by the clause in the charter party last quoted." *The India* (D. C.) 14 Fed. 476 (Judge Benedict), and 16 Fed. 262 (Judge Wallace), is cited as sustaining the conclusion; and it is undoubtedly to the same effect. I do not consider that *Bethel v. Mellor* (D. C.) 131 Fed. 129; *Birt v. Hardie* (D. C.) 132 Fed. 61, *The Barnstable*, 181 U. S. 464, 21 Sup. Ct. 684, 45 L. Ed. 954, and *Leary v. U. S.*, 14 Wall (U. S.) 607, 20 L. Ed. 756, all cited by respondent, are at variance with the cases last referred to. In *Wier v. Union S. S. Co.*, 9 Asp. Mar. C. 13, 9 Id. 111, there are expressions by most of the judges to the effect that a charter like the present does not constitute a demise of the ship. But the English decisions seem to be in some confusion on the subject (See *Carver on Carriage by Sea* [4th Ed.] pp. 148-156, where the cases are compiled). This writer says, however (page 149), 'Contracts in which the possession of the ship is handed over to the charterer are very much less frequent. But they are at times made, and occasionally in such doubtful shapes that it is difficult to tell whether, in fact, the possession does or does not pass to him. But when that does take place, so that the charterer, and not the owner, is in actual control of the ship, it cannot properly be said that the relation between the owner and the charterer is that of carrier and freighter. And that is still true, though the owner may have contracted to make and keep the ship fit for the work, and to provide her necessary stores, and even though he may also have undertaken to supply and pay the crew.'

By the weight of American authority, it seems to me that the charter in this case operated as a demise of the ship, but with a continued responsibility on the part of the owner for her proper navigation and maintenance. Under *The Endsleigh* and *The Del Norte*, supra, it would seem that the owner would not be liable even if the master or crew misappropriated the cargo. Respondent's counsel argues that if this is the law, the crew may broach cargo with impunity. But the risk of theft or other misappropriation by the crew is always assumed by the carrier of goods, and the offense could no more be com-

mitted with impunity where the goods are carried for a charterer as owner pro hac vice than where they are carried by the legal owner under a contract of affreightment. The master is under the same obligations to protect the cargo in either case, and the crew are subject to the same punishment for theft; and by the 11th clause of the present charter the charterer has a right to appoint a supercargo to safeguard his interest. The mischief which it is argued would result if such charters be construed as demises is fanciful, I think. The shortages in question are more likely to have resulted from loss in loading or discharging or in tallying than in any other way, and in such event libellant would not be liable to respondent, since loading, discharging and tallying are all part of the charterer's obligations under this charter.

Respondent invokes the Harter Act, to all the terms, provisions and exemptions of which the charter is made subject by clause 25. By section 2 of the act Feb. 13, 1893, c. 105, 27 Stat. 445 [U. S. Comp. St. 1901, p. 2946] it is made unlawful for the owner, master, agent or manager of the ship 'to insert in any bill of lading or shipping document any covenant or agreement whereby the obligation of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver the same, shall in any wise be lessened, weakened or avoided.' It is argued that the charter is a shipping document within the meaning of this act, and if it could otherwise be construed as relieving the ship and owner for non-delivery of cargo as between the owner and the charterer, the act precludes such construction. If this be so, it would have that effect whether referred to in the charter or not. But I do not think that it applies, or that the present case is within the policy or the purpose of the act. The prohibition, in my judgment, was intended to prevent restriction of liability to the prejudice of shippers of goods under contracts of affreightment, and did not contemplate a regulation of the terms and conditions on which an owner might lease his ship to another as one would lease a house. The owner referred to in the act is the carrier, and where a charterer is owner pro hac vice, the prohibition applies to him in his contracts of affreightment, whether made by him personally, or by the master or another person as his agent. This appears to be in harmony with *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771, and *The Irrawaddy*, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130. If the construction which the respondent puts upon the act be correct, then a ship owner who absolutely surrenders command, navigation and control of his ship to another, reserving no voice whatever in her management, cannot lawfully stipulate with the charterer that he shall be free from all liability to him arising out of the business of the ship while she is run by the charterer.

I therefore disallow the claims for shortage."

Nothing can, in my judgment, be profitably added to the commissioner's discussion, which, with the conclusion, seems to be well sustained by the authorities cited.

This exception is also overruled, and the report will be confirmed.

THE PAUL L. BLEAKLEY.

(District Court, S. D. New York. June 6, 1906.)

1. MARITIME LIENS—WRECKING SERVICES—CONTRACT WITH INSURER.

A scow was sunk in the harbor of New York, which was its home port, and on notice thereof by the owner to the insurer the latter agreed to have the vessel raised, and made a contract therefor with libellant, with which it had made similar contracts previously. *Held*, that the insurer

had no authority to bind the vessel for payment, nor did libellant acquire any lien by virtue of the contract, to which the owner had no relation.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Maritime Liens, § 48.]

2. SALVAGE—SALVAGE SERVICE—RAISING SUNKEN VESSEL.

The raising of a scow sunk in its home port under a contract, and where the work involved no element of danger and nothing out of the usual, is not a salvage service, which creates a lien on the vessel.

3. MARITIME LIENS—SUIT TO ENFORCE—LACHES.

The insurer of a sunken scow made a contract with libellant to raise the same. The policy provided that no action thereon for loss or damage to the vessel should be maintained unless commenced within one year. *Held*, that libellant was barred by laches from maintaining a suit to enforce a lien on the vessel for the service after the expiration of the year, and after the owner's right to recover from the insurer under the policy was barred or had become doubtful.

In Admiralty. Suit in rem to enforce maritime lien.

Avery F. Cushman, for libellant.

Alexander & Ash, for claimant.

ADAMS, District Judge. This was an action brought by the Merritt & Chapman Derrick & Wrecking Company to recover \$689 from the scow Paul L. Bleakley, owned by Cara R. Bleakley, for wrecking and salvage services rendered between the 28th of June and the 3rd of July, 1902. The scow sank, with a load of dirt, near Shooter's Island, at the mouth of Newark Bay, in the Harbor of New York, and was raised by the libellant.

It appears that the owner of the boat was insured in the Greenwich Insurance Company for one year from December 31st, 1901. When the sinking occurred, the charterer of the boat communicated with the owner by telephone at Verplancks Point, New York. The owner thereupon requested the charterer's agent in New York and the builder of the boat, near her home, to notify the Insurance Company, which they proceeded to do by calling on its president at the office of the company in New York City. A conversation then took place in which it was arranged that the Insurance Company should attend to having the boat raised. This took place in June shortly subsequent to the sinking. The Insurance Company then made a contract with the libellant by correspondence, running from June 26th to 28th inclusive, which resulted in the raising of the boat and cargo, by the 3rd of July, of which the Insurance Company was notified by the libellant. Subsequently a bill, made to the scow and owner, for the services was sent to the Insurance Company, and later, on the 11th of September, at the instance of the Insurance Company, one was sent to the owner of the scow but was at once returned with the statement that she had nothing to do with it, and the libellant must look to the Insurance Company under the contract. Thereafter some dunning letters were sent by the libellant to the owner and finally the matter was put in the hands of attorneys, who brought this action against the scow.

The libellant's theory is that the services were rendered to the scow, which is liable therefor under the clause in the policy which provides:

"It is agreed that the acts of the assured or insurers, or their agents, in recovering, saving, and preserving the property insured, in case of disaster, shall not be considered a waiver, or an acceptance of an abandonment, nor as affirming or denying any liability under this Policy; but such acts shall be considered as done for the benefit of all concerned, and without prejudice to the rights of either party. Further, the assured shall not have a right to abandon the vessel in any case, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured, nor shall detention by the season, or by any other cause, be alleged or allowed as cause for abandonment. Moreover, no abandonment, in any case whatever, even when the right to abandon may exist, shall be held or allowed as effectual or valid, unless it shall be in writing, signed by the assured and delivered to this Company or to their authorized agent, nor unless it shall be efficient, if accepted, to convey to, and to vest in this Company an unincumbered and perfect title to the subject abandoned; and the valuation of said vessel, expressed in this Policy, shall be considered the value in adjusting losses covered by this Policy."

• It is further contended that there was no abandonment, and could be none under the terms of the policy, which is doubtless true.

It is further contended that the Insurance Company and the owner are one and the same toward the libellant and that when the Insurance Company was clothed by the owner with all of her right and power with regard to the scow, the libellant can not be deprived of its maritime lien, which it acquired by reason of its services and the authority of the Insurance Company under the policy to bind the scow. It is further urged that the case is governed by *The Dredge No. 1* (D. C.) 137 Fed. 110, where it was held that a salvage claim had priority over earlier judgments in personam. The question of there being a salvage claim in that case was not litigated, the commissioner reporting that the petitioner there was the assignee of a salvage claim. The testimony shows here that the Wrecking Company was in the habit of dealing with the Insurance Company and nothing appears in this case to support a lien.

It does not seem that services of the character rendered here were salvage services. In *Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cumings Dredging Co.* (C. C. A.) 137 Fed. 780, where a dredge was sunk in New York Harbor and raised in circumstances very similar to these, the Circuit Court of Appeals said:

"The work performed by the libellant, though skilful in execution and successful in result, was in no sense a salvage service. It had in it no element of danger to person or property, which is the principal factor relied on in sustaining large awards in salvage cases.

"The problem of raising the sunken dredge was an exceedingly simple one; no new or difficult questions were presented for solution. The sinking occurred in summer, no storm was raging, the water was comparatively shallow, the bottom was soft mud. The moment the wreckers saw the situation they knew exactly what to do."

There is no lien for raising a sunken vessel in her home port. *The D. S. Newcomb* (D. C.) 12 Fed. 735; *The Venture* (D. C.) 26 Fed. 285. There was no agreement whatever with the owner, unless the Insurance Company can be deemed to have been the agent of the owner under the provision of the insurance policy, above quoted.

It can scarcely be said that by virtue of such provision, the Insurance Company was clothed with the power to impose a lien upon the

vessel under the circumstances disclosed by the testimony, which rather shows that the libellant intended to rely upon the credit of the Insurance Company, with which it had been dealing for many years. It seems that before the libellant could rely upon such pledge, even supposing it was intended to be made, some inquiry should have been made of the owner, who could easily have been reached, and then it would have quickly learned that the Insurance Company was the underwriter only and had no authority apart from such as was incident to that relation, which apparently did not go to the extent of enabling it to pledge a vessel it was under obligation to save for the owner upon pain of indemnifying her for any loss that should arise from lack of care. Here there was no necessity for credit and it satisfactorily appears that no credit except that of the Insurance Company was in contemplation. No allusion having been made to the credit of the vessel, it follows that the credit of the Insurance Company was solely in view when the contract for raising was made. *The Wandrahm* (D. C.) 62 Fed. 935, affirmed 67 Fed. 358, 14 C. C. A. 414. It was there said (page 360 of 67 Fed., page 416 of 14 C. C. A.):

"When a person, whose relation to the vessel is unknown, but who is not the apparent agent of the owners, who are unknown, but who can readily be ascertained, makes a contract for something to be done upon the vessel, in the line of his known business as a mechanic, the co-contracting party is put upon inquiry to ascertain the powers which the stranger possesses. If no such inquiry is made, and nothing is said about the credit of the vessel, the inference is that the material man was satisfied with the security of the sole debtor, and the mere subsequent declaration of the libellant that he furnished the materials upon the credit of the vessel will not vary the conclusion which is to be drawn from his conduct when the contract was made."

Even if the libellant had a basis for a lien, the delay on its part, in enforcing it, has been such as to destroy it. The policy provided:

"It is furthermore hereby expressly provided, that no suit or action against this company, for the recovery of any claim for loss or damage upon, under, or by virtue of this Policy, shall be sustained in any Court of Law or Equity, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur; and in case any such suit or action shall be commenced after the expiration of twelve months next after such loss or damage shall have occurred, the lapse of time shall be taken and deemed as conclusive evidence and a conclusive defense against the validity of the claim thereby so attempted to be enforced"

No proceedings were taken by the libellant to enforce a lien until the libel was filed herein on the 31st day of July, 1903. A claim was made against her by the Insurance Company on the 29th of July, 1902, but it was immediately returned with the statement that she had nothing to do with it. On the 11th of September, 1902, the libellant sent a bill to the claimant's agent and he returned it and replied that the scow was insured in the Greenwich Company, which made the contract, and the libellant must look to that company for payment. It sent some dunning letters to her but did nothing further until the libel was filed, more than 12 months after the accident. In the meantime the claim against the underwriter was jeopardized if not lost under the clause above quoted. If, therefore, a recovery

should be allowed here, the insured would, by reason of the libellant's delay, be without a clear recourse against the underwriter. The laches on the part of the libellant would thus enable it to make the owner pay and permit the underwriter to escape, notwithstanding a recognition of liability by its conduct and an actual contract made with the libellant, without the claimant's sanction. The libellant should not be permitted to recover here.

The libel is dismissed.

MILLER & LUX v. RICKEY et al. WOOD et al. v. RICKEY LAND & CATTLE CO. MILLER & LUX v. RICKEY LAND & CATTLE CO. GIGNOUX et al. v. SAME. GALLAGHER v. SAME. AMES et al. v. SAME. NICHOL et al. v. SAME. CONWAY et al. v. SAME.

(Circuit Court, D. Nevada. June 25, 1906.)

Nos. 731, 790, 791, 793-797.

1. WATERS AND WATER COURSES—SUIT FOR DIVERSION OF WATER FROM STREAM—DEFENSES.

In a suit by an appropriator of water from a stream to enjoin diversion of the water by others above him in violation of his prior right, in which no damages are claimed, it is no defense for one defendant, as against the claim of complainant, that others inferior in right to himself are diverting a larger quantity of the water than is claimed by complainant.

2. COURTS—EQUITY—PLEADING—MATTERS ADJUDICATED ON PLEA—AVAILABILITY ON ANSWER.

Matters which have been adjudged on a plea not to constitute a defense cannot be again set up in the answer.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 340.]

3. EQUITY—CROSS-BILLS—PLEADING DEFENSIVE MATTER.

In a suit to enjoin diversion of water from a stream, a cross-bill filed by a defendant against the complainant, which merely alleges priority of right in such defendant and diversion by complainant, and prays affirmative relief, sets up only matter of defense, which may properly be taken by answer and is demurrable.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 469.]

4. SAME.

A defendant cannot by calling his pleading a cross-bill, and praying for affirmative relief, require complainant to answer the same, where the matter set up therein is purely defensive.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 469.]

5. COURTS—JURISDICTION OF FEDERAL COURTS—ANCILLARY PROCEEDINGS ON CROSS-BILLS.

Cross-bills between defendants in a suit in a federal court to determine appropriators' rights in the waters of a stream, of which the court has jurisdiction by reason of the diversity of citizenship between complainant and defendants, are ancillary to the original suit, and within the jurisdiction of the court, without regard to the citizenship of the parties thereto.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 801.

Supplementary and ancillary proceedings and relief in federal courts, see note to Toledo, St. T. & K. C. R. Co. v. Continental Trust Co., 36 C. C. A. 195.]

6. SAME—FEDERAL AND STATE COURTS—PRIORITY OF JURISDICTION.

Where a federal court has first acquired jurisdiction of a suit to determine the respective rights of appropriators of water from a stream, it is its right and duty to protect such jurisdiction against interference, and it will enjoin a defendant from prosecuting a later suit brought by him against the complainant in a state court relating to the same subject-matter.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1345, 1418-1430.]

7. SAME—PROTECTION OF PRIOR JURISDICTION—PURCHASER PENDENTE LITE.

A corporation organized by a defendant in a suit in a federal court, and to which he has, pending the suit, conveyed his water rights, which are the subject of the litigation, takes the same subject to any orders which might be made therein against its grantor, and may be enjoined by the court from instituting and prosecuting a suit in a state court for the determination of the same rights.

In Equity. On exceptions to answer, demurrers to bill and cross-bills, and motion for injunction pendente lite.

W. C. Van Fleet and W. B. Treadwell (Isaac Frohman, of counsel), for complainant Miller & Lux.

A. M. Kidd, for complainants and defendants Henry Wood et al.

James F. Peck and Charles C. Boynton, for defendants Thomas B. Rickey and the Rickey Land & Cattle Company.

Cheney & Massey, for defendants the Mickey Ditch Company et al.

Mack & Farrington and George S. Green, for complainants and defendants J. E. Gignoux et al., Patrick Gallagher, L. R. Ames et al., James Nichol et al., Patrick J. Conway et al., and Mary T. Shaw et al.

John Lothrop, for defendants William R. Penrose et al.

HAWLEY, District Judge. In the multitude of questions involved in these cases it will be the endeavor of the court to group them together, as far as possible, under one general head. There are, however, certain motions and demurrers relating exclusively to the case of Miller & Lux v. Rickey et al. (C. C.) No. 731, 123 Fed. 604, 127 Fed. 573, which will first be disposed of. The general nature and character of this suit may be briefly stated as one in tort to obtain an injunction restraining the defendants from diverting the waters of Walker river above complainant's lands to its prejudice. No damages are asked for. Complainant interposed an exception to paragraphs 28 and 29 of defendant Rickey's answer to the bill of complaint for impertinence. This answer, after containing denials and admissions, sets up new matter, to the effect that certain rights to the water, which are alleged to be prior in point of time to those claimed by complainant, and, in paragraph 28, for further answer alleges, in substance, that below the place where he is diverting the water, and above the place where complainant is diverting the water, a large number of persons named in the answer, some of whom are defendants in this suit, are diverting a quantity of water from the Walker river greater than the quantity which complainant claims, and that their diversions and appropriations of the water are subsequent in point of time to those of the defendant Rickey, and also subsequent in point of time to those of the complainant. This allegation is not responsive to any of the allegations

contained in complainant's bill, and does not, of itself, constitute a defense to this suit. The question involved, so far as the defendant Rickey is concerned, is not whether other parties are diverting the water, but whether he has the right to divert it. If he establishes the fact that his own diversion of the water which he claims is prior in point of time to the appropriation and diversion of the water by the complainant, he has a complete defense to the suit, and if he does not establish that fact he should be enjoined in this suit from diverting the water to the prejudice of complainant. If defendant's diversion of the water was wrongful, he could have no defense as against the injunction on the ground that other persons were guilty of the same wrongful act. Such proof would be irrelevant and inadmissible. Evidence to prove such facts is only admissible on the question of damages. Here no damages are claimed. *Gould v. Stafford*, 77 Cal. 66, 18 Pac. 879.

The matters set up in paragraph 29 of the answer were previously set up by plea and overruled. I think the rule is well settled that such matters cannot be again set up in the answer.

In *Pentlarge v. Pentlarge* (C. C.) 22 Fed. 412, it was held that neither equity rule 39 nor the practice of equity courts outside of the equity rules would allow the defendants to set up in an answer matter which had on the plea been adjudged not to constitute a defense. The same principle is announced in *Sharon v. Hill* (C. C.) 26 Fed. 337, 341.

2. The next preliminary question to be disposed of is presented by demurrers to the cross-bills filed by three different corporations, the Mickey Ditch Company, the Fox Ditch Company, and the Greenwood Ditch Company, and a large number of individual defendants in No. 731, and the demurrers interposed to the cross-bills by divers and sundry others of the defendants. The different counsel representing the different defendants have not pursued the same course in filing their alleged cross-bills, but the controlling principles upon the points raised by the demurrers are substantially the same.

The complainant interposed a demurrer to all the cross-bills, substantially on the ground that no matter contained therein entitles the defendants to any relief in equity other than that to which they are entitled by their answers. In the group of defendants represented by the firm of Cheney & Massey they are all alike, and we select, for the purpose of illustration, that of the defendant the Mickey Ditch Company. It filed what is entitled "Answer and Cross-Complaint of Mickey Ditch Co.," and a separate paper entitled "Cross-Bill in Equity of the Mickey Ditch Co."

The first pleading proceeds in proper form as an answer to the bill of complaint, amounting to a complete defense, and then proceeds with what may be designated as proper matter for a cross-bill, which contains the same allegations as those in the answer, and further makes the following allegation, which distinguishes it from the answer:

"(11) That within three years last past said defendant Miller & Lux, a corporation, has wrongfully diverted the waters of the East Fork of said Walker River at divers places on said river, a large portion of which water

so diverted by them is never returned to the river; that they are now continuing the diversion aforesaid, and threaten to continue such wrongful diversion."

Then follows an averment that the diversions made by Miller & Lux are without right. In this connection it is proper to refer to the fact that the original complaint alleged:

"(21) That within three years last past the said defendants have, and each of them has, diverted the waters of the said Walker river at divers places on said river above the said lands of complainant, and above the points at which the said complainant so diverts said water, a large portion of which water so diverted by them is never returned to said river; and they are now continuing the diversions aforesaid, and have thereby deprived, and are now depriving, the complainant of a large portion of the said water to which the complainant is so entitled."

It thus appears that the complainant in the original bill is lower down the stream than the defendants, and that the defendants' diversions of the water are at places on the Walker river "above the said lands of complainant."

The general principle is well settled that a cross-bill for affirmative relief must contain within itself sufficient averments to entitle the cross-complainant to the relief asked for, or for some equitable relief. A cross-bill must not be founded solely on matters which can properly be availed of by way of answer. The effect of a cross-bill is to compel the original complainant to file an answer thereto, while the answer only calls for a replication.

The contention in support of the demurrer is that all the defenses that can be made are contained in the answer, and that the cross-bills state no cause of action against the complainant; that the defendants, being above the stream from complainant, cannot complain of a diversion of the water by the lower owner, because there is no wrong or injury done by him to the defendants. The only relief which the cross-bills ask for, in addition to the relief asked for in the answer, is as prayed for:

"That your honors adjudge and decree that the rights of your orator in and to the waters so diverted and appropriated by it, as herein alleged, may be adjudged and decreed by your honors prior and superior to any right or rights of said defendant Miller & Lux, and that the title of your orator in and to said waters may be forever quieted, and that said Miller & Lux be forever enjoined and restrained from diverting any water from said river in such manner and to such extent as to deprive your orator of any of the water aforesaid, and that your orator may have such further or other relief as the nature of the case may require and to your honors may seem meet."

If the defendants are able to show that their appropriations and diversions of the water are prior in time to the appropriations and diversions of the water by Miller & Lux, the decree of the court would be against the complainant in the suit, and such a decree would, in effect, quiet the title of the defendants, and give them all the relief to which they are entitled.

The matters contained in the cross-bill annexed to the answer are, it seems to me, purely defensive in their nature and character, and can be and are set up in the answer, and the complainant, Miller & Lux, ought not to be required to put in an answer to such cross-bills.

In *American & G. M. & I. Co. v. Marquam* (C. C.) 62 Fed. 960, it was held that a cross-bill seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed. The court said:

"The cross-bills present mere matters of defense. Such is not their office. Such a bill, seeking no discovery, and setting up no defense which might not as well have been taken by answer, will be dismissed, with costs. 2 Daniell Ch. Pr. 1552, note."

See *Dickerman v. Northern Trust Co.*, 80 Fed. 450, 458, 25 C. C. A. 549.

In *Mills v. Fletcher*, 100 Cal. 142, 148, 34 Pac. 637, the court said:

"The facts stated in the so-called 'cross-complaint' constitute a mere answer, and not a cross-complaint. So far as material they are, that defendants are the owners of, in the possession of, and entitled to the possession of, the demanded premises. The averment that plaintiffs claim an interest in the premises adversely to defendants is unnecessary, since that fact is even more explicitly averred in plaintiffs' complaint, and is put in issue by the general denial in the answer; and the averment that plaintiffs' claim is without right is also included in the general denial of all the allegations of the complaint. It is immaterial what the defendants called their pleading; its character is to be determined by the court."

In *Story's Eq. Pl. (10th Ed.)* § 629, the author, in summing up a discussion on this subject as applicable to the facts of this case, said:

"But wherever the cross-bill seeks relief, it is indispensable that it should be equitable relief otherwise it will be demurrable; for to this extent it is not, as we have seen, a pure cross-bill, but it is in the nature of an original bill, seeking the further aid of the court beyond the purposes of defense to the original bill; and under such circumstances the relief should be such as in point of jurisdiction the court is competent to administer."

With reference to the pleadings filed by Cheney & Massey, entitled "Cross-Bill in Equity," they include Miller & Lux with other defendants in No. 731, and also name other parties not included in the original bill. It contains similar averments to the other pleadings we have noticed, and, among other things, alleges:

"That within three years last past said defendants, excepting the defendant Miller & Lux, a corporation, have, and each of them has, wrongfully diverted the waters of the East Fork of said Walker River at divers places on said river above the lands hereinbefore described, and above the point at which your orator so diverts said water, a large portion of which water so diverted by them is never returned to the river; that they are now continuing the diversion aforesaid, and have thereby wrongfully deprived, and are now wrongfully depriving, your orator of a large portion of the water to which it is so entitled, under the diversion herein alleged, and threatening to continue such wrongful diversion."

There is no specific allegation against Miller & Lux, and no relief is prayed against this corporation. There is no reason why it should be required to answer cross-bills of this character. The principles heretofore announced which are applicable to this case need not be repeated.

The demurrers filed by Miller & Lux to the answers and cross-complaints and to the cross-bills in equity filed by Cheney & Massey are sustained.

The next group of cross-bills to be taken up will be those represented by Mack & Farrington and George S. Green, of which the pleadings filed by J. W. Wilson may be considered a fair type of the entire group. These cases differ from those we have previously mentioned in this, that they are indorsed "Answer of J. W. Wilson," and the demurrers thereto set up the additional ground that they are uncertain, in this, that it cannot be ascertained therefrom whether they are intended to be an answer, pure and simple, or are intended to be also cross-bills, which would require Miller & Lux to answer. This ground of demurrer is well taken. The answers set up the grounds of the defendant constituting a defense to the original bill, "further answering by way of new matter and cross-bill," set up matters purely defensive in their character, such as prescription and the statute of limitation, which could, of course, be included in the answer.

The true rule in cases of this kind is well expressed by the court in *Shain v. Belvin*, 79 Cal. 262, 21 Pac. 747. The court said:

"In the next place, if a defendant has any cause of cross-complaint, he should plead it as such. Matters which are proper as a defense will not be turned into a counterclaim or cross-complaint merely by a prayer for affirmative relief. * * * And if a party calls his pleading a counterclaim, he will not afterward be allowed to maintain that it was really a cross-complaint, and required an answer. * * * Upon the same principle, a party will not be allowed to gain any advantage by giving his pleading two inconsistent characters. If matter is pleaded as a defense, it is denied by force of the statute; if it constitutes a cross-complaint, and is pleaded as such, it requires an answer from the plaintiff. It is inconsistent to say that the same matter does and does not require to be answered. The pleader should take one ground or the other, so that his adversary may know how to proceed. If he, as here, 'for further and separate answer and defense to the complaint, avers by way of cross-complaint,' etc., the rule that a pleading must be construed against the pleader applies, and as against him it may be treated merely as a defense. The words 'by way of cross-complaint' may be treated as surplusage."

It was probably unnecessary for complainant to demur to these so-called "cross-complaints." They are mere surplusage, and should be treated simply as answers. The demurrers are interposed to make it clear that the complainant is not required to answer, and counsel for the defendant expressed themselves as being "perfectly satisfied that the court shall say" the matters alleged for further answer by way of cross-complaint "is a part of the answer, and that the replication covers it."

These defendants also separately filed cross-complaints, which are subject to the rules announced in the former cases represented by other counsel, and the same ruling will be made. The demurrers interposed by complainant will be sustained.

The next group of defendants, wherein John Lothrop appears as counsel for Penrose and others, will now be considered. One pleading is indorsed "Answer and Cross-Bill of Defendant William R. Penrose," the other "Cross-Bill of Defendant William R. Penrose," the same as in the first class of cases hereinbefore described. They differ somewhat from the cases presented by Cheney & Massey. These defendants are co-owners or co-tenants with the complainant Miller & Lux in cer-

tain of the appropriations mentioned in the bill of complaint. After asserting their rights to the water of Walker river, and alleging that they have been in the exercise of such rights as co-tenants with the complainant for more than five years, defendants in the cross-bill allege:

"(10) That this defendant submits, for the reasons hereinbefore set forth, that the complainant is not entitled to any relief whatsoever against this defendant, and that this defendant should be adjudged and decreed and to be entitled to sufficient water of said Walker river as is or may be necessary to irrigate the aforesaid described lands, and for stock and domestic purposes, and to the exclusive use thereof, and for such other and further relief in the premises."

—And that Miller & Lux be required and commanded to appear herein and answer to the several allegations in this cross-bill contained.

As has already been said in the other cases, there is nothing contained in these cross-bills for affirmative relief except such relief as will naturally inure to the defendants' benefit if they establish the rights which they claim in their answers, and the complainant ought not, in any of such cases, be required to file an answer to the cross-bills. For the reasons heretofore given, the demurrers interposed to the pleadings herein referred to will be sustained.

Speaking generally of cross-bills, it may be said that the right of a defendant in a suit in equity to file a cross-bill against his codefendant, is admitted. The propriety of doing so in all cases may be seriously questioned, as it tends to prolong and complicate the trial, and often creates unnecessary expense, but the right exists, and in this regard I shall not interfere with the positions in which the respective parties have placed themselves. The responsibility they have assumed rests with them. The fact is that suits in equity are frequently complicated, and often involve many conflicting interests. In certain cases the subject-matter of the suits can be decided upon the issues made by the complaint and answer, but it sometimes happens that a suit cannot be completely disposed of without deciding upon the claims of defendant either against the complainant or against codefendants, or against property which is the subject of litigation, and, as a general rule, the regular way of bringing such claims before the court is by cross-bill.

A defendant may always avail himself of every possible defense that he can have to a suit by means of an answer alone, but there are cases in equity where the most effective way of making a complete defense is by attacking the assailant, whether complainant or a codefendant; and when a defendant in equity wishes to adopt that mode of defense an answer will not serve his purpose, he must resort to a cross-bill. "An answer is a shield, not a weapon." The distinction between these lines of a defense and an attack belong to all systems of judicial procedure alike, but in the mode of dealing with this distinction there are wide differences. The same facts which will constitute a means of attack only in one system may be a defense proper in another system; but, as said in *Langdell on Eq. Pl.* § 50, "this is not a difference in procedure, it is a difference in the law of rights."

Next in order come the cases relating to the proceedings against the "Rickey Land & Cattle Company," a corporation, which are contained

in all the suits. There are some questions that are common to all, and others apply only to certain of the suits. They may with propriety be classed under four separate heads, viz.: (1) The suit of Wood et al., No. 790; (2) the suit of Miller & Lux, No. 791; (3) the five suits from No. 793 to No. 797, inclusive; (4) the proceedings instituted by a group of defendants in the original suit of Miller & Lux, No. 731. All the cross-bills were filed by leave of the court.

The objective point to be reached in all the proceedings is as to the right, power, and jurisdiction of this court to reach the Rickey Land & Cattle Company, a corporation which was not a party defendant in the original suit of Miller & Lux v. Rickey et al. (No. 731).

The nature and character of this suit has hereinbefore been tersely stated, and a further reference is here made to the statement in Miller & Lux v. Rickey et al. (C. C.) 127 Fed. 575. The defendant Rickey appeared therein, and entered a plea to the jurisdiction of the court, which was overruled, and afterwards he filed an answer to the suit. It is, in substance, alleged in all the cross-bills and complaints herein that after this court acquired jurisdiction of the suit No. 731 the defendant Thomas B. Rickey organized a corporation called the "Rickey Land & Cattle Company"; that he conveyed to that corporation the water rights and the lands to which they were appurtenant, the ownership to which he had set up as a defense in his answer to suit No. 731; that the corporation as formed by him is, in substance, Thomas B. Rickey under another name; that although under the form of a corporation, and although there were necessarily, under the law, other incorporators than Thomas B. Rickey, nevertheless he was the only person beneficially interested in that corporation, and that the other persons who united with him in forming that corporation were merely his nominees, holding stock in fact for his benefit. It is further alleged that this corporation, the Rickey Land & Cattle Company, thereafter commenced two certain suits in the superior court of Mono county, Cal. The complaint in that suit against Miller & Lux is set out fully in the bill brought by Miller & Lux against the Rickey Land & Cattle Company, and it appears from that bill that the issues tendered by the Rickey Land & Cattle Company in those suits were that it had a right, partly upon the law of riparian rights alleged to exist in California, and partly by appropriation, which is recognized by the law of Nevada, to certain waters of the Walker river, extending, in all, to about 2,000 cubic feet per second, and that the defendants in that suit, including Miller & Lux, complainant in suit No. 731, were claiming the right to divert the waters of that river adversely to the Rickey Land & Cattle Company, and alleged that the defendant Miller & Lux had no such right. If it had any right whatever, it was subsequent and subordinate to the right of the Rickey Land & Cattle Company to divert this 2,000 feet of water, and that the claim of Miller & Lux to do so was adverse to the Rickey Land & Cattle Company, and without right; and the prayer of the complaint in that case was that it should be adjudged and determined by that court that the Rickey Land & Cattle Company, plaintiff in this suit, had that prior right, that the defendants, including Miller & Lux, had no right to that quantity of water until that quantity of water

should be exceeded in the river, and that the title of the Rickey Land & Cattle Company to the amount of the waters of that river should be quieted as against Miller & Lux and the other defendants. And it is alleged that the issues in those two cases are the same as the issues in Miller & Lux v. Thomas B. Rickey et al. (No. 731), and that those suits were intended and have the necessary effect of bringing to trial before the said court the issues of which this court had already obtained jurisdiction in the suit of Miller & Lux v. Thomas B. Rickey et al., thereby hindering and embarrassing this court in its determination of the suit of Miller & Lux v. Thomas B. Rickey, and to the necessary prejudice of the complainant in that suit. The nature of the injunction which is sought in these suits is an injunction to restrain the defendant from prosecuting, as against the complainant, Miller & Lux, and a number of other persons, the suits brought by the Rickey Land & Cattle Company in Mono county, and the ground on which an injunction against the further prosecution of those suits is sought is that the issues in those cases are the same as those in the suit of Miller & Lux v. Thomas B. Rickey et al., pending in this court, and that this court first obtained jurisdiction of that controversy, and therefore had a right to retain it to the end, to the exclusion of any interference by any other court. The injunction sought for is against the party, not against the court in Mono county, and on the ground that this court should complete the controversy, and should not be interfered with. A preliminary restraining order was issued by this court, and an order upon the Rickey Land & Cattle Company to show cause, if any it could, why this order or an injunction pendente lite should not be issued in the several cases. They were all set for hearing at the same time, and were all argued together. The defendant, to show cause why the relief should not be granted, interposed separate demurrers to the several pleadings in the several suits and proceedings herein, and also filed several affidavits as to the facts of the incorporation of the Rickey Land & Cattle Company, covering the whole field of its objection to the proceedings herein instituted by the several parties. The affidavits are quite lengthy. It is not deemed necessary to quote them in *hæc verba*, but a reference thereto will be made in order to illustrate the points upon which the corporation relies for a full and complete defense to all the suits and proceedings instituted by the respective complainants.

The demurrers in all the cases are based upon the proposition that the bills of complaint or cross-bills show that the complainants are not entitled to the relief prayed for against the defendant; that the bills are without equity; and that the said bills are uncertain in this: that it cannot be ascertained therefrom what issues are tendered, showing, or tending to show, that the suits brought by defendant in Mono county, Cal., present the same issues which were tendered in the bill of complaint of Miller & Lux v. Rickey et al. in this court. In addition to these propositions, in some of the other classes of cases the demurrer to the cross-bill is based upon the ground that it does not appear that this court has any jurisdiction over the subject-matter of the controversy in said cross-bill; that the facts set forth in said cross-bill are

independent of, distinct and different from, any controversy set out in the original bill, and is an attempt to interpose a new controversy between cross-complainant and this defendant, both of whom are co-defendants in the original bill; that said cross-bill is multifarious, in that it is brought in regard to matters having no connection with the subject-matter of the original bill, and not proper to be investigated in this suit; that several defendants in the original suit are not made parties to this cross-bill; that there is a misjoinder of parties plaintiff, in that several parties have been joined as parties plaintiff who have no common interest or community of interest or joint interest in the water, the subject-matter of the cross-complaints, and that the interest of each plaintiff therein is several.

Under the facts of this case the question arises whether or not this court has the power and authority to issue the injunction against the Rickey Land & Cattle Company that is prayed for; in other words, has this court any jurisdiction in the premises?

The main discussion of this question will be first confined to the suit of Miller & Lux against that corporation (No. 791), as it is free from certain objections raised in the other cases. This suit was brought by Miller & Lux for an injunction prior to the date of service of summons in the Mono county cases instituted by the defendant.

In *Rodgers v. Pitt* (C. C.) 96 Fed. 668, 670, this court said:

"The general rule is well settled that where different courts have concurrent jurisdiction the court which first acquires jurisdiction of the parties, the subject-matter, the specific thing, or the property in controversy is entitled to retain the jurisdiction to the end of the litigation, without interference by any other court. * * * If this court first obtained jurisdiction of this cause, it has the power and it is its duty to restrain the defendants herein from taking any proceedings in the state court which would have the effect of defeating or impairing the jurisdiction of this court."

These general principles are not denied, but their application to the facts of this case is seriously questioned. In the bill of complaint in No. 791 the pleader sets forth the proceedings had in No. 731, and then sets forth in full the proceedings in the two actions brought by defendant in Mono county, Cal., and alleges:

"(22) That the issues tendered by said complaints in said two actions so brought by the defendant herein as plaintiff against your orator and said other persons are, so far as concerns your orator, the same issues which were tendered by the said bill of complaint of your orator so filed in this court, so far as the same related to the defendant Thomas B. Rickey in said suit. (23) That at the time of the filing by the defendant herein of its complaints aforesaid, the said defendant did not have or claim to have, and does not now have or claim to have, any right whatever in or to any of the waters of said Walker river, or of any branch or tributary thereof, except such rights, if any, as it acquired by said conveyance to it from the said Thomas B. Rickey. (24) That the defendant herein, in and by the actions aforesaid, intended, and the necessary effect of said actions is, to bring on for trial and determination in said superior court the same issues presented by the said bill of complaint of your orator in the said suit so brought by it in this court, so far as relates to the issues between your orator and the said Thomas B. Rickey, and to obtain from said superior court a judgment determining said issues in advance of a determination of the same by this court, and thereby to defeat the jurisdiction of this court in the said suit so now pending before it, and to hinder and embarrass this court in the trial

of said issues, and in the enforcement of any decree which this court may render in the said suit so pending before it; and further prosecution of said actions, or either of them, as against your orator, would therefore be in derogation of the jurisdiction of this court and of the rights of your orator in the suit so brought by it in this court and now pending therein."

All the cross-bills, so far as the Rickey Land & Cattle Company is concerned, relate to the same subject-matter which was brought before this court by the complaint of Miller & Lux in the original suit, and to the right of the defendant Rickey to take any water away from the river, as against its respective rights. The relief asked for is in relation to the same matter which was brought before the court in the original suit.

In view of what has already been said, it is unnecessary to take up *seriatim* the other cross-bills filed against the Rickey Land & Cattle Company. The truth is that the principles already announced show that, although there may be a difference in some of the facts, there is none in the application of the principles of law to all the cross-bills. They stand virtually upon the same plane, and are governed by the same rules.

The suggestion is made that this court has no jurisdiction of certain cross-bills because the parties thereto are citizens of the same state. This is without merit. The cross-bills are all ancillary to the original suit of *Miller & Lux v. Rickey et al.* (No. 731). The principle is well settled that a cross-bill of this character is not an original suit, but is ancillary and dependent, supplementary, merely, to the original suit out of which it arises, and is maintained without reference to the citizenship or residence of the parties. It does not depend upon the citizenship of the parties, but on the subject-matter of the litigation. *Krippendorf v. Hyde*, 110 U. S. 276, 281, 4 Sup. Ct. 27, 28 L. Ed. 145; *Morgan's Co. v. Texas Central Ry.*, 137 U. S. 171, 201, 11 Sup. Ct. 61, 34 L. Ed. 625; *In re Tyler*, 149 U. S. 164, 181, 13 Sup. Ct. 785, 37 L. Ed. 689; *Root v. Woolworth*, 150 U. S. 401, 413, 14 Sup. Ct. 136, 37 L. Ed. 1123; *Broadis v. Broadis* (C. C.) 86 Fed. 951, 954; *Home Ins. Co. v. Virginia C. C. Co.* (C. C.) 109 Fed. 681, 687.

The fact that some of the cross-bills were not filed until after the service of process was made upon the parties in the Mono county suits is wholly immaterial. The jurisdiction of this court does not in any manner depend upon the question as to the service of process in the Mono county suits. The only jurisdiction which this court is called upon to assert was obtained in the proceedings had in the suit of *Miller & Lux v. Rickey et al.* (No. 731), which was long prior to the commencement of the Mono county suits, as will hereafter more fully appear.

The affidavits filed by defendant, which upon the hearing hereof take the place of an answer, do not deny the issues made in the original suit (No. 731), nor do they deny that this court acquired jurisdiction of the person of the defendant Rickey years before the commencement of the actions in Mono county. They do not deny that said Rickey, pending the original suit, conveyed to the Rickey Land & Cattle Company the water rights which he was claiming, and by virtue of which he was defending the original suit, but they do deny

that said corporation is simply a change of name. The affidavit of Thomas B. Rickey states that Charles Rickey is, and at all times since the organization of this corporation has been, the owner of 100 shares, and that "Alice B. Rickey is now, and ever since the organization of said corporation has been, the owner of and entitled to all the rights, privileges, and profits growing out of one hundred shares of the capital stock of said Rickey Land & Cattle Company; that each of said persons, Charles Rickey and Alice B. Rickey, became owners of said stock by subscription to the capital stock of said corporation." This affidavit does not state that they, or either of them, ever paid any value therefor.

By the institution of the original suit and the process of this court therein, this court acquired jurisdiction to hear and determine what rights the defendant Rickey had in the premises. These propositions are not denied in the affidavits filed on behalf of the Rickey Land & Cattle Company. So far as these affidavits are concerned, it stands admitted, because it is not denied that Rickey, pending the suit brought by Miller & Lux, and after his personal appearance therein, conveyed to the corporation known as the Rickey Land & Cattle Company the water rights which he was claiming to own, and by virtue of which he was defending the suit in question. The affidavits show that he is the largest, if not the sole, owner of the entire stock of this corporation. I shall not discuss this part of the transaction. The affidavits speak for themselves, and show what the transactions were. From the view I take of the legal controlling question herein, it matters not whether, in law or fact, Mr. Rickey himself was the sole owner of the entire stock of this corporation, and whether or not his wife and son were holding the small number of shares in their names for his individual benefit or their own.

Is it not true that the corporation, whoever its stockholders may be, has the same rights that Thomas B. Rickey had, no more, and no less? It is not the name of the parties, but their situation and relation to the subject-matter of the original suit, which will fix their status in the present proceedings. It is not claimed that Thomas B. Rickey before he transferred his private property to the corporation could not have been enjoined from bringing the suits in Mono county to quiet his title to the flowing waters of the Walker river, which is the subject-matter of this litigation. But it may be said that he could not have brought such a suit because he was a party to the original suit of Miller & Lux v. Rickey, and that this court had acquired jurisdiction over his person and the subject-matter of that suit. It is true that the corporation is not a party to the original suit. It is not necessary that it should be made a party in order to authorize this court to grant the relief asked for.

In *Mellen v. Moline Iron Works*, 131 U. S. 352, 371, 9 Sup. Ct. 781, 33 L. Ed. 178, the court said:

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased

by them pendente lite. *Eyster v. Gaff*, 91 U. S. 521, 524, 23 L. Ed. 403; *Union Trust Co. v. Inland Navigation & Improvement Co.*, 130 U. S. 565, 9 Sup. Ct. 606, 32 L. Ed. 1043; 1 Story's Eq. Jur. § 406; *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566. As said by Sir William Grant in *Bishop of Winchester v. Paine*, 11 Ves. 194, 197: "The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed; otherwise, such suits would be indeterminable, or, which would be the same, in effect, it would be in the pleasure of one party at what period the suit should be determined." The present proceeding is an attempt upon the part of a purchaser pendente lite to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted, consistently with the settled rules of equity practice."

In 2 Black on Judgments, § 550, relating to purchasers pendente lite, the author said:

"It is a general rule that a purchaser of property, * * * who buys pending a litigation concerning it, comes into privity with his vendor, so as to be bound by the judgment in that suit the same as if made a party of record. [Citing many authorities.] 'We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased bona fide, and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the suit. The law infers that all persons have notice of the proceedings of courts of record. The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset'—citing *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 838; 1 Story, Eq. Jur. § 406, and other authorities. * * * In a late case it is said that the purpose of the rule is to keep the subject-matter of the litigation within the power of the court until judgment or decree shall be entered, since, otherwise, by successive alienations pending the suit, the judgment or decree could be rendered abortive and impossible of execution. It is also said that two things seem to be indispensable to give effect to the doctrine of lis pendens: (1) That the litigation must be about some specific thing which must necessarily be affected by the termination of the suit; and (2) that the particular property involved in the suit may be so definite in the description that any one reading it can learn thereby what property is intended to be made the subject of litigation."

And observes:

"That the only office of a notice of lis pendens is to give constructive notice to, and to bind by the subsequent proceedings, those who may deal with the defendant in respect to the property involved in the action during its pendency and before final judgment; and no notice is necessary to make the judgment effectual as against parties claiming under the defendant by transfer subsequent to the judgment. The judgment disposes of the rights of the parties, is a matter of public record, and is conclusive both upon the defendant and any subsequent grantee. It is also conclusive, without such notice, upon a purchaser who has actual knowledge of the pendency of the suit."

In 1 Bates Fed. Eq. Pro. § 541, the author, in discussing the question of injunctions issued to stay proceedings in state courts, and after quoting the provisions of section 720, Rev. St. [U. S. Comp. St. 1901, p. 581], said:

"It is well settled, upon both reason and authority, that the prohibition contained in this statute 'does not apply where the federal court has first obtained jurisdiction, or where, the state court having first obtained juris-

diction, the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction has first attached.' If the rule were otherwise, 'after suit brought in a federal court, a party defendant could, by resorting to a suit in a state court, defeat, in many ways, the effective jurisdiction and action of the federal court, after it had obtained full jurisdiction of person and subject-matter'"—citing *Sharon v. Terry* (C. C.) 36 Fed. 365, and numerous other authorities.

And in the course of the discussion quotes from *Peck v. Jenness*, 7 How. 612, 624, 12 L. Ed. 841:

"It is a doctrine of law too long established to require a citation of authorities that where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and whether its decision be correct or otherwise, its judgment, till reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court and the right of a plaintiff to prosecute his suit in it have once attached, that right cannot be arrested or taken away by proceedings in another court. These rules have their foundation, not merely in comity, but in necessity. For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other. Neither can one take property from the custody of the other by replevin or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

In *Starr v. Chicago Ry. Co.* (C. C.) 110 Fed. 3, 6, the court said:

"(1) The federal courts must determine for themselves the limits of their jurisdiction, and the Supreme Court of the United States is the final arbiter in all questions of this nature. A renunciation of this power or a failure to discharge his duty would be fatal to our system of government. It would withdraw the keystone of the arch. * * * (2) Wherever a federal court and a state court have concurrent jurisdiction, the tribunal whose jurisdiction first attaches holds it to the exclusion of the other until its duty is fully performed and the jurisdiction involved is exhausted. * * * (3) The foregoing principle is so indispensable to the harmonious working of our systems of federal and state jurisprudence that neither the eleventh amendment to the Constitution, nor section 720 of the Revised Statutes, which prohibits the issue by a court of the United States of a writ of injunction to stay proceedings in any court of a state, can be permitted to interfere with its maintenance. The court which first obtains jurisdiction of the subject-matter and of the necessary parties to a suit may—and, if it discharges its duty, it must—if necessary, issue its injunction to prevent any interference by any one with its effectual determination of the issues, and its administration of the rights and remedies involved in the litigation."

—And in support of these principles cites a vast number of authorities.

These general principles are too well settled to require further discussion. They have repeatedly been declared in suits and actions of various kinds by the highest court in the land, and announced in nearly, if not all, the federal courts, circuit and district, and in the various courts of appeal, wherever the question has been presented.

The object and purpose of the *Rickey Land & Cattle Company* in the commencement of the suits in question in Mono county, Cal., is to take to another court the questions which have long been, and still are, properly in litigation in this court, and this is sought to be done in order to forestall and nullify, if possible, any decision or decree

which this court may render regarding issues of which it first obtained full and complete jurisdiction. The impropriety and inadmissibility of such proceedings in the light of the established fundamental rules of our judicial systems is manifest. The suits in this court will quiet and settle the title or rights of the respective parties to the flowing waters of Walker river. The enforcement of the rule that the court which first takes jurisdiction of the parties and subject-matter of a suit must retain and exercise it to the exclusion of any and all proceedings in other courts until its jurisdiction is exhausted by the final judgment or decree is absolutely essential to the due and proper administration of justice. This duty it owes to itself, as well as to the litigants, in seeing that its own jurisdiction is not impaired. The litigants have the right to have the case tried in the court where jurisdiction was first obtained, and should not be harassed or annoyed, or compelled to go to another court, and there try the identical questions which will properly arise in the court where the suit was originally commenced and is still pending. Such a rule, properly applied, should be rigidly enforced, not only to prevent unseemly conflicts in the courts, but to protect the litigants who are properly before this court.

The several demurrers interposed by the Rickey Land & Cattle Company to the bills in equity and cross-bills are overruled.

The injunction pendente lite, as prayed for against the Rickey Land & Cattle Company, is granted.

GARSDIDE v. NEW YORK TRANSP. CO. (two cases).

(Circuit Court, S. D. New York. July 3, 1906.)

1. HIGHWAYS—CONTRIBUTORY NEGLIGENCE—PERSON CROSSING FROM STREET CAR TO CURB—QUESTION FOR JURY.

A passenger alighting from a surface street car is not bound, as matter of law, to look in both directions along the street before starting to cross the space between the car and the curb, but the question whether the failure to so look constituted negligence is one of fact, to be determined by the jury under all the conditions and circumstances shown by the evidence.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 460, 473.]

2. SAME—INJURY TO PERSON ON STREET—ACTION FOR DAMAGES.

Plaintiff alighted from a street car, and after taking two or three steps was struck and injured by defendant's automobile. Her testimony was that when she stepped off she looked along the street in front of the car, and seeing no vehicles approaching started to cross diagonally to the curb at the crossing, which was a short distance behind the car, when the automobile caught her dress, and pulled her down backward and ran against her. The machine had just crossed in front of the car from the opposite side of the street, which was obstructed, and came behind plaintiff. Defendant contended that plaintiff started to cross the track behind the car, and, meeting another automobile which was following the car, stepped backward in front of the machine, which struck her. The speed of such machine was in dispute. *Held*, that such issues of fact required the submission of the case to the jury; that accepting defendant's contention as correct, plaintiff was not necessarily chargeable with contributory negligence, and, even if so, it would not prevent her recovery if the driver of

defendant's machine saw or should have seen her dangerous position between the two machines in time to stop his own before striking her.

[Ed. Note.—For cases in point, see vol. 25, Cent. Dig. Highways, §§ 460, 473.]

3. HUSBAND AND WIFE—INJURY OF WIFE—RECOVERY BY HUSBAND FOR LOSS OF SERVICES.

To entitle a husband to recover for the loss of his wife's services while she was incapacitated by reason of an injury due to defendant's negligence it is not necessary to show that he employed or became obligated to pay for the services of another to supply her place as housekeeper.

[Ed. Note.—For cases in point, see vol. 26, Cent. Dig. Husband and Wife, § 768.]

At Law.

Motions by defendant to set aside the verdict of the jury and for a new trial in each case, on the grounds that the verdict is contrary to the law and evidence and unsupported thereby, and on the exceptions to the ruling of the judge in refusing to direct a verdict for the defendant at the close of plaintiffs' case and again at the close of the whole evidence. No question of error is assigned by defendant on the rulings in rejecting or admitting evidence, or in the charge to the jury, and all such objections, if any, are waived.

William Victor Goldberg, for plaintiffs.

Arthur K. Wing (Mr. McIntyre, of counsel), for defendants.

RAY, District Judge. Ginerva Garside, the plaintiff in the one action, is the wife of John R. Garside, the plaintiff in the other. Ginerva Garside sues to recover damages for injuries to her caused by the alleged negligence of the defendant, the New York Transportation Company, in running upon her with its electrical automobile near the intersection of Sixth avenue and Thirty-Fifth street in the city of New York on the 10th day of January, 1903. The husband, John R. Garside, brings his action to recover the damages he alleges he sustained by reason of the same negligence, to wit, the value of the services and society of the wife while she was suffering from such alleged injuries, and which he claims he lost because of such negligence. By written stipulation filed and agreement made in open court the two actions were tried as one, but separate verdicts were rendered. The jury assessed the damages of Mrs. Garside at \$4,000, and those of her husband, John R. Garside, at \$1,000. Mr. Garside is a large manufacturer of shoes in the city of New York, and "keeps house" with his wife. She managed the household, and looked after its affairs, the servants, and children, and did some manual labor in connection therewith. They had a nurse for the children at times, but none at the time of the transaction in question. Prior to the accident Mrs. Garside was a strong active woman, in good health, and accustomed to protracted exercise in walking long distances etc., the mother of four children, and about 36 years of age. On the day in question, January 10, 1903, which was Mr. Garside's fortieth birthday, Mrs. Garside left her home a little before 2 o'clock p. m., and went to Huyler's on Forty-Second street, between Fifth and Sixth avenues, and then took a closed Sixth avenue surface car, and rode down to Thirty-Fifth street, on her way to Macy's store which is on the west side of Broadway, between Thirty-Fourth

and Thirty-Fifth streets. She was dressed in the street attire of the fashion of the day, and the skirt was of such length that the trail, if not gathered and held up by the hand when the wearer was walking, would drag a little. This Sixth avenue car, on which Mrs. Gar-side rode to Thirty-Fifth street, ran south, and stopped on the westerly surface track of the avenue a few feet south of what would be the southerly or south side cross walk of Thirty-Fifth street, if a cross walk were actually constructed, for passengers to get on and off the car. This was the usual and regular stopping place for south-bound cars on this as well as other avenues in the city of New York. At the locality in question there is an elevated railroad, supported by iron columns standing in the avenue about two feet outside of the outer rail of the surface car tracks, and Sixth avenue has two of these surface tracks, or four rails at suitable distances apart, and south-bound cars run on the westerly track, and north-bound cars run on the easterly track. At or near Thirty-Fourth street, Broadway crosses Sixth avenue diagonally, forming a triangle, which is bounded on the west by Broadway, on the north (the base) by Thirty-Fifth street, and on the east by Sixth avenue. The apex is not far from Thirty-Fourth street. It is 200 feet from Thirty-Fourth to Thirty-Fifth street. It is about 100 feet from the westerly side of Sixth avenue to the easterly side of Broadway on the north side, or along the base of this triangular space described. That space, fenced in and forming a small park, is surrounded by a walk, and a person alighting from a south-bound surface car at Thirty-Fifth street at the point mentioned, and desiring to cross to Broadway, and thence to Macy's, would naturally and almost necessarily pass to the walk on the west side of Sixth avenue, and thence along the walk at the base of this triangle, which is in fact the south sidewalk of Thirty-Fifth street. North of Thirty-Fifth street, at this place, between Thirty-Fifth and Thirty-Sixth streets and Sixth avenue and Broadway, stands the Herald Building. Sixth avenue is about 60 feet in width from curb to curb, and the distance between the curb line on the west side of Sixth avenue and the westerly or south-bound surface car tracks is not more than 20 feet. From curb line to the elevated pillars it is 18 feet. At the time in question there stood in Sixth avenue, next to but outside the curb, and extending nearly up to Thirty-Fifth street, lacking not over two feet, an owl wagon or night restaurant on wheels. This was about 6 or 7 feet wide, and some 12 or more feet in length, and narrowed the street between a car on the westerly surface track and the owl wagon to not more than 14 feet. Between the line of iron columns of the elevated road and the owl wagon the distance was not more than 11 or 12 feet. One of these columns or pillars was about opposite the south end of the owl wagon. Just south of this owl wagon, and but a few feet distant from it in the avenue, stood a furniture van or wagon, which occupied as much or more space as did the owl wagon. These were in plain sight of any person passing up or down Sixth avenue, and could be seen for a long distance, and had been there months. This was a pleasant day, and the accident occurred shortly after 2 o'clock. Ordinary ve-

hicles, such as automobiles or an ordinary carriage, could not at speed pass each other here safely. There was barely room to pass a person on foot, who was on the watch, safely. On alighting from the car, at the rear and on the west side thereof, according to her narrative of the transaction, Mrs. Garside faced and glanced south, and found that there was nothing in sight in the street, and then faced west, and found she had to move northwest in order to reach the curb, or move north till she had passed this owl wagon. She changed her purse and parcel from her right to her left hand, and gathered up her skirts with her right hand, and then took two or three steps in a northwesterly direction, when she felt herself pulled backward. Thereupon she screamed. She says:

"I felt myself pulled back, and I screamed. I was not hurt, I simply screamed from instinct, I think. Then I was pulled further back, and down and down onto my knees, and something hit my right hip, and then I screamed again. Something had caught me, and I screamed, and I found myself suddenly released, and something backed off my clothes."

She was then picked up, and turned around, when she saw this automobile of the defendant right there behind her. She says the wheel, or whatever it was, hit her, and "hurt me very severely, so that when it released me I sat down in a heap, sort of, and somebody picked me up—lifted me up." They attempted to put her in this automobile behind her, but she objected, and was then taken across Sixth avenue to Hall's drug store. Her skirt, worn by her that day, was produced in court, and, without objection, with the skirt on she described just how the transaction occurred. The skirt was torn from the waistband in the rear, and torn or split crosswise at the knees. She reiterated that she got off the car facing directly south, and that the force used in pulling her back and down was such that her knees were forced through the skirt, which was of strong material. At this time there was a temporary blockade of Sixth avenue on the easterly side, caused by a heavy ice wagon backed up to the east side curb, about opposite the rear of the car from which Mrs. Garside alighted, and this had delayed the movement of cars on the easterly or north-bound track to such an extent they were at a standstill for a few minutes. The defendant's automobile, an electrical vehicle, driven by its employé, one Joseph A. Carey, with whom one Daniel J. Lenahan, a footman for a Mr. Flower, was riding, came up Broadway, and turned into Sixth avenue at Thirty-Fourth street, about, and proceeded north from there on the east side at least half way to Thirty-Fifth street, and it is claimed further, when, seeing the block, without stopping or slackening its speed, it turned to the west across the surface tracks to the westerly side of the avenue, and then turned northerly, and passed up the avenue on the westerly side, and passed between the car from which Mrs. Garside had alighted on the east and this furniture van and owl wagon on the west, until it came in contact with Mrs. Garside. The plaintiffs contend that Mrs. Garside, having looked to the south and picked up the trail of her dress, was proceeding to cross in a diagonal direction from the place of alighting to the curb or walk on the west side, as she had the right to do, and as she was

compelled to do in order to avoid this van and owl wagon. That as she had taken a step or so to the northwest and towards the curb just north of this owl wagon, the defendant's vehicle, driven by Carey, came suddenly upon her from the south at dangerous speed, and carelessly and negligently driven and managed, so as not to be under proper control, and caught in her dress skirt, and pulled her back and then down, and that as she went down on her knees, held and pulled by the vehicle, it was forced against her right hip, and she was severely injured. The claim is that crossing from the east to the west side of Sixth avenue the vehicle was run carelessly at a high rate of speed, so as not to be under proper control, and that it crossed the avenue suddenly in front of the car from which Mrs. Garside alighted, either before it started or just after, without warning and without a slackening of speed. That the driver knew and had good and sufficient reason to apprehend that persons would be in the avenue at that point getting off and on the car, and passing to and from the curb or sidewalk, and that to run the vehicle into such a place at such a time at such rate of speed was a negligent act.

That Mrs. Garside was pulled down and run upon or against by defendant's vehicle cannot be doubted. There was an abundance of evidence that such was the fact. That it crossed from the east to the west side of the avenue but a very short time before striking Mrs. Garside was not disputed. No warning was given and speed was not slackened. There was a difference between defendant's witnesses who spoke on the subject and plaintiff's as to the speed of the vehicle; defendant's placing it at about three miles per hour, and plaintiff's at five or six miles per hour. The blockade in the east side of Sixth avenue was about opposite where the street car stopped, and about 30 to 60 feet south of the corner of the avenue and Thirty-fifth street. Defendant's vehicle was well up to it before it crossed, and probably passed to the west side but a short distance south of where Mrs. Garside stood when struck, possibly some 60 or 70 feet, although there was some evidence, the distance was less, and Mrs. Garside and the other persons who alighted from the car were probably hidden from the driver of the vehicle until it was within 30 to 60 feet of them. If the vehicle was proceeding at the rate of seven feet per second, as claimed, at such a place, under such circumstances and conditions, plainly visible and reasonably to be anticipated, the jury was amply justified in finding negligence on the part of the driver. The driver of the car and the footman with him admit they saw the street car coming south, saw it stop, and claim they saw Mrs. Garside alight. The footman says two others got off at the same time, and that Mrs. Garside was run upon or against as these persons were crossing to the westerly curb of the avenue. It was for the jury to say what the speed was and what the conditions were as the electrical vehicle passed to the westerly side, and whether, under the circumstances, the vehicle was being run at a negligent rate of speed and was negligently managed. At such a time and in such a place on that side of the avenue it was incumbent on the driver to proceed with great care and caution, having his vehicle well

under control, and whether or not he did so was a question for the jury. Mrs. Garside was corroborated by witnesses who stood just across the street, and even looking at her as she alighted from the car. It is true one or more of them say, in substance, she appeared to step backward, but as this was at the time defendant's vehicle came up to or upon her, and, as she says, caught her dress and pulled her backward, it was for the jury to say whether she stepped backward to the westward at all. It well might be that this compulsory movement was mistaken by these witnesses for a voluntary one on the part of Mrs. Garside.

The defendant contended that there was no fault on the part of the driver, and that the accident to Mrs. Garside was the result of her own negligence in backing into the defendant's vehicle, or that, even if the driver was negligent, she was also negligent, and that her negligence contributed to her injury, and therefore she cannot recover. The contention is that when she descended from the car she turned to the north and then to the east, and moved as if to go eastwardly across the surface tracks; that as she did this she was confronted by a very rapidly moving gasoline automobile going south on this surface track, following the car from which Mrs. Garside had alighted, which gave warning by "tooting" its horn, and that Mrs. Garside stepped back without looking behind her, and stepped directly in front of the right front wheel of defendant's vehicle, which was then proceeding so slowly and carefully up the avenue that it was brought to a dead stop the moment Mrs. Garside backed into it. The evidence that any such thing occurred was of a doubtful and suspicious character. There was considerable evidence that when Mrs. Garside was struck the car stood where it did when she alighted, and even the driver of defendant's vehicle finally said it was but just getting in motion. As the defendant proved that one or two other cars stood on the easterly track, and there was a blockade of the entire street beyond, and there was no room for a vehicle going south to pass between the cars, the jury was justified in finding that nothing of the kind occurred. More than one eyewitness, paying attention, said that no automobile passed to the south of Thirty-Fifth street at or near that time, or came down the avenue to the place of the accident. But, even if this did occur, it was not necessarily negligence on the part of Mrs. Garside that would prevent a recovery if she did step back to avoid an automobile going south, and came into contact with defendant's vehicle going north on the westerly side, if that vehicle was not under proper control, was being driven at a negligent rate of speed, and did not stop when its driver saw, or, in the exercise of ordinary care, ought to have seen, the perilous position of Mrs. Garside. She was rightfully in the avenue, and had a right to go east or west, proceeding with due care. If she was suddenly confronted with a rapidly moving vehicle going south at a rapid rate of speed, and defendant's driver saw this, and that she must step back quickly to avoid it, he was not justified in proceeding, being within some eight or nine feet of her, if he could see that collision with her and consequent injury to her would be the probable consequences. If, under all

the circumstances and existing conditions, Mrs. Garside did the best she could to avoid the danger, and defendant's driver, seeing the situation, negligently continued on when he might have stopped, and ran against her as she backed to escape the danger in front, the jury was justified in finding that the action of Mrs. Garside was not such contributory negligence as would preclude a recovery. The rule of law is well settled that if a person by negligence gets into a place of danger, one seeing him in that position is bound to exercise care and caution to avoid doing him injury. The negligence of the one does not justify negligent acts by the other, knowing the situation, which if not done would avoid or obviate the danger and consequent injury. (On this subject the court charged the jury:

"If as Mrs. Garside moved from the car where she alighted, northerly, or even somewhat easterly, if she did, having looked, as she says, first south, and not seeing anything coming from that direction, she was confronted by an automobile as she moved northerly and easterly, coming south on the westerly car track of Sixth avenue, and it was so close to her that it made it necessary for her step backward to avoid it as it passed, and the driver of the defendant's automobile was then substantially up with her or near to her, and about to pass her, only three or four feet west of that car track—you heard the distance described, how far west it was—it is for you to determine the distance, whether it was only three or four feet west of that car track. If the driver of that vehicle of the defendant could see that she was to be necessarily between the two automobiles as they passed each other within that narrow space of three, four, or five, or six feet, as the case may have been, and could see that an emergency existed in which the plaintiff, Mrs. Garside, was required to act quickly, and was required to avoid the automobile coming from the north, then if the driver of the defendant's automobile could and did see, or ought, in the exercise of ordinary care to have seen, that Mrs. Garside must move to avoid the one coming south, and that it was imminently dangerous to her to be inclosed between the two moving automobiles as they passed each other—the one moving north and the other south—on account of the narrow space in which she would be inclosed, and that in avoiding the one moving south she would probably be struck, or must be struck, by the one he was driving—if he could see that and did see it, or if, in the exercise of ordinary care and diligence, within the rules I have stated, he ought to have seen it—then it was his duty to stop the automobile he was driving, if he could, the moment he saw the dangerous and critical situation, if it was such. It is for you to say. If such was the condition, and Carey actually saw and apprehended the situation, or, in the exercise of ordinary care under the conditions and surroundings he ought to have seen and apprehended the situation and danger, and failed in his duty to stop the automobile when he might have done so, then the plaintiff, Mrs. Garside, was not necessarily guilty of contributory negligence which would prevent recovery, if she did the best she could in the emergency and under the circumstances, even if she did necessarily move backward to avoid the automobile going south, and in so doing made a mistake, if the automobile going south was there, and she may recover if you find the accident and injury to her was caused solely by the negligence of Carey, the driver of the defendant's auto, in not stopping the automobile before reaching her, when, in the exercise of ordinary care and caution under such conditions he ought to have done so, and might have done so, even if she erred in judgment in the dangerous position forced on her by Carey's negligence. If he saw Mrs. Garside in a dangerous situation, where she was liable to be injured by his going on past her, and he, in the exercise of ordinary care, could have stopped and avoided the accident, it was his duty to do so, and if he failed in that duty, then you may find he was negligent, and if you so find the facts to be, it would be your duty so to find. If negligent—and Mrs. Garside was not negligent under those conditions—and that negligence of the defendant, or of the defendant's driver, caused the injury, the plaintiff is entitled to recover."

The general rule is stated in Saunders on Negligence (page 63) thus:

"Contributory negligence, however, will not disentitle the plaintiff to recover damages, unless it be such that but for such negligence the injury would not have been sustained; nor if the defendant might by the exercise of care on his part have avoided the consequences of the negligence of the plaintiff."

He cites *Tuff v. Warman*, 2 Conn. B. (N. S.) 27, L. J. C. P. 322 (Ex. Ch.). In 7 Am. & Eng. Ency. Law, pp. 385-387, the rule is thus stated:

"And so when the negligence of the person inflicting the injury is subsequent to, and independent of, the carelessness of the person injured, and ordinary care on the part of the person inflicting the injury would have discovered the carelessness of the person injured in time to avoid its effects and prevent injuring him, there is no contributory negligence, because the fault of the injured party becomes remote in the chain of causation. In such a case the want of ordinary care on the part of the injured person is held not a juridical cause of his injury, but only a condition of its occurrence. * * * And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that, if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other after its occurrence in time to foresee and avoid its consequences, then such party is held to have notice; and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proximate cause of a following injury. But if, in the exercise of ordinary care, the one party would not have discovered the negligence of the other in time to avoid the injury, the rule just stated has no application; and it is only when the negligence of one party is subsequent to that of the other that the rule can be invoked." See the cases there cited.

In the case now under consideration Mrs. Garside, on defendant's theory, was facing northeast, as if to cross to the east side of Sixth avenue. Her back was to the south, and as one of defendant's witnesses puts it she had not been off the car a quarter of a minute. The gasoline automobile was coming south, following the car from which she alighted, and suddenly confronted her, and "tooted" its horn. All this the driver of defendant's vehicle saw, or ought to have seen, the jury were authorized to find. She must avoid it by stepping back, or stopping, if far enough away from the track on which it was proceeding. The jury was justified in finding that, seeing her in that position and place, it was negligence for the driver of defendant's vehicle to go up to and attempt to pass her at that time, thus inclosing her between the two automobiles. And if he did, and she was in peril from the one, and in escaping it was to be in peril of the other, and that other saw the situation, and proceeded on when he might in the exercise of ordinary care have stopped, it was negligence not to do so, or at least the jury were justified in finding, under all the circumstances, that it was negligence. The question was submitted to the jury. If so, and Mrs. Garside by such negligence of defendant was put in that perilous position, and required to act quickly, an error of judgment in stepping too far back would not be such negligence as would defeat recovery.

In *Grand Trunk Railway Co. v. Ives*, 144 U. S. 429, 430, 12 Sup. Ct. 679, 687, 36 L. Ed. 485, the Supreme Court of the United States stated the rule thus:

"Without going into a discussion of these definitions, or even attempting to collate them, it will be sufficient for present purposes to say that the generally accepted and most reasonable rule of law applicable to actions in which the defense is contributory negligence may be thus stated: Although the defendant's negligence may have been the primary cause of the injury complained of, yet an action for such injury cannot be maintained if the proximate and immediate cause of the injury can be traced to the want of ordinary care and caution in the person injured, subject to this qualification, which has grown up in recent years [having been first enunciated in *Davies v. Mann*, 10 M. & W. 546], that the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the injured party's negligence. *Inland & Seaboard Coasting Co. v. Tolson*, 139 U. S. 551, 558, 11 Sup. Ct. 653, 35 L. Ed. 270, and cases cited; *Donohue v. St. Louis, etc., Railroad*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; *Vicksburg, etc., Railroad v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *Deans v. Wilmington, etc., Railroad*, 107 N. C. 686, 12 S. E. 77, 22 Am. St. Rep. 902; 2 *Thompson on Negligence*, 1157; *Cooley on Torts* [1st Ed.] 675; 4 Am. & Eng. Enc. Law, tit. 'Contributory Negligence,' 30, and authorities cited in note 1."

See, also, the following cases: *Costello v. Third Av. R. Co.*, 161 N. Y. 317-322, 55 N. E. 897. It was for the jury to say whether the defendant's driver might not have avoided the consequences of Mrs. Garside's negligence in approaching the track, if she did, by the exercise of reasonable care and prudence. *Grand Trunk R. Co. v. Ives*, 144 U. S. 409-429, 12 Sup. Ct. 679, 36 L. Ed. 485; *Haley v. Earle*, 30 N. Y. 208; *Button v. H. R. R. Co.*, 18 N. Y. 248.

To the charge as made, and above quoted, defendant's counsel excepted as follows:

"Mr. McIntyre: 'Even though she made a mistake' were the words I desire to take exception to; that portion of the charge that if there was a mistake made, then there was no evidence of contributory negligence."

The court then recharged on the subject as follows:

"The Court: No, I did not say that. I said it was not necessarily contributory negligence. If she was there in that situation, going along as she had the right to do, and that car came down on that westerly track at the speed some of the defendant's witnesses say it did come, and came suddenly upon her, and there was an emergency, and she did the very best she could under the circumstances, if she acted with due care and caution under those conditions and circumstances, then it was not necessarily contributory negligence for her to step back and avoid it. And if she was in that situation, and the driver of the defendant's car saw her there, and saw that rapidly moving automobile coming down—and one witness said, I think, that it went 'whizzing' by—if that was true, if you so find it to be, then, of course, it was his duty, she facing in that direction, as she had the right to face, if she was going northeasterly, if to avoid that automobile she stepped back, and the driver of defendant's car saw her in that position, and saw that car coming, and saw that she would necessarily be between the two, and his nearness to the railroad track was such that she would probably necessarily be hit by one or the other, then it was his duty to stop; and even if she made a mistake in stepping back, if it was necessary to step back at all—if she made a mistake and stepped too far—and the defendant's driver was guilty of negligence in not stopping the automobile when he could see the situation, or when he ought to have seen it, if you so find—if she made a mistake, if such conditions existed, and it is for you to say what the conditions were—under the evidence of the defendant's witnesses her action was not necessarily negligence. You have heard them testify, some of them, that this car from which she alighted, at the time this accident occurred, stood there dead still, and then some of the other witnesses have testified that it had gone on, and

that this car on the same track came down whizzing past. Is that true? Had it gone far enough so that that car came down and whizzed past with those easterly tracks blocked? You will think about it and consider it, and determine just what the facts are. It is for you to say, under all those circumstances."

To this no exception was taken. In the same connection and on the same subject the court also charged:

"Mr. McIntyre: May I ask your honor to charge that if the operator of the defendant's automobile, Carey, stopped his car as soon as he could after having seen Mrs. Garside step backwardly, there was no negligence on the part of the defendant."

"The Court: It is for you to say whether he did see her step backwardly or not, or whether the automobile caught on to her and pulled her back. If she stepped backwardly, then if he stopped his automobile as soon as he could, and if he was not, under the circumstances and conditions, proceeding at a negligent rate of speed, and was not negligent in not looking about him and not seeing her soon enough—if all that is true, then, of course, he did his duty, and defendant is not liable, and the question is what were the circumstances and conditions under which he proceeded."

"Mr. McIntyre: I think your honor did charge that if the jury found that was an unavoidable accident the defendant must have a verdict. I think your honor charged that."

"The Court: Yes. Is there anything further?"

The jury was repeatedly told that the driver of defendant's automobile must have seen Mrs. Garside, and must have had time to stop, and negligently failed to do so.

It seems to me clear that the question of Mrs. Garside's contributory negligence was fairly submitted to the jury, for it was charged expressly:

"If the injury was due to an unavoidable accident, which could not be avoided by the defendant, the defendant is entitled to your verdict. If the plaintiff backed into the automobile without looking to ascertain if it was approaching, she was guilty of contributory negligence, and your verdict must be for the defendant. If the jury find that she became alarmed at the approach of an automobile from the north, and then backed into the defendant's auto, she cannot recover. If that is actually and baldly true, she cannot recover. If she simply became alarmed and backed into it; if you find that she became alarmed at the approach of an automobile, and backed into the defendant's automobile, she cannot recover. I have described the conditions under which, even if it was approaching her, she could recover. If she was guilty of contributory negligence in the slightest degree, she cannot recover. I charge you that. When the operator of the defendant's automobile discovered that the street was blocked or impassable, he violated no law or city ordinance by going from the east side to the west side, but he had a right to cross provided he operated the cab in a careful and prudent manner. I so charge, if under all the circumstances and conditions there existing he went with due care and caution and prudence where he did. If there was a necessity for it, while it would not be in accordance with the terms of the ordinance, still he would have a right to do it."

The jury was also told that "the plaintiff was not, as matter of law, bound to look both ways before crossing the avenue," that is before crossing from the car from which she alighted to the sidewalk. The court added to this instruction the following:

"I have so charged, and I charge it again. It is a question of fact for you to consider and determine whether in the exercise of due care she ought to have done it."

And before that:

"She was bound to be cautious and watchful in seeing, as I have stated; and the greater the danger or the complications about her that she could see or understand, or ought to have apprehended, then, of course, the more careful and watchful she was required to be."

Also:

"Mrs. Garside was also under the duty to look about her, and note the conditions plainly to be seen and those reasonably to be apprehended, and proceed with the expedition and care and caution demanded by such conditions."

Defendant's counsel excepted to the charge in regard to looking both ways as follows:

"I desire to except to that portion of your Honor's charge wherein you say that the plaintiff was not bound to look both ways when she was alighting from the car."

The court then said and charged:

"I did not say that. I did say, and I say again, that she was not bound, as a matter of law, to look both ways. The law did not impose any such absolute duty on her. It is a question for you, in the exercise of reasonable care and caution, what ought a person to do on and after alighting from a car; and I have stated to you that it is their duty to exercise their senses, to look and listen. Just where they shall look and how they shall look depends on the surrounding circumstances, and it is for you to say what she ought to have done there in the exercise of due care, and what she did do. She says she did look both ways. It is for you to say whether she did or not."

To this no exception was taken. The charge on this subject was correct. *Moebus v. Herrman*, 108 N. Y. 349, 15 N. E. 415, 2 Am. St. Rep. 440; *Elliott, Roads & Streets* (2d Ed.) 912, § 835; *Williams v. Grealey*, 112 Mass. 79; *Shapleigh v. Wyman*, 134 Mass. 118; *Stringer v. Frost*, 116 Ind. 477, 19 N. E. 331, 2 L. R. A. 614, 9 Am. St. Rep. 875; *Hennessey v. Taylor*, 189 Mass. 583, 76 N. E. 224.

In *Moebus v. Herrman*, *supra*, the court said:

"The duty imposed upon a wayfarer at the crossing of a street by the track of a railroad to look both ways does not, as matter of law, attach to such person when about to cross from one side to the other of a city street. The degree of caution he must exercise will be affected by the situation and surrounding circumstances. In the former case there is obvious and constantly impending danger, not easily or likely to be under the control of the engineer; in the latter the vehicles are managed without difficulty, and injuries are infrequent."

It is quite true that there may be cases where it should be and would be held as matter of law that to enter upon and attempt to cross a crowded city street where vehicles were numerous without looking both ways was negligence. Such was the case of *Barker v. Savage & Gormley*, 45 N. Y. 191, 6 Am. Rep. 66. But here no such or similar conditions existed, no vehicles were near, the avenue was not crowded, and there was a city ordinance, of which Mrs. Garside presumably had knowledge, reading as follows:

"It shall not be lawful for any vehicle to be driven or propelled around a corner of any of the streets or avenues of said city traveling at a faster gait than at the rate of three (3) miles an hour, and all and every such carts and all other vehicles when passing through or along any of the streets or

avenues of said city shall, when in motion, be kept on the right of the center of the road at all times, except within 100 feet of the stopping or starting point. And it shall be unlawful for any such public cart, carriage or any other vehicles, or horse or horses attached thereto to be driven foul of or against any person, vehicle or other thing whatever, in any of the streets or avenues of said city."

And Mrs. Garside had no knowledge of any blockade of the avenue on the east side, and hence no reason to think any vehicle would come north on the west side of the avenue. For these and other reasons, the court could not have properly charged that Mrs. Garside was bound, as matter of law, to look both ways, up and down the avenue, before attempting to cross that narrow space to the west curb. The court was not requested to so charge, or to charge even that it was negligence not to look both ways. The court charged the jury, however, on this point:

"If the jury believe that the plaintiff on alighting from the car looked to the south, and did not see the vehicle of the defendant approaching, and that such vehicle was then more than a car's length from the plaintiff, and hidden by the one from which she alighted, and that the plaintiff then proceeded to cross the avenue with due diligence, and was struck on the back by defendant's vehicle the jury may find that the plaintiff was free from negligence, and that the injuries were caused by the negligence of the defendant. If you so find the facts to be true, that is true, gentlemen."

This was tantamount to saying that plaintiff could not recover unless such were the facts; that is, unless she looked south, and failed to see defendant's vehicle, because it was hidden from her view by the car from which she alighted.

The peculiar stories told by the driver of defendant's vehicle and the footman with him and that of the witness Steurer, when taken with the other testimony in the case, may not have impressed the jury as frank and truthful. Collier, Fitzgerald and Stephens all, in a general way, corroborated Mrs. Garside. Considerable stress is laid on the fact that some of plaintiff's witnesses spoke of Mrs. Garside having apparently turned so as to face northeastwardly, and as having taken a sort of half side, half backward, step just before coming in contact with the vehicle. Quite likely the movements described by Mrs. Garside appeared just that way to them. Any intelligent person who has seen a lady turn her head, and drop and turn her shoulder, with a backward movement of the right limb and foot at the same moment as she picks up the trail of her dress, will see in a moment how Mrs. Garside seemed to turn partly to the east as she took up the trail of her dress the moment before she started to cross to the westerly walk. The evidence of Collier and Fitzgerald is perfectly consistent with that of Mrs. Garside in all essentials.

The damages awarded were reasonable in amount, and justified by the evidence. That she was injured and suffered a long time was probable, and supported by medical evidence of undoubted credibility. The extent of the injury was disputed, as was its probable duration. The verdict gives no evidence of prejudice or passion. The jury was specially cautioned in this regard. The damages awarded Mr. Garside were not excessive. The physician's bill was reasonable, as were

the bills for crutches and medicines. He lost her services in his household in the administration of its affairs and in the care of his children for months, and there was proof of the value of certain of such services which would have justified a larger verdict. It was immaterial to his right of recovery that Mrs. Garside's mother came in, and so far as she could supplied her place without charge. To enable Mr. Garside to recover for the loss of such services of the wife it was not necessary to show that he supplied her place at all, or, if he did, that he paid out anything, or became legally obligated to pay, for the services of the one who became the housekeeper. If he had paid anything, it might have been recovered as an item of damage, but not as the measure. See generally, 1 Joyce on Damages, § 316; Jones v. U. & B. R. R. Co., 40 Hun (N. Y.) 349; Ainley v. M. R. Co., 47 Hun (N. Y.) 206; Kelley v. Mayberry Tp., 154 Pa. 440, 26 Atl. 595.

I think the verdicts were amply sustained by the evidence, and, finding no error that could have prejudiced the defendant, the motion for a new trial is denied.

DELAWARE SECURITIES CO. v. METROPOLITAN TRUST CO.
OF CITY OF NEW YORK.

(Circuit Court, S. D. New York. July 17, 1906.)

1. TRUSTS—PLEDGE OF STOCKS AS SECURITY FOR BONDHOLDERS—CONSTRUCTION OF AGREEMENT.

Complainant, a corporation, entered into a trust agreement by which it agreed to transfer to defendant as trustee stock in certain other corporations as security for its bonds. The agreement provided that complainant should have the right to vote such stock so long as it was not in default on the bonds "or under this trust agreement or any of the covenants herein." Held, that complainant was not entitled to a proxy from defendant to vote the stock of one of the corporations which had been transferred to defendant's name until it had placed defendant in position to also obtain a transfer to it of the stock of the others as provided in the agreement.

2. SAME—EFFECT OF DEVIATION FROM AGREEMENT BY PARTIES.

Where the terms of an agreement, and especially a trust agreement under which the trustee is to protect and care for the interests of others, are not of doubtful import or meaning there is no room for the application of the rule with respect to the effect of a practical construction by the parties, and the rights of the trustee under the agreement cannot be affected by the fact that, through neglect or misapprehension of its duty, it has done or permitted acts which were not justified under the terms of the trust.

3. SAME—PROXIES TO PLEDGOR OF STOCK IN TRUST—RIGHT OF TRUSTEE TO LIMIT.

Where, under an agreement by which stock of other corporations was transferred to a trustee as security for the bonds of complainant corporation, complainant was to have a proxy to vote "at all meetings of the stockholders on all shares of stock * * * for the election of directors and for every other purpose not inconsistent with the provisions of this trust agreement," the trustee has the right in giving such proxy to limit its terms so far as reasonably necessary to make it impossible for the pledgor to vote the stock for any purpose that is inconsistent with the provisions of the trust agreement.

In Equity. Suit by the Delaware Securities Company, a corporation of the state of Delaware, against the Metropolitan Trust Company of the city of New York, successor to the Atlantic Trust Company, a corporation of the state of New York, as trustee holding certain shares of stock in the Laflin & Rand Powder Company, a New York corporation, actually owned by the said securities company, to compel the said trust company, defendant, to execute and deliver to it a proper proxy for voting the said stock of the Laflin & Rand Powder Company at the stockholders meeting of that company.

Townsend, Avery & Button, for complainant.

Parsons, Closson & McIlvaine (Herbert Parsons, of counsel), for defendant.

RAY, District Judge. October 1, 1902, the Delaware Securities Company executed and delivered to the Atlantic Trust Company, later merged into the Metropolitan Trust Company, which succeeded to the rights, obligations and liabilities of the Atlantic Trust Company, so far at least as this controversy is concerned, a certain trust agreement to secure certain debentures to the amount of about \$4,000,000, to be issued by the securities company under and pursuant to said trust agreement. The property deposited under this trust agreement as security consisted of certain shares of stock, viz.: 9,971 shares of the Laflin & Rand Powder Company, 7,000 shares of the Eastern Dynamite Company, a New Jersey corporation, and 10,000 shares of the E. I. du Pont de Nemours & Co.

This trust agreement contains, among other agreements and stipulations, the following:

"Sec. 14. The trustee under this trust agreement shall cause to be transferred into its name as trustee, or into the name or names of its nominee or nominees, all shares of the capital stock, the certificates for which shall be delivered to the trustee hereunder. The securities company shall be entitled to collect any and all dividends which, from time to time, shall be declared on the stock, at any time pledged with the trustee hereunder, and the trustee shall, from time to time, deliver to the securities company suitable orders in favor of the securities company or its nominee for the payment of such dividends; provided, however, that no default shall have been made in the payment of the principal or of the interest of any of the bonds secured hereby, or in the observance and performance of the covenants therein contained, or contained in this trust agreement, and that no order shall have been made for the appointment of a permanent receiver of the said securities company or powder company, or for winding up or liquidating the business or affairs of either of the said companies.

"Sec. 15. The securities company shall have the right to vote at all meetings of the stockholders on all shares of stock, at any time pledged hereunder, for the election of directors and for every other purpose not inconsistent with the provisions of this trust agreement; provided, however, that the said securities company shall not be in default under said bonds or under this trust agreement, or of any of the covenants herein.

"Sec. 16. The trustee may, at any time, do whatever may be necessary for the purpose of preserving the corporate existence of the powder company and shall, upon the request of the securities company, assign and transfer, or caused to be assigned and transferred, such shares of the powder company as may be necessary to qualify persons who may be chosen directors or officers of the powder company. In the event of the trustee so assigning or transferring said shares it may, in its discretion, require the persons to

whom such shares are transferred, to reassign the same in blank and deliver the certificates therefor, and the trustee may make such other arrangements, subject to the provisions of this trust agreement, as it may deem necessary for the protection of the bondholders.

"Sec. 17. If the securities company shall make default in the payment of the principal or interest of any of the bonds secured hereby, or in the observance or performance of any of the covenants of this trust agreement on its part, then, from and after such default, and as long as such default shall continue, the trustee shall exercise in its absolute discretion, for the sole and exclusive benefit of the holders of said bonds, all the rights of ownership of said stock, including the voting power thereon and the right to collect the dividends of said stock and apply the same as hereinafter provided."

"Sec. 19. In case of the happening of any default, then during the continuance of such default, the trustee shall revoke all assignments, orders, or other instruments by it executed for the purpose of enabling the securities company to collect and receive dividends on the stock held hereunder, and thereafter the trustee shall be entitled to receive and collect all dividends which shall become payable upon said stock, and all sums so received or collected by the trustee as dividends upon such stock, after deducting therefrom all proper charges, costs and expenses payable to the trustee hereunder, shall by the said trustee be applied to the payment of the interest in default in the order of maturity of the instalments thereof, such payments to be made ratably to the persons entitled thereto without discrimination or preference; provided, however, that no coupon or claim for interest belonging to any bond which in any way at, before or after maturity shall have been transferred and pledged separate and apart from the bond to which it relates, shall, unless accompanied by such bond, be entitled in case of any default hereunder, to any benefit of or from this trust agreement until the payment in full of the principal of the bonds issued hereunder and of all coupons and claims for interest not so transferred or pledged, shall have been made."

"Sec. 24. The securities company will from time to time duly pay all taxes, assessments, and other charges lawfully imposed upon the trust estate or upon any part thereof, and it will also pay and discharge all taxes, assessments and other charges lawfully imposed upon the interest of the trustee in the trust estate; provided, however, that the said securities company shall not be required to pay any such tax, assessment or charge so long as it shall in good faith contest the validity thereof. The securities company will at all times, until the payment of the principal of said bonds, keep an office or an agency in the borough of Manhattan of the city of New York, where notices and demands, provided for in this trust agreement, may be served, and, in default of any such office or agency, presentation, and demand, may be made and notices served at the office of the trustee in the city of New York, or at the office of any successor to it in the trust."

"Sec. 26. Until all the bonds hereby secured shall be paid, the securities company and the powder company shall and will fully and faithfully perform their corporate duties, and use and exercise their corporate authorities and franchises, and shall not permit nor suffer any use or nonuse of their corporate rights and franchises, whereby the same may in any wise be forfeitable or forfeited. The capital stock of the powder company shall not be increased beyond its present authorized amount and the indebtedness of the powder company [except so far as may be necessary for properly operating said company] shall not be increased, nor shall the securities company issue bonds of any kind in excess of the amount herein provided for, until all the bonds hereby secured shall have been fully paid. The securities company will not voluntarily create or suffer to be created any lien, debt or charge having priority to, or preference over, or equality with the lien of this trust agreement upon the shares of stock pledged and deposited hereunder or any part thereof, or upon the income derived therefrom, and save, subject to this trust agreement, will not sell, encumber or by any voluntary act part with any of such shares or with its right, title and interest therein or the voting powers thereof."

"Sec. 30. Any instrument required by this trust agreement to be signed and executed by the bondholders, may consist of any number of concurrent instruments of similar tenor, and may be executed by such bondholders in person or by an agent or attorney authorized so to do in writing. Nothing contained in this trust agreement shall prevent the consolidation or merger of the securities company, or of the powder company, with any other corporation or corporations, provided that the holders of a majority in amount of the said bonds then outstanding shall consent thereto, and such consent shall be stamped or indorsed upon said bonds."

At the time of the execution and delivery of the trust agreement and of the deposit of the stock as security under its provisions the said Atlantic Trust Company delivered to the securities company a proxy to vote the said stock of the Laffin & Rand Powder Company, which proxy reads as follows:

"Know all men by these presents, that Atlantic Trust Company, trustee, hereby nominates and appoints Delaware Securities Company, a corporation existing under the laws of the state of Delaware, its true and lawful attorney for it and in its name, place and stead to vote at any regular or special meeting of the stockholders of the Laffin & Rand Powder Company, a corporation existing under the laws of the state of New York, all of the stock of the said Laffin & Rand Powder Company now or hereafter standing in the name of the said Atlantic Trust Company as trustee under the provisions of the trust agreement dated October 1, 1902, between the said Delaware Securities Company and said Atlantic Trust Company, trustee; provided, however, that this proxy shall not be used for the purpose of voting said stock in any way inconsistent with the provisions of said trust agreement. In witness whereof, the said Atlantic Trust Company, trustee, hath caused these presents to be signed by its president and its corporate seal to be hereto affixed this 8th day of October, 1902.

"[Signed.]

Atlantic Trust Company,

"Attest:

"By L. V. F. Randolph, President.

"Benjamin Strong, Jr., Secretary."

Similar proxies to vote the other stock so pledged were also given. The proxy to vote the Laffin & Rand stock expired 11 months from its date. Subsequently, and about March 7, 1904, a formal demand for a proxy, in substance, the same as the one above quoted, was demanded by the securities company, and refused. This refusal seems to have been based on two grounds, viz.: Generally that the securities company is not entitled to a proxy such as it had before received and specially that as the shares of stock in the Dynamite and du Pont de Nemours Company had not been transferred there was a default by the securities company which exonerated the defendant company from giving any proxy. The defendant, trust company, puts the questions involved in the following language:

"(1) Ought the certificates of stock of the Eastern Dynamite Company and the E. I. de Nemours & Company to be transferred into the name of the Trust Company? (2) Is the Delaware Securities Company in default because they have not been so transferred? (3) Provided there is no default, must the trust company give to the securities company a proxy on the Laffin & Rand Powder Company stock to vote for the election of directors, and as to the rest simply in the words, or substantially and in effect in such words as 'and for all other purposes not inconsistent with the provisions of the trust agreement,' or is it its duty to require the securities company to state for what specific purposes, in addition to the election of directors, the proxy can be used, and to specify those in the proxy? (4) If the trust company has taken the incorrect attitude is it not protected under the trust agreement in that it acted under the advice of counsel?"

The claims of the complainant company are thus summarized:

"First. Such form of proxy is required by the construction of section 15 of the trust agreement. Second. The situation and understanding of the parties and the surrounding circumstances, at the time of the execution of the trust agreement require such form of proxy. Third. At the time of the execution and delivery of the trust agreement, as a part of the same transaction, such form of proxy was agreed upon, and the contract so interpreted by the parties thereto. Fourth. The defendant's contention would construe the trust agreement in such a manner as to render its provisions void as against public policy. Fifth. There is no default on the part of the complainant in the transfer of the Eastern Dynamite or de Nemours Company stock."

Is complainant company in default such that it is not entitled to any proxy whatever to vote any of the stock? By section 15 the right of the securities company to vote on the stock pledged and consequently its right to receive a proxy is on condition it is not in default in performing its covenants and agreements, express or implied, contained in such trust agreement. As the shares of stock stood in the name of the securities company, and could only be transferred on the books of the companies, and new certificates issued on the proper transfer and surrender of the old certificates, the securities company had a duty to perform in carrying out or in enabling the trust company to carry out the provision of section 14, which says, the trustee shall cause to be transferred into its name as trustee, or into the name of its nominee or nominees all shares of the capital stock and the certificates therefor shall be delivered to the trustee. If it has refused to properly transfer the old stock or surrender the old certificates or do what it must do to properly transfer the stock to the trust company, and the doing of such acts has not been waived, this action cannot be maintained for he who comes into equity must come with clean hands and after having performed all conditions precedent, if any. 6 Pomeroy's Eq. Jurisprudence & Equitable Remedies, being volume 2 of Equitable Remedies (3d Ed.) § 806. In section 805 it is stated:

"The doctrine is fundamental that either of the parties seeking a specific performance against the other must show, as a condition precedent to his obtaining the remedy, that he has done or offered to do, or is then ready and willing to do, all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms. In the language often used, he must show himself 'ready, willing, desirous, prompt, and eager.' There are two apparent exceptions, depending upon strictly equitable considerations: (1) A strict performance at the very stipulated time is not always essential; and (2) partial and immaterial failures of title or defects of the subject-matter, if admitting of compensation, may not prevent the vendor from enforcing the remainder of the agreement."

While this suit is not perhaps, strictly speaking, an action for specific performance in substance and effect, it is and the most, if not all, the rules of equity applicable there apply here. It is conceded in the record "that at the time of the execution of the trust agreements, there were deposited with the Atlantic Trust Company certificates for 10,000 shares of stock of E. I. du Pont de Nemours & Co., and also certificates for 7,000 shares of stock of the Eastern Dynamite

Co., and that these certificates all had proper powers of attorney for their transfer upon the books of the respective companies. It is further conceded, for the purposes of this action, that at this time there were deposited 5,336 shares of the capital stock of the Laflin & Rand Powder Company with proper power of attorney for transfer." Shortly thereafter the balance of the shares of stock of the Laflin & Rand Powder Company were delivered with proper powers of attorney for their transfer and all of this stock, 9,971 shares, was duly transferred on the books of the company, and new certificates issued and duly delivered to the trust company. It appears, however, that this stock of the du Pont de Nemours Company and of the Eastern Dynamite Company did not stand in the name of the securities company, but in the names of various other parties, the owners thereof, from whom it was secured for the purpose of carrying out the trust agreement, and while there was, when delivered to the trust company, attached thereto, proper powers of attorney for the transfer to it of all such shares, the securities company had no direct control over it, or over its actual transfer on the books of the two companies. It was within the power of the trust company proceeding against the real owners who had signed these powers of attorney and the companies issuing the stock, to compel the actual transfer on the books of the company. This it did not do and has not done. I know of no theory upon which the trust company can be compelled to give a proxy to the securities company to vote this stock prior to its actual transfer to the trust company. The trust company does not own it or as yet hold it, so as to control it and be entitled to vote it as trustee.

Section 20 of the general corporation law (Laws 1892, p. 1807, c. 687 as amended by Laws 1901, p. 975, c. 355), says:

"Sec. 20. Qualification of Members as Voters. Unless otherwise provided in the certificate of incorporation, every stockholder of record of a stock corporation shall be entitled at every meeting of the corporation to one vote for every share of stock standing in his name on the books of the corporation; and at every meeting of a nonstock corporation, every member, unless disqualified by the by-laws, shall be entitled to one vote. The stockholders of a stock corporation, by a by-law adopted by vote at any annual meeting, or at any special meeting duly called for such purpose, may prescribe a period, not exceeding forty days prior to meetings of the stockholders, during which no transfer of stock on the books of the corporation may be made. Except in cases of express trust, or in which other provision shall have been made by written agreement between the parties, the record holder of stock which shall be held by him as security, or which shall actually belong to another, upon demand therefor and payment of necessary expenses thereof, shall issue to such pledger or to such actual owner of such stock, a proxy to vote thereon."

I do not think this applies here as there is a provision in regard to it in the trust agreement. But even if it does apply the stock stood on the books of the company in the name of other parties, not in the name of the trust company. There is evidence tending to show that when the dispute arose as to the proper form of proxy to be given to vote the stock of the Laflin & Rand Company, and of the other companies, as well, obstacles were thrown in the way of the proper transfer of the stock of the Dynamite and the du Pont de Nemours

Companies, the claim being made that there had been an oral agreement that the transfers should be to a nominee or nominees of the trust company agreed upon, and not to it, and also that a transfer should not be made in face of the claim of the trust company that the proxies given should contain certain limitations upon the holder of the proxies voting the stock, such as would limit it unduly was the claim. There is evidence tending to show that the securities company, or some of its officers, had to do with this obstruction of the transfer of the stock. This suit is brought to compel the giving of a proxy to vote the Laffin & Rand stock, notwithstanding the fact that the stock of the other companies has not been transferred to the trust company, such proxy to contain a limitation in these words:

"Provided, however, that this proxy shall not be used for the purpose of voting said stock in any way inconsistent with the provisions of said trust agreement."

The defendant denies that it is under any obligation to give a proxy to vote the Laffin & Rand stock until the other stock pledged as security for the debentures mentioned in the trust agreement has been properly transferred to it. It denies that there was any legal or valid agreement naming a nominee or nominees to whom the stock should be transferred, and I do not find evidence to sustain a finding that any such agreement was made. Neither can this trust agreement as to the giving of proxies be made divisible so as to permit the securities company to demand and receive a proxy in any form to vote the Laffin & Rand stock so long as it is a party to proceedings which prevent the proper transfer to the trustee company of the other stock. But the parties now assume the position that the transfers will be made when it is settled what form of proxy is to be given or what form of proxy the securities company is entitled to. It is always the duty of a court of equity to settle, if possible, the disputes, contentions, and differences of parties when once before it, and the subject-matter is well defined.

The complainant contends that, because of the giving of the proxy hereinbefore set forth, the parties have given a practical construction to the trust agreement which should control. There is no question of the general rule that where there is doubt as to the meaning of words or terms used in a contract or agreement the practical construction and interpretation of the parties given to it by their conduct and proceedings under it in carrying it into effect are of great weight and there may be cases where this so-called practical construction and interpretation are controlling. *Dodge v. Zimmer*, 110 N. Y. 43, 17 N. E. 399; *Nicoll v. Sands*, 131 N. Y. 19, 29 N. E. 818; *McClanathan v. Friedel*, 85 Hun, 175, 32 N. Y. Supp. 588; *Sattler v. Hallock*, 160 N. Y. 291, 54 N. E. 667, 46 L. R. A. 679, 73 Am. St. Rep. 686. To the same effect are *Kauffman v. Raeder*, 108 Fed. 171, 175, 47 C. C. A. 278, 54 L. R. A. 247; *Fox v. Tyler*, 109 Fed. 258, 260, 48 C. C. A. 356; *Accumulator Co. v. D. St. R. Co.*, 64 Fed. 70-74, 12 C. C. A. 37; *Salt Lake City v. Smith*, 104 Fed. 457, 462, 43 C. C. A. 637, cited by complainant. But where the terms of an agreement, especially a trust agreement of this kind where the trustee represents, and

is to protect and care for the interests of a large number of persons, are not of doubtful import or meaning there is no room for the application of the rule. "Where the meaning of the instrument is clear in the eye of the law the error of the parties cannot control its effect." *Railroad Co. v. Trimble*, 10 Wall. (U. S.) 367, 19 L. Ed. 948; *Russell v. Young*, 94 Fed. 45, 36 C. C. A. 71; *Insurance Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360; *Glynn v. Moran*, 174 Mass. 233, 54 N. E. 535; *Railway Co. v. Blackman*, 44 Minn. 514, 47 N. W. 172; *Humphreys v. N. Y. & H. R. R. Co.*, 121 N. Y. 435, 24 N. E. 695; *Borley v. McDonald*, 69 Vt. 309, 38 Atl. 60; *Davis v. Shafer* (C. C.) 50 Fed. 764; *Lawson on Contracts* (2d Ed.) p. 458, § 400; *Wald's Pollock on Contracts* (3d Ed. Williston) 572. The trustee, by neglect of duty or by misapprehension of duty or of legal obligations imposed, and the consequent doing of acts not justified or warranted by the terms of his trust, cannot change the agreement under which he is acting. The conduct of the parties may be such and of such continuance as to show that a contract in writing has been abandoned and a new one, by parol, substituted. But there is no pretence of this here. There is nothing in the trust agreement itself that prescribes the form of proxy or its terms or conditions. It is not even provided, in terms, that a proxy shall be given. But from the language of section 15 of the trust agreement it is plainly implied that the securities company is to have a proxy else it could not vote "at all meetings of the stockholders on all shares of stock, * * * for the election of directors, and for every other purpose not inconsistent with the provisions of this trust agreement." When, in a position to receive a proxy, the securities company is entitled to one that will enable it to do that, and no more; and, in giving it, the trust company has the right to limit its terms, so far as reasonably necessary to make it impossible for the securities company to vote the stock for any purpose that is inconsistent with the provisions of the trust agreement. But it has no right on theory, or imagination, or conjecture, to refuse a proxy to vote any of this stock. In other words the trust company has no right to "conjure up" a possible contingency where the securities company possibly might vote in a way that would be inconsistent with the provisions of the trust agreement. There is no presumption it will do this. The presumption is the other way.

We are, therefore, to look at the agreement and ascertain, if possible, what votes would be for a purpose inconsistent with the provisions thereof. The use of a proxy for such a purpose may be prohibited therein. If certain purposes for which the stock might be voted are inconsistent with the provisions of the trust agreement, such purposes may be named in the proxy and by its terms the powers conferred limited accordingly. Such limitations in the proxy would give notice at the meeting when it was used of the limitation. And I think that under section 17 the proxy may provide that in case the securities company shall make default in the payment of either principal or interest, on any of the bonds secured by such trust agreement, or in performing any of the covenants thereof to be performed by it, the proxy shall become void. So as to taxes under section 24.

And, under section 26, the terms of the proxy might well have a provision that no vote shall be cast by its holder authorizing the company or its officers not to perform any corporate duty, or to increase or aid in increasing the capital stock of the powder company beyond the amount authorized when the trust agreement was made, or the increase of the indebtedness of that company, except as necessary for properly operating it, or give any vote that would give or aid in creating a lien on the stock of that company that would have priority over the lien of the trustee under the agreement. So, there may be other well-defined acts that the holder of the proxy might vote to have done by the company which would be inconsistent with the provisions of the trust agreement. The court will not attempt at this time to point out or exactly define all the limitations that may properly go in the proxies to be given by the trust company when all the stock of the three companies shall have been properly transferred and delivered to it. This may be done on the settlement of the decree when both parties can be heard.

There will be a decree that the securities company shall have executed and delivered to it by the trust company proper proxies to vote the stock of the Laflin & Rand Powder Company, of the Eastern Dynamite Company, and of the E. I. du Pont de Nemours & Company, containing, in substance, the limitations above suggested, and such other as the court may name on the settlement of the decree, and that the trust company shall execute and deliver same to the said securities company, when all the shares of stock of said companies, not redeemed under the provisions of the trust agreement, pledged or agreed to be pledged thereunder shall have been properly transferred to the trust company on the books of the respective companies, and the certificates of stock delivered to the said trust company, and which execution and transfer of stock and delivery of certificates is made a condition of the execution and delivery of any proxy. That such transfers and deliveries shall be completed within 30 days after service of a copy of the decree, and that if not made within that time, then the trust company shall not execute or deliver any proxies. The parties should submit to the court proposed limitations and conditions to be inserted in the proxies and serve same on each other and may move for a settlement of the decree at my chambers in Norwich, N. Y., on any day in July, 1906.

ROSS v. CENTRAL R. R. OF NEW JERSEY.

(District Court, S. D. New York. July 9, 1906.)

1. SHIPPING—INJURY TO TOWS FROM SWELL—NEGLIGENT NAVIGATION OF STEAMER.

The owner of a large steamer navigating New York Bay and harbor is liable for injury caused by her swell to scows or similar vessels being lawfully and properly navigated in tows, where it is shown that when proceeding at full speed she causes a swell dangerous to such tows within a distance of 1,000 to 1,500 feet, but that by reducing her speed to a reasonable degree such swells may be avoided.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 345.]

2. SAME—EVIDENCE.

In an action to recover damages for injuries to scows in New York Bay and harbor on several occasions, alleged to have been caused by swells created by respondent's steamer, which made several trips each day in such waters, where libellant's witnesses were unable to fix the times of such injuries with certainty, but identified the steamer from her appearance, such evidence is not overcome by entries in the steamer's logbook showing that in some cases she was going in the opposite direction from that testified to, or was not in the vicinity at the precise time named by such witnesses in accordance with their best recollection.

In Admiralty. Libel in personam for damages alleged to have been done by the steamer Asbury Park, owned by respondent, to several scows of libellant, on different occasions by the heavy swells created by the rapid passage of this steamer while navigating the upper and lower New York harbors or bays, and in passing the Narrows from the one to the other. The respondent on the trial and in its brief says:

"The eight several causes of action were united in one suit against the respondent in personam, pursuant to an understanding had between the parties for their mutual convenience. No question is raised as to the propriety of such practice."

Benedict & Benedict, for libellant.

De Forest Bros., for respondent.

RAY, District Judge (after stating the facts). The evidence shows to my satisfaction that the steamer Asbury Park, running on regular trips from Pier 8, city of New York, to and from Atlantic Highlands, especially when running at speed with the tide, under ordinary conditions causes very heavy swells—swells dangerous to scows in tow of steam tugs or lying still, when within reach or the influence of these swells. She is the largest and most speedy of three steamers run by defendant on this line in these harbors, and quite powerful. Whether these swells are the result of her speed, or of her speed and construction combined, does not definitely appear, but probably they result from both. In any event, it is not disputed that she causes them when at speed, and that they are dangerous to and do damage to loaded scows lawfully and properly in and navigating these waters when properly attached together and handled. This is the effect of these swells made by the Asbury Park at ordinary speed on scows at a distance of from 1,000 to 1,500 feet away. When passing at a closer distance, these swells have caused these loaded scows to overturn—"turn turtle." When the speed of the Asbury Park is reduced to a reasonable degree, these dangerous or injurious swells or surges are not created by her. The evidence, therefore, shows that by careful navigation the respondent may avoid these injuries. It may be regarded as settled that a steamer of this character under such conditions in these waters is not run or navigated with proper care when navigated as above described, or when run at such a rate of speed in the neighborhood of such smaller craft as these scows as to create these heavy and dangerous swells. The Asbury Park (D. C.) 138 Fed. 617, affirmed (C. C. A.) 142 Fed. 1037; The As-

bury Park (D. C.) 138 Fed. 925. Ocean steamers passing these scows in these waters under their own steam do not create such dangerous swells. In 138 Fed., at page 618, it was held:

"The evidence establishes: (1) That swells did affect the dumpers so as to cause the injury; (2) that the swells were caused by the Asbury Park; (3) that if the speed of the Asbury Park is properly reduced, and if she passes at a proper distance from a tow, she produces no injurious swell. As she did cause an injurious swell, it is inferable that she was not observing the customary care which she had theretofore deemed requisite for safety."

The evidence shows that the Asbury Park was accustomed to pass these scows at full speed, and it seems clear she must be held in fault for not slackening her pace, so as to reduce the surges caused by her passage to the safety limit. The evidence as to each and every occurrence set forth in the libel shows that some damage was done to the scow of the libelant mentioned therein. This damage was more serious in some cases than in others. The main contention on the trial was the identity of the steamer doing the damage. Libelant's witnesses claim to have identified the Asbury Park as the one creating these swells or surges, and they say no other vessel that could have done this was near at the time. The size, shape, or general build, speed, and color of awnings, etc., were in some cases relied upon as means of identification. Many of the witnesses had seen the Asbury Park at close quarters, and knew her by name, having read it thereon. It is quite probable and credible that such a steamer navigating these harbors daily, and making several trips each day, would be readily recognized from her general appearance by those familiar with such craft. There is no evidence there was any other steamer navigating these harbors at this time of her size, general build, and appearance, and liable to be mistaken for her. The witnesses for the libelant speak of having met her or of having passed her at the times the injury was done at about an hour named, but except in one, or, possibly, two, instances, they do not attempt to fix the hour with any certainty. In some instances they state that the Asbury Park was going towards New York when the injury was done, and in others that she was making towards the Highlands. The respondents produce the logbook of the Asbury Park, and from it show that in some of the instances named by libelant's witnesses she was in fact proceeding in the opposite direction. From this it is argued that it must have been some other vessel that created the swells or surges and did the damage. If the witnesses of the libelant had made memoranda at the time, instead of relying on memory, or it had been shown that the injury alleged could not have been caused by a vessel going in the direction of the Asbury Park was proceeding as shown by "the log" of the Asbury Park, this evidence would be more potent and convincing. The Asbury Park made the trip from Pier 8 to the Highlands, 17 nautical miles, in 67 minutes usually, and the return trip in about the same time. She made no intermediate stops except for special cause, in which case it was noted in the logbook, as was any material slackening of speed for special reasons. Her rate of speed was not uniform, as it stands to reason that in leaving Pier 8, for instance, she would proceed slowly and carefully if the

Harbor was crowded at the time in that vicinity, and then go more rapidly as the way became entirely unobstructed. For these and other reasons it could not and cannot be stated just where she was at a given time, unless when at her pier or at the Highlands, and on the occasion of special stops and delays. The evidence of libelant's witnesses, who appeared fair and honest, is not to be discredited because the log of the Asbury Park would make it appear, assuming she proceeded at a uniform rate of speed, that she was not at or near the place of the injury when it occurred, assuming such injury was sustained at the precise time named by libelant's witnesses according to the best of their recollection. Recollection may have been at fault anywhere from 15 minutes to an hour, and, taking the times of arrival and departure for the Asbury Park from her log, and allowing for tide and obstructions in some cases, and errors in recollection, we see at once that the variations in time are not of great weight. So the witnesses may be easily and honestly mistaken as to the direction in which the Asbury Park was proceeding. The surge or swell would be the same in either case. The witnesses would not have her direction impressed on their memory unless there was some special event or circumstance to call that particularly to their attention. But where the discrepancy is so great in time as to show that the Asbury Park could not have been at or near the place of injury at the time the evidence adduced by the libelant shows it was or must have been done, then it is the duty of the court to exonerate her from fault; for it was incumbent on the libelant to show an injury to his scow from the improper navigation or management of the Asbury Park at near the time mentioned in the libel. Where the evidence shows the time when and the place where the injury was done, and that the Asbury Park was not there or in that vicinity, a perfect defense is shown. But it is not sufficient, in the face of positive identification by libelant's witnesses, to show by the log of the Asbury Park that she may not have been there, or that under ordinary conditions she probably was not there, so as to be the author of the swells that did the damage. In *The Asbury Park* (D. C.) 138 Fed. 617, at page 618, Judge Thomas aptly said:

"The claimant bases an argument upon discrepancies in the statements of the libelant and its agents and servants as to time. But experience teaches that misstatement of time and distance is a common error, and departure from accuracy in such regard in this case is not sufficient to override the evidence that the offending vessel was the Asbury Park."

The respondent gave no evidence whatever as to the speed of the Asbury Park on these occasions; that those in charge of her did or did not observe these scows, or pay any attention to them, or slow down as she passed, although she passed close to some of them, and libelant's witnesses say she passed at her usual and regular rate of speed. Libelant was free from fault, as these scows were properly attached in the tows, and properly and carefully managed.

The libelants have established their case except as to the matter set forth in paragraph 9 of the libel, which could not be proved because of the death of the witness.

The libelant will have a decree in the usual form.

TWEEDIE TRADING CO. v. PITCH PINE LUMBER CO.

(District Court, S. D. New York. April 26, 1906.)

SHIPPING—DEMURRAGE—LIABILITY OF SHIPPER UNDER CONTRACT.

Where a bill of lading expressly gave the shipowner the right to hold the shipper for any charge under the contract, the fact that such owner did not enforce its right, also given thereby, to collect demurrage for detention in discharging from the consignee, or by enforcing its lien on the cargo at the port of discharge, did not estop it from collecting such demurrage from the shipper, especially where the shipper consigned the cargo to itself, and, although it indorsed the bill of lading to another, remained the owner until actual delivery.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 637; *Randall v. Sprague*, 21 C. C. A. 337; *Hugerman v. Norton*, 46 C. C. A. 4.]

In Admiralty. Suit for demurrage.

Wheeler, Cortis & Haight, for libellant.

Wing, Putnam & Burlingham, for respondent.

ADAMS, District Judge. This action was brought by the Tweedie Trading Company, the chartered owner of the steamship Sangstad, to recover from the Pitch Pine Lumber Company 12 days' demurrage of the said steamer, said to be due by reason of her detention in unloading at Buenos Aires, Argentina, in September, 1905. A contract was made between the parties for the transportation of the lumber in a letter, of which the following is a copy:

"New York, June 26th, 1905.

The Pitch Pine Lumber Co., City.

Dear Sirs: We beg to confirm freight booking with you, under deck, on one of our steamers, for shipment of 1,000,000 superficial feet, say two (2) lots of 800 M. feet each, white pine lumber from Portland, Me., to Buenos Ayres, Argentine, part cargo via port or ports, steamers option, shipment subject to all terms and conditions of B/L as per copy attached; freight Nine Dollars (\$9.00) per thousand superficial feet intake measure and intaken survey, prepaid at New York, July or August shipment, steamers option, your option of cancelling this contract if steamer does not report for cargo by 6 p. m. August 10th. Cargo to be received and delivered within reach of steamers tackles at ports of loading and discharging, as fast as vessel can receive and deliver, and at such berths where steamer can always safely lie afloat. We to give shippers fifteen (15) days notice of a steamer's expected readiness to load. Steamer to load at such wharf as designated by shippers and to discharge at such wharf as designated by consignee.

Yours very truly,

The Tweedie Trading Co.,

(Sgd) by M. Stanley Tweedie, President.

The Tweedie Trading Co.,

(Sgd) A. V. Moore, Jr., Secretary.

We hereby accept the above contract.

The Pitch Pine Lumber Co.,

(Sgd) by G. R. Crossley, Vice Pres. & Treasurer."

The form of bill of lading referred to contained the following clauses:

"(7) Also, that the carrier shall have a lien on the goods for all freights, primages and charges; and also for all charges, expenses, fines, liability or damages which carrier, ship or cargo may incur or suffer by reason of any

illegal, incorrect or insufficient marking, numbering or addressing of packages, or description of contents, or for any illegal or improper act of shipper, owner or consignee, and also for all other sums for which shipper, owner or consignee may be liable hereunder to carrier; and that such lien shall continue after delivery of the goods until paid; and the shipper shall also be liable therefor.

(8) Also, Steamer to commence loading immediately upon arrival at the port of loading, and to load continuously, working all hatches at once, any custom of the port to the contrary notwithstanding. Any detention on the part of the shippers in supplying cargo as fast as steamer can receive to be accounted for by the payment of demurrage by them at the rate of eight pence British Sterling per Steamer's net register ton, and Steamer to have a lien on cargo for same, unless contrary agreement outside of this Bill of Lading.

(9) Also, that the ship may commence discharging immediately upon arrival and discharge continuously any custom of the port to the contrary notwithstanding, the Collector of the Port being hereby authorized to grant a general order for discharge immediately upon arrival, the goods to be taken from the ship's tackle, where the carrier's responsibility shall cease by the consignee without notice immediately the vessel is ready to discharge, package by package as they come to hand in discharging the ship; and if the goods be not so taken from the ship all responsibility of ship or carrier therefor, either as carrier, bailee or otherwise, shall be thereupon ended and the agent or master of the ship shall have liberty, for account of, and as the servants of shipper, owner and consignee, all and any of them, and at their sole risk, charge and expense, to hire lighters and craft for the landing of the goods, to enter and land the same, to put them in hulk, craft or store, or deposit them in or upon wharf, ware house, public stores or Custom House, or permit them to lie where landed, according to the best judgment of said agent or master which shall be final and conclusive upon all persons interested without previous notice to shipper, owner or consignee, and thereupon the goods shall be deemed to be fully delivered, the carrier retaining a lien thereon until payment for all costs, charges and expenses incurred and also as hereinbefore provided, and the goods to be subject to storage, wharfage and other charges. If the steamer discharge at wharf consignees to receive cargo there, as above provided, and any detention on the part of the consignees or owners of the cargo in receiving cargo as fast as Steamer can deliver in lighter, if the Steamer discharges in lighters, or in receiving cargo at wharf, if Steamer discharges at a wharf, Steamer working all hatches at once, in both instances, to be accounted for by the payment of demurrage by them at the rate of eight pence British Sterling per Steamer's net register ton, and Steamer to have a lien of cargo for same, unless contrary written agreement outside of this Bill of Lading."

The steamer was loaded with about 1,600,000 feet of yellow pine and spruce lumber at Portland and, when using all of her 5 hatches, at the rate of about 400,000 feet per day. Other lumber besides that in question was taken aboard. She was loaded for three ports, Rosario, Campana and Buenos Aires. She was duly loaded and sailed on the 5th of August, and arrived at the last place on Sunday the 3rd of September and entered at the Custom House on Monday the 4th of September at 10 o'clock. That afternoon orders were received to go to unloading berth, but on reaching there the next day about 8 o'clock A. M., she found the wharf occupied by another vessel, the steamer Cape Nor, and was obliged to lie outside of her. The Cape Nor was also some distance, about 20 feet, from the wharf, on account of shallow water. Discharging was then commenced to the shore over the other steamer and into lighters outside and continued until the 13th of September, when the Sangstad was shifted to another berth, where the discharging was finished on the 19th. At the

first discharging place there was delay owing to the discharging men being obliged to work over the other steamer, and there was some delay at the second place because of deficiency of discharging men. Altogether there was considerable detention, for which the demurrage is claimed.

The answer alleges that if there was any detention the respondent is not responsible for it under the provisions of the contract and that the libellant lost any right it had in such respect by failing to enforce it in Buenos Aires.

The correspondence shows and the president of the libellant substantially admits that while urging its correspondents to collect the demurrage, it did not seek to enforce its legal rights there because it did not wish to encounter the delays and expenses of litigation in that place, and relies upon its rights against the respondent under the contract.

It is urged by the respondent (1) that paragraph 7 of the bill of lading precludes a recovery because it specifically provides that consignees or owners shall be liable for detention at port of discharge and gives the ship a lien for any demurrage and (2) that the libellant having made no bona fide effort to collect at Buenos Aires is therefore estopped from proceeding against the shippers.

I do not consider that these positions are sound. There was no act or omission on the part of the libellant which would form the basis of an estoppel and the controversy is determinable upon the terms of the contract of shipment. They gave the libellant three recourses in collecting demurrage, one against the shipper, another against the consignee and the third against the lumber. The libellant relinquished the last two, relying, rightfully I think, upon the first.

The letter of June 5th, contained a clause that the cargo was to be delivered as well as received "as fast as vessel can receive and deliver" and clause 7 of the bill of lading conferred upon the libellant the right to hold the shipper for any charge under the contract. It now appears that the shipper did not continue to be the owner of the cargo to the end, that is, in securing advances on the bill of lading, it conveyed away the title to the lumber before the time of shipment but even if such act affected the libellant, it was not notified of the transfer then, or at any time in which it could take steps to protect itself.

It is contended that under clause 9 of the bill of lading only the owner or consignee of the cargo became liable for demurrage. If that were so, the respondent is apparently still responsible herein, as it addressed the lumber to itself at the port of discharge and the person to whom it subsequently ordered the lumber to be delivered was the endorsee of the bill of lading, but it remained the consignee until the actual delivery.

Clause 7 provides "that the carrier shall have a lien on the goods for all freights * * * and also for all other sums for which the shipper, owner or consignee may be liable hereunder to carrier * * * and the shipper shall also be liable therefor." The

cesser clause being eliminated, as it was here, and a stipulation having been made for the liability of the shipper, it does not seem that any defence is presented by the contention that the clause only covers claims, of a like character to those enumerated, because demurrage is included "as being an extended freight or reward to the vessel in compensation of the earnings she is improperly caused to lose." It was said in *Neilsen v. Jesup* (D. C.) 30 Fed. 138, 139, using the above quotation: "In this view the consignee who is liable for freight would be equally liable for demurrage."

Decree for the libellant, with an order of reference.

THE C. C. CLARKE.

(District Court, S. D. New York. May 18, 1906.)

COLLISION—TUGS MEETING—VIOLATION OF PASSING RULES.

A tug coming out light from the Atlantic Basin and turning up the Buttermilk Channel at night, *held* solely in fault for a collision with a tug passing down with a tow on her side a little to the eastward of the middle of the channel, on evidence which, although conflicting, showed by a preponderance that on coming from the basin she had the other tug on her starboard hand on a crossing course and was bound to keep out of the way, and that after she turned up stream article 1 of the pilot rules applied and required the vessels to pass port to port in conformity to which the descending tug signaled and ported her helm. The latter *held* not in fault for not stopping and reversing; it being doubtful if the vessels were far enough apart when the danger became apparent to thus avoid the collision, and the plain faults of the other tug being sufficient to account for it.

In Admiralty. Suit for collision.

Wing, Putnan & Burlington, for libellant.

Butler, Notman & Mynderse, for claimant.

ADAMS, District Judge. This action was brought by the National Fireproofing Company, the owner of the tug *Fireproofer*, against the tug C. C. Clarke to recover the damages sustained in a collision between those vessels, which happened in the Buttermilk Channel, and on the 31st day of December, 1904, about 5 o'clock A. M. The tide was ebb. The *Fireproofer* was light and bound from the Atlantic Basin to Wallabout in the East River. The Clarke had taken in tow on her starboard side, so that it projected ahead about 10 feet, a grain barge at pier 31 East River, a short distance above the gap of the Atlantic Basin, and backed out, the sterns of the vessels swinging down the river under the influence of the tide. The Clarke then circled around under a starboard wheel until she straightened down the channel. The tugs came in collision somewhat to the westward of the middle of the channel and opposite a point about half way between the gap of the Basin and the Hamilton Avenue Ferry, the *Fireproofer* striking the Clarke on her port bow about 20 feet from the stem.

The *Fireproofer* alleges that after she passed another tug bound down, she sighted the green light of the Clarke, which was appar-

ently heading towards Hamilton Ferry; that the Clarke went across the Fireproofer's bow, blew one blast and then suddenly changed her course to the starboard, whereupon the latter gave a signal of two blasts and stopped her engines; that the Clarke then blew alarm signals, which the Fireproofer answered with alarm signals and reversed at full speed; that the Clarke swung to the starboard still further, shutting out her green light and showing only her red; that the Clarke blew alarm signals the second time and when about 100 feet from the Fireproofer blew a signal of two blasts; that although the Fireproofer had sternway, the Clarke came on and struck the Fireproofer's stem doing damage which will amount, with demurrage to upwards of \$3500. The Fireproofer alleges as faults against the Clarke: (1) that she was not in charge of a competent person; (2) that she did not keep a good lookout; (3) that she did not carry the vertical lights required by law for a vessel with a tow; (4) that though she had the Fireproofer on her starboard hand, she did not keep out of her way but attempted to cross her bow; (5) that after crossing the Fireproofer's bow, she did not continue her course but ported her helm and thus brought about the collision; (6) that she did not reverse her engines but came on at full speed, and (7) that they did not give proper and timely signals.

The Clarke alleges that on the morning in question, at Union Stores, on the Brooklyn side, a short distance above the gap, she took in tow on her starboard side a partly loaded grain barge, bound for the Erie Basin, some distance beyond the Atlantic Basin; that while the tug and tow were proceeding down the Buttermilk Channel, somewhat to the starboard of mid-channel, those in charge of the navigation of the Clarke saw a tug, which later proved to be the Fireproofer, coming out of the Atlantic Basin Gap, showing her green light and bearing several points off the port bow of the Clarke; that the Fireproofer was swinging under a port helm as she came out and shortly showed both her red and green lights, then shut out the green and exhibited her red light only to the Clarke; that after the exchange of signals between the Fireproofer and a tug bound down the channel ahead of the Clarke, passing the Fireproofer port to port, and when the red light of the Fireproofer only was visible to the Clarke, the latter gave a single blast on her whistle to indicate that she would pass the Fireproofer port to port, said tug still bearing on the port bow of the Clarke; that said signal was answered with a single blast by the Fireproofer and the helm of the Clarke was ported in conformity with said agreement; that shortly afterwards, the Fireproofer gave a signal of two blasts, contrary to said agreement, and showed both her green and red side lights to the Clarke; that thereupon the Clarke slowed her engines and repeated her original signal of one whistle, to indicate she was carrying a port helm, and followed it promptly by danger blasts; that the Fireproofer answered the danger blasts but kept on with unabated speed and struck the Clarke a heavy blow on her port bow, about 20 feet from the stem; that when the vessels were in very close proximity to each other and a collision inevitable, the engines of the Clarke were put ahead a few turns and her wheel

held hard a port in order that the Fireproofer might not strike the grain barge. The Clarke's allegations of fault against the Fireproofer are: (1) That having agreed to pass port to port, the Fireproofer failed to abide by the agreement but on the contrary gave two blasts of her whistle and directed her course to port; (2) in that, although when the vessels originally sighted each other, the Clarke bore on the starboard hand of the Fireproofer, the latter did not keep out of the way of the Clarke; (3) in that although the Fireproofer at all times bore on the port bow of the Clarke, the former did not avoid the latter, which was the privileged vessel; (4) in that when the said vessels were in positions of safety, each showing her port light to the other, the Fireproofer changed her course and attempted to cross the bow of the Clarke; (5) in that the Fireproofer did not reverse her engines at full speed immediately upon hearing danger blasts from the Clarke; (6) in that the Fireproofer did not at all times pursue a course on her starboard side of the channel; (7) in that the Fireproofer was not in charge of competent persons, and (8) in that the Fireproofer did not have a sufficient lookout.

The testimony in substance supports the respective contentions and is in as great conflict as the pleadings, but that of the Clarke, that after getting straightened down in the channel, subsequent to making the turn from her starting place, she pursued a straight course down the channel until nearly in collision, is much more credible than the claim of the Fireproofer's witnesses that the Clarke was apparently coming across the channel, first showing her green light and then turned to the starboard, showing both of her side lights and then the red alone just before the collision. The pilot, at my instance, indicated the movements of the Clarke, as well as his own boat, on a diagram, which was marked in evidence by the Clarke (Claimant's Exhibit A). It is reasonably consistent with the Fireproofer's testimony but improbable and entirely opposed to that of the Clarke, supported as it is, to some extent, by the disinterested testimony from the Narragansett, the tug that was preceding the Clarke in the channel.

I concluded at the trial that the charge of the Fireproofer could not be sustained, and that those of the Clarke should, but reserved decision to examine into the question of the Clarke's possible participation in the faults of the collision, because instead of stopping and reversing, when it became imminent, she increased her speed.

The testimony of the Clarke shows the well known fact that where a tug with but one boat in tow alongside, the tow will ordinarily on the tug stopping her speed and reversing, turn in the direction of the tug, thus, in this case, the effect of stopping the engines would be to turn the tug and tow to the port and the effect of reversing would be to increase such a turn. Having this in view, the pilot of the Clarke, when the collision was impending, put the engines at full speed ahead, for the purpose of saving the tow which he contends would have been exposed to the blow instead of the tug, if the engines of the Clarke had been stopped and reversed. This is doubtless true but it leaves open the question whether the vessels were far or only a short dis-

tance apart when the necessity for stopping and backing became apparent. The pilot of the Clarke testified that at first, when the Fireproof was coming out of the Gap, she blew one blast and showed her green light alone and then blew two and changed to both lights; that when she changed to both lights, she was about two lengths away and the Clarke slowed her engines. Such slowing had little effect, however, as within a few seconds, the Clarke put her engines at full speed ahead again. The situation was at first governed by the star-board hand rule requiring the Fireproof to avoid the Clarke, and afterwards by Pilot Rule 1, requiring the vessels to pass port to port. It may be that, notwithstanding the Fireproof's violation of both of these rules, the collision might have been avoided if the Clarke had reversed immediately upon discovering the possible danger of the situation, but it is doubtful if the vessels were then far enough apart to avoid it, and in view of such doubt and the plain faults of the Fireproof which sufficiently account for the collision, it does not seem that the Clarke should be held responsible for any part of the damages.

Libel dismissed.

TWEEDIE TRADING CO. v. GEORGE D. EMERY CO.

(District Court, S. D. New York. June 9, 1906.)

1. SHIPPING—CHARTER HIRE—DETENTION OF VESSEL AT QUARANTINE.

Under a charter party which required the owner to furnish the crew, and provided that, in case of loss of time from deficiency of men or stores, preventing the working of the vessel for more than 24 hours, the hire should cease during the detention, the charterer is entitled to a deduction of charter hire during the time the vessel was detained in quarantine in consequence of the illness of the crew, and the requirement of the quarantine officers that a new crew should be shipped before she was permitted to enter the port, which involved a delay of more than 24 hours.

2. SAME.

A provision of a charter party mutually exempting "restraints of princes, rulers, and people" covers a detention of a vessel in quarantine, and exempts the charterer from the payment of hire during the time of such detention.

In Admiralty. Suit to recover charter hire paid.

See 143 Fed. 144.

Wheeler, Cortis & Haight, for libellant.

Convers & Kirlin, for respondent.

ADAMS, District Judge. This action was brought by the Tweedie Trading Company to recover from the George D. Emery Company certain prepaid hire of the steamer Osceola during detention at quarantine, Staten Island, in April, 1905.

The parties have stipulated as follows:

"1. The libellant made advances to the master of the Osceola for the respondent which constituted payment of the charter hire in advance up to the time of the steamer's re-delivery at the end of the charter, including hire at the charter rate for the period of the quarantine of the vessel, as hereinafter stated.

"2. The Osceola was detained at quarantine at the Staten Island station under the circumstances described in the master's deposition, from April 10th, 1905, at 2 p. m., until April 12th, 1905, at 9:30 a. m., a period of one day and nineteen and one-half hours. Charter hire for that period, at the rate provided in the charter party would amount to \$245.81. During the detention at quarantine the steamer consumed eight tons of coal, which had been shipped in pursuance of clause 2 of the charter party, and was of the reasonable value of \$26.80. The aggregate of these two amounts is \$272.61.

"3. The charterer paid the ordinary pilotage of a ship entering port from sea for the services of the pilot in bringing the ship into quarantine on April 10, 1905. In consequence of the detention at quarantine, and solely by reason thereof, the charterer incurred further pilotage in bringing the ship from the quarantine station to her dock, amounting to \$23.13.

"4. The parties have adjusted between themselves the items of claim and counterclaim referred to in the fifth and sixth articles of the libel, and in the sixth article of the answer herein, save only the claims of the libellant against the respondent enumerated in paragraphs 2 and 3 of this stipulation.

"5. No costs shall be recovered by either party on the final decision of this court herein."

From the master's deposition it appears that the vessel was quarantined on her way from the Barbadoes into the port of New York, during the time stated, owing to the sickness of the crew. She came in under a foul bill of health. She also had a foul bill from Para, the preceding port, to Barbadoes. The previous port was Buenos Ayres, from where she had a clean bill of health. Sickness appeared among the sailors and firemen of the crew after she left that port, which still continued after reaching New York, necessitating the shipment of a new crew, which being done, the quarantine restriction was removed, but the loss of time occurred and the question presented is whether the owner or the charterer should sustain it. The hire having been prepaid, the charterer sues to recover. The sickness probably arose through the carriage of live animals, which the charter party permitted. The provisions of the charter party, which have some bearing are:

"1. That the Owners shall provide and pay for all provisions and wages of the Captain, Officers, Engineers, Firemen, and Crew; shall pay for the Insurance on the vessel, also for all engine-room stores, and maintain her in a thoroughly efficient state in hull and machinery for the service.

"10. That the Captain shall prosecute his voyage with the utmost despatch, and shall render all customary assistance with the Ship's Crew and Boats.

"16. That in the event of loss of time from deficiency of men or stores, breakdown of machinery, or damage preventing the working of the Vessel for more than twenty-four running hours, the payment of hire shall cease from the hour when detention or inefficiency begins until she be again in an efficient state to resume her service; * * *.

"18. The Ship has liberty to call at any ports in any order, to sail without Pilots, to tow and assist Vessels in distress, and to deviate for the purpose of saving life and property. The Act of God, * * * arrests and restraints of princes, rulers, and people, * * * always mutually excepted, * * *.

"20. That the Owners shall have a lien upon all cargoes and all sub-freights or freights or hire due under this charter, and Charterers to have a lien on the Ship for all monies paid in advance and not earned."

It appears that the shipment of the new crew by the owner secured the release of the vessel. Until this was done the quarantine officials would not allow her to proceed. The new men, consisting of 8 sailors and 2 firemen at once took the place of the old ones, who were

removed by the health authorities, and brought the vessel to her wharf. The ill ones, though possibly physically able, were not allowed to take the vessel from quarantine. Until the new men were put aboard she was practically helpless. The contract intended that the owner should furnish the men necessary to work her. The language of the contract is clear in that respect and the authorities, so far as they touch the question, are decidedly in favor of the charterer's contention.

In *The Ethel*, 8 Fed. Cas. 798, No. 4,540, there was a loss of cargo through a deficiency of crew from desertions. The charter provided that she should be "well and sufficiently manned." It was held that it was the owner's duty to furnish the crew and keep them on board, so that the freighter would not suffer loss.

In *The Eliza*, 8 Fed. Cas. 459, No. 4,348, Judge Ware said (460): that the contingencies relating to a crew "the owner takes upon himself."

Further, the charterer was deprived of the use of the vessel during the quarantine, which circumstance brought into operation the 8th clause relating to the arrest and restraint of princes, rulers and people. With reference to this matter, it is said in *Carver's Carriage by Sea*, § 82:

"82. 'Restraints of princes, rulers, and peoples' covers any forcible interference with the voyage or adventure at the hands of the constituted government, or ruling power of any country * * *, whether done by it as an enemy of the state to which the ship belongs, or not. For example, orders of government prohibiting or restricting the exportation or landing of goods; quarantine regulations (f); embargoes, or restrictions on particular ships; blockades; confiscations of goods as contraband, and so forth."

The authority there referred to in support of the text "(f)" relating to quarantine is *The Progreso*, 50 Fed. 835, 2 C. C. A. 45. In that case the question was whether the vessel was required to go to a quarantined port. The court said (at page 837 of 50 Fed., at page 47 of 2 C. C. A.):

"It may be taken as settled that 'detention at quarantine' is fairly included in the scope of that clause in this charter party which has reference to the 'restraints of princes, rulers and people.' Quarantine regulations and health laws, so called, although often affecting in their operation a direct and palpable regulation of commerce, are constantly made and prescribed by states, and even by local municipal corporations, and pass everywhere, unchallenged, as the result of a legitimate exercise of that police power which resides in sovereignty. Such regulations would be worthless unless the enforcement were sure; and such certainty of enforcement is attained by virtue of the power of the people, as exhibited and exercised through their governmental agents. It follows, then, that enforced obedience to lawfully-prescribed quarantine regulations is a 'restraint' of natural liberty of action devised by and proceeding from the 'people.' The *Progreso* was therefore clearly entitled to the benefit of this exception as a valid excuse for her default in performance of those terms and conditions of her contract, which the quarantine regulations at Charleston deprived her of ability to perform."

The libellant should have a decree for \$295.74, but without costs as the parties have so stipulated.

BALLANTINE v. YUNG WING.

(Circuit Court, D. Connecticut. June 25, 1906.)

No. 569.

1. COURTS—FEDERAL COURTS—RULE OF DECISION—STATUTE OF FRAUDS—STATE LAW.

Since the statute of frauds attacks the remedy, the *lex fori* governs, and the law of the state on such subject is a rule of decision in the federal courts.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 946.

State laws as rules of decision in federal courts, see *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553.]

2. FRAUDS, STATUTE OF—CONTRACT OF EMPLOYMENT—CONTRACT FOR MORE THAN A YEAR—MEMORANDUM.

Where a contract of employment which was not to be performed within a year was evidenced by certain correspondence between the parties which was vague and was declared to be "Supplemented by conversations" or aided by oral testimony to supply defects or omissions, the writing was insufficient as a memorandum to comply with the statute of frauds.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Frauds, Statute of, §§ 240, 375.]

3. WORK AND LABOR—ACTION ON CONTRACT—QUANTUM MERUIT.

Where a complaint distinctly counted on a contract of employment which was within the statute of frauds and on a breach thereof, there could be no recovery on a quantum meruit.

[Ed. Note.—For cases in point, see vol. 50, Cent. Dig. Work and Labor, §§ 25, 44; vol. 23, Cent. Dig. Frauds, Statute of, §§ 330, 331, 342.]

4. PLEADING—DEMURRER—CERTIFICATE OF COUNSEL—MOTION TO STRIKE.

Where a demurrer to a complaint lacked the required certificate of counsel, plaintiff's remedy was to attack such irregularity by motion to strike.

[Ed. Note.—For cases in point, see vol. 39, Cent. Dig. Pleading, § 1103.]

5. SAME—GOOD FAITH.

Where a mere glance at a demurrer to the complaint was sufficient to show that it was filed in the best of faith, a statement of counsel that it was not interposed for delay was not required.

Emil Schneeloch, for plaintiff.

Robinson & Robinson, for defendant.

PLATT, District Judge. The complaint alleges, in paragraph 2, that on or about December 29, 1903, "the defendant entered into an agreement with the plaintiff whereby he hired the plaintiff to work for him as a traveling representative in the continent of Asia for at least the term of two years," and agreed to pay him certain sums of money at certain times, and that the "plaintiff agreed with defendant so to work and serve for the said time and for the said compensation." That plaintiff entered upon said service, and continued therein until January 10, 1904, when defendant broke the contract and discharged the plaintiff, by reason of which plaintiff is damaged \$28,500, which is as much and perhaps more than plaintiff could have claimed if the contract had been completed. This was filed February 20, 1905. On May 24, 1905, the defendant filed a motion asking that "plaintiff

be required to amend his complaint by stating whether or not the agreement alleged in paragraph 2 of the complaint is in writing, and that if in writing plaintiff be required to file a copy of the same." On June 24, 1905, plaintiff in reply stated:

"That there is no formal agreement in writing signed or executed by the parties, but that the said agreement alleged in the complaint is evidenced by certain correspondence or letters between the parties to this action, supplemented by conversations, all of which facts are within the personal knowledge of the defendant."

Thereupon the defendant, on June 27, 1905, filed a demurrer for the reasons:

"That, although it appears from said complaint that the alleged agreement was not to be performed within one year from the making thereof, yet it does not appear from said complaint that said alleged agreement, or any memorandum thereof, was made in writing and signed by the party to be charged therewith or his agent."

In this way it is clearly contended that our Connecticut statute of frauds is a bar to the action. The section in which it appears is 1089, Revision of 1902, and the pertinent part is:

"No civil action shall be maintained * * * upon any agreement that is not to be performed within one year from the making thereof, unless such agreement, or some memorandum thereof, be made in writing and signed by the party to be charged therewith. * * *"

The statute attacks the remedy. The *lex fori* governs, and it is such a law as has been declared by Congress to be a rule of decision in the federal courts. These propositions are too elementary to require citations. Under the Connecticut decisions, the statute requires the memorandum of agreement to be complete, definite, and certain in all necessary details, and not some vague writing, which to be of value must be "supplemented by conversations" or aided by oral testimony to supply defects or omissions. *Nichols v. Johnson*, 10 Conn. 192; *Morris v. Peckham*, 51 Conn. 128; *Andrew v. Babcock*, 63 Conn. 109, 26 Atl. 715; *Devine v. Warner*, 76 Conn. 229, 56 Atl. 562.

Treating the plaintiff with every liberality, the statute of frauds appears to impede his further progress. The statute is directed at the remedy, and not at the evidence which might support a remedy, if one could be made operative.

We need not discuss the effect of a demurrer upon the original complaint, for there is now coupled with it the facts which appear in the statement filed in response to the motion of May 24th, and when one looks at the entire situation as voluntarily put forward by the plaintiff it is too plain for argument that he cannot possibly maintain his action. The complaint counts clearly, and only upon a contract which is within the statute and upon a breach thereof. There is no room in it for a recovery upon a quantum meruit. The demurrer lacks a certificate of counsel, but the way to attack that irregularity was by motion to take it off the files. Such motion would not have prevailed, because a mere glance at the demurrer would satisfy the court that it was filed in the best of faith, and a statement from counsel that it was not interposed for delay would have been superfluous.

Let the demurrer be sustained, with costs.

UNION REFRIGERATOR TRANSIT CO. v. S. S. McCLURE CO.

(Circuit Court, S. D. New York. June 13, 1906.)

LIBEL.—ACTION BY CORPORATION.—PLEADING.

A corporation can maintain an action to recover for pecuniary loss as the result of a libelous publication precisely as an individual could in a like situation, and where the publication is libelous per se, and calculated to injuriously affect plaintiff's business, special damages need not be alleged.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Libel and Slander, § 174.]

On Demurrer to Complaint.

Huntington, Rhineland & Seymour, for plaintiff.

Roe & McCombs and Gilbert E. Roe, for defendant.

HAZEL, District Judge. The authorities indicate that the plaintiff has a right to maintain this action without allegation of special damages. The context of the published article, read in its entirety, charges the commission of a crime and imputes wrongdoing in its trade, and is calculated to injuriously affect the commercial relations of the plaintiff. Assuming the truth of the latter statement, the cases seem to hold that a corporation may recover for pecuniary loss as a result of a libelous publication precisely as an individual could in a like situation.

The demurrer is overruled, with costs. Defendant may answer within twenty days.

In re JACOB BERRY & CO.

(District Court, S. D. New York. February, 1906.)

1. BANKRUPTCY—DISCHARGE—TRANSFER OF PROPERTY WITH INTENT TO DEFRAUD CREDITORS.

The pledging by a firm of brokers, within four months prior to their bankruptcy, of stock in their hands owned by customers to secure a loan to themselves, was not a transfer of their property with intent to hinder, delay, or defraud their creditors, within the meaning of Bankr. Act July 1, 1898, c. 541, § 14, subd. "b." 30 Stat. 550 [U. S. Comp. St. 1901, p. 3428], as amended by Act Feb. 5, 1903, c. 487, § 4, 32 Stat. 797 [U. S. Comp. St. Supp. 1905, p. 684], which debars the bankrupts from a discharge, although they may have had a lien on some of the stock pledged.

2. SAME—PARTNERSHIP—TRANSFER OF PROPERTY BY EMPLOYÉES.

Where employé of a partnership had general authority to obtain loans for the firm on securities, a transfer by such employé of stocks belonging to the firm by way of pledge for such a loan was the act of the partners, and, if made within four months prior to their bankruptcy, and with intent to defraud their creditors, would defeat their right to a discharge.

In Bankruptcy. On report of referee granting discharge.

In this case objections were made to the discharge of the bankrupts, who were a firm of stockbrokers in the city of New York. It was found by the referee that they had pledged as security for loans to the firm, made by the

Hanover National Bank and the Consolidated National Bank, certain stock certificates, which were the property of their customers, who had not authorized the pledge. Of these certificates for 300 shares of Columbus & Hocking coal and iron stock had been sent to the firm for sale by a customer who had no account with them. The other securities consisted of shares of Union Pacific common and American Telephone stock, which had been sent to the firm by customers who had open accounts with them as margin for their accounts, but under special agreements with them that they should be held as special trust deposits, and not used without further notice. The referee further found that the bankrupts had no personal knowledge of the hypothecation of this stock, but that the same was made by the cashier of the firm and his assistants, who had general authority to select the securities hypothecated for loans, and who did not know of the arrangement that the securities were not subject to such hypothecation. The referee reported that this action was a transfer of the broker's special property in the securities, but had been made by the bankrupts' clerks without their authority, was not made with fraudulent intent to hinder, delay, or defraud, and hence was no objection to their discharge, although if the bankrupts had authorized or known of the hypothecation their discharge must have been denied to them.

Roger Foster, for bankrupts.

Joline, Larkin & Rathbone (Arthur H. Van Brunt and Henry V. Poor, of counsel), for objecting creditors Collins and Baldwin.

James, Schell & Elkus (James N. Rosenberg and Robert P. Levis, of counsel), for objecting creditors Wernz et al.

HOLT, District Judge. I think that the bankrupts should be granted their discharge in this case, but on somewhat different grounds from those stated by the referee in his report. I think that the customers' stock pledged was not the bankrupts' property, and that its transfer was not with intent to hinder, delay, and defraud the bankrupts' creditors, within the meaning of the provision of the bankrupt act relating to the grounds for opposing a bankrupt's discharge. The stock was the customers' property. If the bankrupts had what is called a special property in it, in the way of a lien upon it, I do not think that that is what is referred to in the bankrupt act as the bankrupt's property. Moreover, if its transfer was with an intent to defraud anybody, it was with an intent to defraud the particular customer, and not the entire body of creditors. The ground upon which the referee has granted the discharge, that the stock was pledged by employes of the bankrupts, and not by the bankrupts themselves, and that therefore the bankrupts had no intent in the matter, and therefore are not barred from a discharge by such act, seems to me untenable. The employes who pledged this stock were given complete control of the business of borrowing money for the firm on securities. If such employes, having such general authority, had in fact transferred the bankrupts' property with intent to defraud the bankrupts' creditors, I think that the bankrupts' discharge would have been barred.

On the grounds stated, the referee's report is confirmed, and the discharge granted.

BERRY et al. v. CHASE.

(Circuit Court of Appeals, Sixth Circuit. June 11, 1906.)

1. PRINCIPAL AND AGENT—LIABILITY TO THIRD PARTIES—UNDISCLOSED PRINCIPAL.

One who has dealt with an agent cannot upon discovery of an undisclosed principal hold both the agent and the principal liable on the contract, but must elect between the two, and, an election once made, he must abide by it.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 513-520.]

2. TRIAL—MOTION FOR DIRECTION OF VERDICT.

In passing upon a motion to instruct a verdict it is not the province of the judge to weigh the evidence, but if there is any evidence which, with the inferences that may legitimately be drawn therefrom, would warrant a verdict in favor of the party against whom the motion is made, such motion should be overruled. A mere scintilla of evidence, however, is not enough to prevent the withdrawal of the case from the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 376-380.]

3. CONTRACTS—LAW GOVERNING—SALE OF STOCKS.

An order to buy or sell stock on the New York Stock Exchange is governed as to the legality of the transaction by the law of New York, and not by that of the place where the order is given.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, §§ 455-461.]

4. GAMING—WAGERING CONTRACT—SALES FOR FUTURE DELIVERY.

An order to sell stocks for future delivery, intended to be executed on the New York Stock Exchange, when executed creates a valid contract, unless both parties joined in the intention that there should be no delivery, but merely the payment of the difference between the market and the contract price.

[Ed. Note.—For cases in point, see vol. 24, Cent. Dig. Gaming, § 22.]

5. BROKERS—SALE OF STOCKS—QUESTIONS FOR JURY.

Evidence considered, and *held* sufficient to require the submission to the jury of the questions whether a transaction between defendant and a firm of brokers in Tennessee was a sale of stocks by defendant to the firm, or an order by defendant to sell the stock on his account, and, if the latter, whether it was agreed or contemplated that the sale should be made on the New York Stock Exchange.

Error to the Circuit Court of the United States for the Western District of Tennessee.

Leopold Lehman, for plaintiffs in error.

T. K. Riddick, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, delivered the opinion of the court.

The plaintiffs below were a firm of stockbrokers engaged in business in New York. The action was brought to recover an alleged loss arising upon a sale and purchase of Northern Pacific stock by direction of a firm of stockbrokers doing business at Memphis under the firm name of Schloss, Miller & Malone. The defendant W. J. Chase is sued as the undisclosed principal for whom the Mem-

phis brokers acted. There was evidence tending to show that the plaintiffs sold on March 30, 1901, on a New York Exchange, 25 shares of Northern Pacific stock for and on account of Hogan & Co., a firm of Memphis stockbrokers. There was also evidence that before delivery Hogan & Co. dissolved, Hogan dying. Their unfinished business was transferred to the firm of Schloss, Miller & Malone. May 8th and 9th there was a great flurry in Northern Pacific stock, and plaintiffs called upon Schloss, Miller & Malone to deposit \$20,000 to protect their previous short sale. Instead of doing this, they directed plaintiffs to buy on the market 25 shares against the 25 shares sold. This was done, at \$325 per share. The difference between the price at which plaintiffs had sold and at which they bought was \$5,762.50. This loss was realized May 9, 1901, and Schloss, Miller & Malone notified. Thereupon they notified plaintiffs that their principal was the defendant, W. J. Chase, and asked that the matter be taken out of their account and charged against W. J. Chase. Although thus notified, some time in May or June of 1901, that Schloss, Miller & Malone claimed to be acting for the defendant, Chase, and although requested to take the trades out of the account of Schloss, Miller & Malone, and charge the loss up to a theretofore undisclosed principal, plaintiffs did not do so, and in October of 1901, the account being still unsettled, they claim to have assigned the claim as a claim against Schloss, Miller & Malone to one John P. Darwent, with the right to bring suit in their name against said Schloss, Miller & Malone, or any undisclosed principal they might have. In November following Darwent elected to sue Chase, and this suit was started.

Jacob Berry & Co. had no reason to suppose that Schloss, Miller & Malone were not dealing for themselves, or, if they did, they had no knowledge of the undisclosed principal until after they had realized the large loss for which they sue. But the law is that, when there is an undisclosed principal behind, he may be made liable, although he was never given credit by the seller, provided the circumstances are not such as to make such a result unjust or inequitable. But one who has dealt with an agent cannot upon discovery of an undisclosed principal hold both the agent and the principal liable. He must choose between the two, and an election once made he must abide by it. *Mechem on Agency*, §§ 695, 696, 698, 700; *Fradley v. Hyland* (C. C.) 37 Fed. 49; *Tuthill v. Wilson*, 90 N. Y. 423; *Silver v. Jordan*, 136 Mass. 319; *Ahrens v. Cobb*, 9 Humph. (Tenn.) 643; *Curtis v. Williamson*, 102 B. L. R. 57; *Smithurst v. Mitchell*, 1 El. & El. 622.

At the close of the plaintiffs' evidence, and after the defendant, W. J. Chase, had testified, but before the defendant had notified the court of the conclusion of his evidence, the trial judge stopped the case, and instructed the jury to return a verdict for the defendant. Exceptions were duly reserved. The ground upon which the instruction was based was, as stated by the trial judge in his charge, as follows:

"Two questions present themselves to my mind that bar the plaintiffs' right of recovery. The first is that this stock was not bought at the direction of Mr. Chase. Schloss, Miller & Malone directed the buying of that stock at their motion. The second is, it is a Tennessee contract. Mr. Chase made his

contracts and agreements here with Hogan & Co., and their contract was assumed or transferred by some process to Schloss, Miller & Malone. So far as Mr. Chase is concerned, he had no further connection with any brokers, or any contracts except to sell that stock, and if they sold it themselves, and it went to New York, it would be a New York contract between these brokers and the New York brokers, but as between Mr. Chase and the New York brokers it is a Tennessee contract, and, being a Tennessee contract, all that is necessary under the law of Tennessee to avoid liability is to show by the proof that one of the parties to the transaction treated it as merely dealing in futures, in which the party bought or sold, but was not to deliver or receive, and in this case I shall hold the plaintiff has no right of action. That being so, I direct you, gentlemen of the jury, to return a verdict for the defendant."

For the plaintiffs in error, it is now insisted that the court erred in taking the case from the jury, and that there was some substantial evidence upon which the jury might reasonably have found that Schloss, Miller & Malone were authorized to buy as they did 25 shares of Northern Pacific stock on May 9, 1901, for account of W. J. Chase, and also some evidence that the contract was not a Tennessee but a New York contract. An attentive consideration of the evidence leads us to an agreement with this contention.

In passing upon a motion to instruct a verdict it is not the province of the judge to weigh the evidence. In *Mt. Adams v. Lowery*, 74 Fed. 463, 477, 20 C. C. A. 596, we gave elaborate consideration to the difference between the function of a judge when acting upon a motion for a new trial because the verdict is against the evidence and a motion to instruct for want of evidence. In the latter case we said:

"His duty is to take that view of the evidence most favorable to the party against whom the motion is made—to direct a verdict—and from that evidence, and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not, under the law, a verdict might be found for the party having the onus. If not, he should, upon the ground that the evidence is insufficient in law, direct a verdict against that party. That there is a mere scintilla of evidence is not enough to prevent the withdrawal of the case from the jury. Such evidence is insufficient in law because so insufficient in fact."

This has been many times reaffirmed and applied by this court. *Travelers' Ins. Co. v. Randolph*, 78 Fed. 754, 24 C. C. A. 305; *Standard Acci. Co. v. Sale*, 121 Fed. 666, 57 C. C. A. 418, 61 L. R. A. 337; *Shugart v. Atlanta, etc., Ry. Co.*, 133 Fed. 505, 66 C. C. A. 379.

If we look to the evidence tending to show that Schloss, Miller & Malone had authority from the defendant to sell and buy 25 shares of Northern Pacific stock on the Exchange in New York for and on account of the defendant, Chase, we find: (1) That either Hogan & Co., stockbrokers at Memphis, or Schloss, Miller & Malone, who succeeded to their unfinished trades or deals with or in behalf of Chase, did sell on or about March 30, 1901, 25 shares of Northern Pacific stock at 94 and a fraction. (2) Whether the alleged sale of such shares were made by Hogan & Co. or by Schloss, Miller & Malone is not clear. So far as it is of importance, there was a question for the jury as to whether the sale was made by the one or the other. There was evidence that Chase sold to Hogan & Co. 25 shares of that stock at 94 and something. This Chase testified to. He also swore

that when he did he had no such shares, and had no intention to deliver, and no expectation that he would be called upon to deliver. In short, he sold what he did not have with no purpose to obtain and deliver, and no agreement on his part that he would buy and deliver. According to his view of the matter, he merely intended to make a bet on the rise or fall of the stock, and receive or pay the difference as it might turn out. Now, if there was no evidence conflicting with this, the contract was a Tennessee contract, and governed by the law of Tennessee. For the purpose of breaking down all gambling contracts, the Tennessee statute (section 3166, Shannon's Code) provides that any contract for the sale of products or bonds or stocks shall be deemed a gambling contract and null and void "when either of the contracting parties have had no intention or purpose of making actual delivery or receiving the property in specie." This statute seems to make a contract void regardless of the good faith of one of the parties, if the other had no purpose to receive or deliver. *McGraw v. City Produce Exchange*, 85 Tenn. 572, 578, 4 S. W. 38, 4 Am. St. Rep. 771; *Allen v. Denham*, 92 Tenn. 257, 265, 266, 21 S. W. 898. Upon the question as to whether Chase sold to Hogan & Co., or authorized Hogan & Co. to sell 25 shares of Northern Pacific stock on his account, there was conflicting evidence. Thus the witness A. E. Malone, surviving member of the firm of Hogan & Co. and a member of the New York firm of Schloss, Miller & Malone, testified that before dissolution of that firm it had sold 25 shares of Northern Pacific stock on account of W. J. Chase to an unknown purchaser through a firm of New York brokers known as Parnell & Higman. There was also evidence tending to show that this sale is what is called in the parlance of such dealings a short sale, and that no delivery had been made when Hogan's death brought about a dissolution of Hogan & Co. Thereupon Malone, the surviving member, gave notice that it was desirable that all unclosed "trades" and ledger balances should be transferred to Schloss, Miller & Malone. There was evidence that Chase wrote under this written notice a request as follows:

"A. W. Hogan & Co.: Please transfer open trades and ledger balance to the firm of Schloss, Miller & Malone without additional cost.

"Yours truly,

W. J. Chase."

From this the jury might infer that whatever deals or trades were unclosed on books of Hogan & Co., and whatever ledger balance there was affecting him, should be transferred to and carried out by Schloss, Miller & Malone. That Hogan & Co. did sell 25 shares of Northern Pacific stock short on account of W. J. Chase is the positive testimony of the surviving member of that firm. Mr. Schloss, of the firm of Schloss, Miller & Malone, was asked:

"At what price originally did Mr. Chase through you sell this stock?"

He answered:

"Well, he did not sell it through us. He sold it through Hogan & Co., and we acquired the short side of it by instruction and consent of Mr. Chase. It was in the neighborhood of 94 or 95. Whatever that amount was, was taken over at the same figures by Schloss, Miller & Malone."

He and Malone both testified that in buying and selling they were to receive a commission of one-fourth of 1 per cent., and that this they divided with the plaintiffs. It is true that Malone did not testify whether the original order from Chase was given to Hogan or himself. Upon the subject of where the order to buy and sell was to be placed or filled, this occurred in the cross-examination of the witness by the counsel for Chase:

"Q. In this transaction, did you have any understanding with him, or any agreement as to where the orders would be placed or filled? A. Mr. Chase would have to state where he wanted the order filled, or we could not fill it. That goes without saying. We were following his instructions. Q. You had instructions to fill it in New York? A. We had certainly had instructions to fill in New York. That goes without saying. We were following his instructions."

The same witness stated that on May 8th and 9th there was a great flurry in Northern Pacific stock, and that on the 8th, after close of New York market for the day, he called upon Chase to make some settlement, and that he said he "would arrange it the next morning, and would either make delivery or put up sufficient money to guaranty us against loss." This he says he did not do, and that he could not be found the next day, on which day the stock went up as high as 1,000, and whereupon plaintiffs called upon them to put up \$20,000 immediately. They being unable to find Chase, they wired plaintiffs to pay as high as \$350 for 25 shares, and that plaintiffs obtained the necessary shares at \$325. That it is not made clear whether Malone was speaking from his own knowledge of Chase's original order to sell given to Hogan & Co., or from entries on the books of that concern, or from his knowledge of the usual course of their business, may be conceded. His examination, and above all his cross-examination, does not seem to have been so shaped as to clear this up.

It may therefore be conceded that the case for the plaintiffs as to Chase's original direction to Hogan & Co., was weak. The matter was somewhat strengthened by the evidence as to what occurred on May 8th, when he was called upon to make a settlement. Then he promised to either deliver the stock, or make a deposit to guaranty Schloss, Miller & Malone against loss. From this, in the absence of other or more credible evidence, it might be inferred by the jury that the sale theretofore made on the New York market had been originally authorized by him. If the jury should infer from all of the evidence that he had directed a sale of 25 shares of Northern Pacific stock to be made on his account in New York, they might also infer that such sale was to be made under the rules and regulations of the stock market of that city, in which case the contract would be a New York contract, and not a Tennessee contract. If the sale was to be made in New York, and the contract was valid under the law of New York, plaintiffs' action would be governed by the law of that state, and not the law of Tennessee where the original order was given. So, too, if the transaction was of a character usually and customarily executed through New York stockbrokers and this was understood by Chase, Schloss, Miller & Malone would impliedly be authorized to make the trade through stockbrokers selected by them in New York.

Under the well-settled law governing such transactions when intended for execution in New York, a contract for future delivery of an article which the seller has not at the time is perfectly valid unless nothing but the difference between the contract and market price was intended to be paid by the parties. To make it a mere wagering contract it is not enough that one of the parties intended instead of delivery to pay the difference between the selling price and the market price when delivery was demandable. Both parties must join in the intention that there shall be no delivery of the specific thing. *Clews v. Jamieson*, 182 U. S. 462, 21 Sup. Ct. 845, 45 L. Ed. 1183; *Irwin v. Williar*, 110 U. S. 499, 508, 4 Sup. Ct. 160, 28 L. Ed. 225; *Pearce v. Rice*, 142 U. S. 28, 12 Sup. Ct. 130, 35 L. Ed. 925; *Bibb v. Allen*, 149 U. S. 481, 489, 13 Sup. Ct. 950, 37 L. Ed. 819.

The question as to whether the assignee, Darwent, is a real or fictitious person, and whether if he be a real person he is not acting in behalf of Schloss, Miller & Malone as the real plaintiff, is not so clear as to justify at this stage of the case a dismissal of the suit as one not really between citizens of different states. Upon another hearing the matter may be looked deeper into, and if it appear then that Schloss, Miller & Malone are the real plaintiffs, and the assignment a mere device to give the federal courts jurisdiction, the court should then dismiss the suit as one not within its jurisdiction.

Judgment reversed, and new trial awarded.

LINDEKE et al. v. ASSOCIATES REALTY CO.

(Circuit Court of Appeals, Eighth Circuit. July 30, 1906.)

No. 2,419.

1. LANDLORD AND TENANT—CONSTRUCTION OF LEASE—FORFEITURE FOR BREACH OF COVENANT.

A lease for the term of 50 years of real estate in the business district of a rapidly growing city, after stipulating for the payment of rent, taxes, etc., by the lessee, provided that in case of default for 60 days "in the payment of any of said rent, taxes, or assessments * * * or in the performance of any of the covenants or agreements on the part of the said second party to be performed," the lessor should have the right on notice to forfeit and terminate the lease and re-enter. Following were covenants to keep the sidewalks and alleys in repair, to insure, to observe a party-wall agreement, and to remove the old buildings and build and complete within 5 years a 5-story business building covering the entire lot, from plans to be approved by the lessor. The lease was subject to a mortgage for \$50,000, which the lessor agreed to pay, and time was made of the essence of the contract. *Held*, that construing the lease in the light of the circumstances surrounding the parties, the length of the term, and the nature and condition of the property, the lessor's right of forfeiture was not limited to the case of default in the payment of rent or taxes, but extended to a default in the performance of any of the covenants and especially that to build, which was evidently one of the principal objects of the lease.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 331.]

2. CONTRACTS—RULES OF CONSTRUCTION—RULE OF *EJUSDEM GENERIS*.

Although a general term follows specific words in a contract, it will not be restricted by them under the rule of *ejusdem generis* where it is ap-

parent from the entire contract that a larger object was in the minds of the parties, to which the general phrase can distinctly apply when given its ordinary meaning.

[Ed. Note.—For cases in point, see vol. 11, Cent. Dig. Contracts, § 737.]

3. LANDLORD AND TENANT—WAIVER OF RIGHT TO DECLARE FORFEITURE OF LEASE—ACCEPTANCE OF RENT.

A lessor having a right to declare a forfeiture of the lease, and who has served notice of such forfeiture, does not waive his right by the subsequent acceptance of rent from the lessee covering a period which will expire before he is entitled to re-enter under the terms of the lease.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Landlord and Tenant, § 345.]

4. SAME—NOTICE TO QUIT—SERVICE ON CORPORATION.

Where a corporation is tenant under a lease, service of notice to quit upon its treasurer is a good service upon the corporation, both at common law and under Gen. St. Minn. 1894, § 5199, which provides that in an action against a corporation, service of summons may be made on its president, secretary, cashier, treasurer, a director or managing agent.

5. BANKRUPTCY—EFFECT OF ADJUDICATION—LANDLORD AND TENANT—NOTICE TO QUIT.

Where notice to quit was served on a corporation tenant, its subsequent adjudication as a bankrupt did not affect the efficacy of the notice nor necessitate a reservice upon the trustees in bankruptcy who took only the rights of the bankrupt at the time of the adjudication.

6. EQUITY—ENFORCEMENT OF FORFEITURE.

The rule that courts of equity will not enforce a forfeiture is not absolute or inflexible, and does not extend beyond the reasons which underlie it, and where its enforcement is more consonant with the principles of equity than the denial of such enforcement equity will enforce it in a case within its cognizance.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, §§ 69-76.]

7. BANKRUPTCY—LANDLORD AND TENANT—ENFORCEMENT OF FORFEITURE OF LEASE.

A corporation tenant for a long term failed to perform a covenant of the lease which required it to build an expensive building on the leased premises, and after notice of a forfeiture of the lease in accordance with the terms thereof had been served upon it, was adjudged a bankrupt, and its assets passed into the hands of its trustees. *Held*, that on petition of the lessor, the court of bankruptcy properly decreed the enforcement of the forfeiture, and directed the trustee to surrender possession of the property as the only effective remedy for the protection of the rights of the lessor.

Appeal from the District Court of the United States for the District of Minnesota.

The appellee, the Associates Realty Company, a corporation of Minneapolis, Minn., being the owner of 44 feet of lots 1 and 2, in block 221, in the city of Minneapolis, with the store building thereon, leased the same, on the 26th day of March, 1900, to J. F. Evans, R. W. Munzer, Adam Pickering, A. V. Hamburg, W. A. Alden and J. F. Elwell, partners under the firm name of Evans, Munzer, Pickering & Co., to run 50 years from the 1st day of April, 1900, at an annual rental of \$5,000, to be paid in quarterly installments in advance, upon the 1st days of April, July, October and January of each year during said term; and further, and in lieu of additional rent, to pay all taxes and assessments of every kind and nature which may be assessed against any part of said leased premises, or against any buildings, structures, or improvements thereon or which might thereafter be placed thereon during said term. "And in consideration of the premises, the said parties of the second part (Evans, Munzer, Pickering & Co.), for themselves, their heirs, executors, administrators and assigns, do hereby covenant and agree to and with the said party

of the first part, its successors and assigns, that the said parties of the second part will, and their heirs, executors, administrators, and assigns shall, at all times during the continuance of this lease, pay the rents which may become payable under this lease, and all taxes and assessments which may be levied upon or assessed against the said leased land, and against any buildings, structures, or improvements now on said land, or that shall hereafter be placed thereon during said term, or against any part of the same, promptly, and as above provided.

"It is further agreed between the parties hereto as one of the conditions upon which this lease is made, that 'if said parties of the second part, their heirs, executors, administrators or assigns, shall make default for the space of sixty (60) days in the payment of any of said rent, taxes or assessments, when any of the same shall become payable, or in the performance of any of the covenants or agreements on the part of the said parties of the second part to be performed, the said party of the first part, its successors or assigns, may give said parties of the second part, their heirs, executors, administrators, and assigns, notice in writing of its or their intention to terminate this lease, and all the rights thereby reserved or granted unto the said parties of the second part, which notice shall be subscribed by the said party of the first part, its successors or assigns, or its agent or attorney, and shall specify the sums of money, or the covenant or agreement on account of the nonpayment, or nonperformance of which such declaration of forfeiture shall be made; and if the said parties of the second part, their heirs, executors, administrators, or assigns, shall not within four (4) months after the time of service of said notice, pay the rents, taxes, or assessments for the nonpayment of which said forfeiture shall have been declared, together with interest on said rent from the time the same shall have been due and payable, and any and all expenses that said first party shall have incurred in and about the preparation and service of said notice, or shall not perform the covenants or agreements for the nonperformance of which said forfeiture shall have been declared, then and in that event this lease shall, from and after the termination of said four (4) months, become ended and determined, and all rights of said parties of the second part, their heirs, executors, administrators and assigns hereunder, shall be forfeited and lapse as fully as if this lease had expired by lapse of time, and all buildings and improvements thereon shall remain as attached to the freehold and become and be the property of the party of the first part, its successors and assigns. And the said party of the first part, its successors and assigns, shall at once have all the rights of re-entry upon said premises, and to repossess and have and enjoy the same, which it, or they, would have upon the expiration of this lease by lapse of time."

It is further covenanted and agreed that upon the termination of the lease, whether by lapse of time or under any of the conditions or provisions contained therein, the lessees or their assigns would peaceably surrender the possession of the property and the buildings and improvements thereon unto the lessor, its successors or assigns; except that such buildings that might have been previously removed from said premises are freed from the provisions of the contract; and that no waste or injury to said premises, or to any building thereon, should be permitted or committed by the lessees or any persons holding under them during the continuance of the lease.

The lessees further covenanted and agreed to keep the sidewalks, alleys and passageways contiguous or appertaining to the leased premises in good repair and free from obstructions as might be prescribed by the city of Minneapolis; and to indemnify and hold harmless the lessor against claims or demands that might be made by reason of any defect, imperfection, or obstruction in said sidewalks, alleys or passageways.

The lessees covenanted and agreed to keep the buildings insured in some reliable fire insurance company or companies, selected by the lessor, in an amount equal to the insurance value of said buildings, and cause the insurance policies to be made payable, in case of loss, to the lessor or its mortgagees, as collateral security for the payment of the rents due or to become due, and for the payment of taxes, assessments, and charges against said real estate; and that so soon as the new buildings hereinafter provided for should be erected, the

lessees would cause the same to be insured in at least the amount of \$12,500 and keep the same insured for not less than said amount, in some reliable insurance company selected as aforesaid, with a like provision respecting the payment of loss to the lessor, as collateral security, whether said policies are held and made payable in that way or not.

It was further covenanted and agreed that in case of any default by said lessees as aforesaid in the payment of any rents, taxes, or assessments due under the terms of the lease, the lessor, at its election, instead of declaring the lease forfeited might pay the taxes or assessments in default, and that all rents in arrears, and such taxes and assessments and insurance premiums paid by said lessor should become a specific lien and paramount to all other liens, drawing interest at the rate of 6 per cent. per annum; with power to foreclose said lien and sell the said leasehold estate, buildings, etc., at auction, as in case of the statute relating to the foreclosure of mortgages, and out of the purchase money to retain the amount of rent in arrears, taxes, assessments, and interest as aforesaid. Said lease was made subject to the terms and conditions of a certain party-wall contract made between certain parties and entered upon the records of the county, the conditions of which the lessees assumed and agreed to perform, and to indemnify the lessor harmless therefrom. It was also made subject to a mortgage thereon, which the lessor agreed to pay off, which mortgage was in the sum of \$50,000. The said lessees for themselves, their heirs, executors, etc., further covenanted and agreed with the lessor that they would within five years from the 1st day of April, 1900, erect and complete upon said leased premises a substantial business building, to cover the entire property leased, at least five stories in height, and as substantial in character and attractive in appearance, and equal in manner and cost of construction to the building now occupied by said lessees adjoining said described premises, and would complete the same in all respects free and clear of any liens within the time aforesaid, and that they would cause the same at once to be insured as before stated.

It was further covenanted and agreed that before the old buildings situated on the premises were torn down and removed, the lessees should first enter into a valid contract with a responsible contractor providing fully for the erection and completion of said new building, according to plans and specifications providing for a building of the kind, etc., aforesaid, which said contract should specifically provide that said building should be so erected and completed within a reasonable time therein specified, free from any lien or claim on the part of the contractors, and should be submitted to and approved by the lessor before the building standing upon the premises should be demolished as aforesaid. It was covenanted that the lessees or their assigns on paying the rents, taxes, assessments and insurance charges, and performing the covenants and agreements provided for in the lease, could peaceably hold and enjoy the premises during the continuance of the lease. The further covenant and agreement was that at all times during the last year of the said term of the lease and after the end of said first term, the lessor should have the option either to buy the improvements on said land or to sell said land to the lessees at a valuation in either case to be arrived at by arbitration, or to release said premises to the lessees for a further term of 20 years, at an annual rental of 5 per cent. on the fair market value of the land exclusive of the improvements, to be fixed by arbitration. Said valuation, however, not to be less than the initial valuation thereof of \$100,000, agreed to be the present value of the land exclusive of the improvements; and to relet the same for a further successive term of 20 years at the expiration of said term, and thereafter to relet the same for a further term of 10 years, unless the lessor shall have either purchased said improvements on said land or shall sell said lands to the lessees, at a valuation in either case to be arrived at by arbitration; the lessees covenanting that they would either buy said leased lands or sell the improvements thereon or release said lands on the basis as fixed by such arbitration (in case of reletting, however, such valuation in no case to be less than \$100,000), at the election of the lessor. The manner of selecting the arbitrators under the provisions of the lease was then set out.

And finally it was mutually covenanted and agreed "That all covenants,

promises, undertakings, agreements, obligations, liabilities, grants, or powers entered into, made, assumed or undertaken by either party thereto in and by this lease, shall bind as well as inure to the benefit of the successors and assigns of said party of the first part, and the heirs, executors, administrators and assigns of said parties of the second part hereto respectively, whether so particularly provided herein, or otherwise, and that time is of the essence of this contract."

The said lessees immediately entered into possession of said leased premises, and conducted a mercantile business therein, and continued such possession until the month of April, 1902, when they became incorporated under the laws of the state of Minnesota under the corporate name of Evans, Munzer, Pickering & Co., which corporation took over the business and obligations of said copartnership firm, and held possession of the premises until April 23, 1904, when it changed its corporate name to that of Evans, Johnson, Sloane Company, which latter corporation continued to occupy and hold the premises under the lease until the 13th day of October, 1905, at which date it was duly adjudged a bankrupt by the United States District Court for the District of Minnesota. On the 13th day of November, 1905, the appellants herein were duly appointed trustees in bankruptcy of the estate, and took possession of the business and assets of the estate and entered into possession and occupancy of said leased premises, which they have ever since held. The said corporation, Evans, Johnson, Sloane Company, paid to the lessor the rent for the premises which fell due on the 1st day of April, 1905, for the three months of April, May, and June, 1905; and on the 8th day of August, 1905, it paid to the lessor the rent which fell due on the 1st day of July, 1905, for the three months of July, August, and September, 1905. No rent has since been paid or demanded since the 1st day of October, 1905. Neither of said lessees, Evans, Munzer, Pickering & Co. or either of said corporations, their successors, complied with the covenants contained in said lease respecting the erection of said new building, or took any steps looking to its performance at any time from the 1st day of April, 1900, to the 1st day of April, 1905, or at any time thereafter; but refused and neglected to perform said covenants, and wholly defaulted therein. The said default having continued for more than 60 days after the time when said covenant to build should have been performed, as in the lease provided, the lessor on August 1, 1905, elected to declare, and did declare, its intention to terminate said lease, and all the rights therein reserved or granted unto the lessees, their successors, and assigns; and delivered a notice in writing thereof which was served on the 1st day of August, 1905, on said lessees, Evans, Munzer, Pickering & Co. and the corporation, Evans, Johnson, Sloane Company.

On the 2d day of December, 1905, the lessor made demand upon the trustees in bankruptcy to surrender and deliver to its possession said premises, which they refused to comply with, and have ever since held and retained possession and occupancy of the premises. On December 21, 1905, the lessor, the Associates Realty Company filed its petition in the United States District Court for the District of Minnesota, setting out the facts aforesaid, praying judgment for the rental value of the property during the detention by the trustees in bankruptcy, and for the enforcement of their right to forfeit, and for possession of the premises. Decree accordingly; to reverse which the said trustees in bankruptcy have brought the case here on appeal.

E. H. Morphy (F. H. Ewing and John M. Bradford, on the brief), for appellants.

Ralph Whelan (M. B. Koon and William H. Bennett, on the brief), for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the facts as above, delivered the opinion of the Court. There are a large number of assignments

of error—21 specifications—but as is not infrequently the case, only a few questions are involved determinative of the controversy. A dozen and one are to findings of fact by the trial court, and the other 8 present the reverse side, that the court erred in not finding the issues for the appellants.

The essential question for decision is whether or not the right to declare a forfeiture of said lease and leasehold estate, with the consequent right of re-entry by the lessor, arose by reason of the failure of the lessees to erect and complete the new building on the leased ground within the five years as prescribed by the demise. The contention of appellants is that the forfeiture clauses of the lease have exclusive reference to the matter of the failure to pay the reserved rentals as they became due, to pay the taxes, assessments, and the like. The contention of appellee is that the right of forfeiture extends as well to the failure by the lessees to erect the new building within the prescribed period of five years. In a contract like this, of many specifications and covenants, in ascertaining the application of the forfeiture provisions it is a sensible thing to do to place ourselves as near as may be in the attitude and relation of the parties respecting the subject-matter of the contract at the time of its execution, and then taking the instrument by its four corners, read it, and so construe it as to harmonize and give effect to all its material parts, so as to give it a reasonable and practicable application.

As appears from the record, the property in question is located near the center of the mercantile district of Minneapolis, a city of rapid development, and steady growth. The buildings on the leased premises were old, worn, and illy constructed, not in rapport with surrounding business houses, nor were they adequate by comparison to the accommodation of a growing mercantile establishment. It was, therefore, apparently to be desired and expected by the lessees that a more attractive and commodious building should supplant the old one in view of their long tenure, with the option to buy at the end of the five years or to continue the term for successive periods. The lot itself was estimated to be of the value of \$100,000, and at the time was subject to a mortgage of \$50,000. It was, therefore, of importance to the lessor to have the new building contemplated constructed, as it would not only enhance the security for the rental money and the other acts to be performed by the lessees, but would greatly augment the value of the property in case of the purchase by either under the option. In view of this situation, let us examine the covenants and forfeiture provisions. The opening consideration of the contract is the payment of the rentals and taxes as well as the performance of the covenants and agreements to be paid and performed by the lessees. It was expressly covenanted and agreed that the lessees within five years from the 1st day of April, 1900, would erect and complete upon said premises a substantial business building to cover the entire property leased, five stories in height, attractive in appearance, etc., and that as soon as the new building should be completed they would insure it in a sum not less than \$12,500 for the better security of the lessor. It was further agreed, as one of the conditions

upon which the lease was made, that if the lessees should make default for the space of 60 days in the payment of any of the rents, taxes, or assessments, "or in the performance of any of the covenants or agreements on the part of the said parties of the second part to be performed," the lessor, after giving the specified notice to quit, could end the lease. This is followed by the covenant that upon the termination of the lease, "whether by lapse of time, or under any of the conditions or provisions contained herein," the lessees would peaceably surrender the premises. From all of which it appears that the respective covenants alike pertained to the acts, the things to be done by the covenantors—to the obligation to build as well as pay rentals, taxes, etc. The mere separation of the provisions into distinct paragraphs was merely the mode adopted by the draughtsman for convenience or method of construction. So while the argument of the learned counsel for appellants is ingenious in the attempt to limit the forfeiture clauses to the paragraph respecting the failure to pay rentals, taxes, etc., it is more specious than reasonable.

It hardly admits of controversy that immediately, coupled with the covenant and agreement to pay rentals, taxes, etc., is the covenant or agreement to build, and that failure to perform both or either is expressly made the basis of the declaration and enforcement of the forfeiture. This uniting of the right of forfeiture is exemplified in the succeeding covenant that "upon the termination of this lease, whether by lapse of time, or under any of the conditions or provisions contained herein" the lessees would peaceably surrender the possession, etc. And should the lessees pay the rentals, assessments, taxes, insurance, and charges and perform the covenants and agreements provided for in the lease, they should hold and enjoy the premises. So it is made clear that the right of the lessees to hold and enjoy was made to depend not alone upon the payment of the rents, taxes, insurance, etc., but as well upon their performance of the other covenants and agreements, which indisputably would cover the building clause. And it is significant in this connection that in the closing paragraph of the lease it is declared that time is of the essence of this contract. There is nothing strained or unreasonable in this view of the contract. It necessarily devolved upon the lessees to remove the old structure to make place for the new, to get out the plans and specifications therefor, and during the change to submit to the interruption of business consequent thereon. The usual bond given by lessees for the construction of new buildings within the prescribed time was not exacted in this case. In lieu thereof it was deemed a sufficient guaranty to the lessor and incentive to the lessees that the building would be constructed as agreed upon, that the forfeiture provision hung suspended over the heads of the lessees.

Some stress in argument is laid upon the phrase found in the provision respecting the letting of the lessees of the contract for the erection of the new building, which requires "that said building shall be so erected and completed within a reasonable time therein specified." By giving to this the insulated office of an independent stipulation,

read in connection with the plans and specifications to be submitted to and approved by the lessor, counsel for appellants builds the hypothesis that is was not in the contemplation of the parties that a forfeiture might be predicated of the building covenant. The argument is that the lessees had the full five years in which to begin the work of building; that as the plans and specifications had to be prepared and submitted to the lessor, subject to its approval, which might detain at will and finally reject them, necessitating the getting up and submitting new ones—a process that might go on during the entire five years of the term—and hence the provision was inserted that after concurrence in the plans and specifications, a reasonable time should be allowed the lessees for completing the building, which might extend beyond the five years' period. There are several satisfactory answers to this contention. The language "said building shall be so erected and completed within a reasonable time therein specified," has exclusive reference to the prescription as to the contract the lessees were to enter into with their contractor for the work. To prevent dallying and unnecessary delay as between the lessees and the contractor it was provided that the erection and completion should be within a reasonable time, having regard to the delays and interruptions ordinarily incident to the execution of such contracts. In no degree, however, did it contradict or mitigate the primary covenant and agreement between the lessor and the lessees that the building was to be completed within the five years. In respect of the suggested possible delay the lessor might occasion by the detention and final rejection of any plans and specifications submitted to it, it is sufficient to say (1) that the business desire of the lessor to have a new building upon the lots would presumptively make it to its interest to avoid any captious delay or objection; and (2) if it should act arbitrarily in the matter, the law would afford ample protection to the lessees in preventing a forfeiture declared by the derelict lessor.

In further support of the contention that the forfeiture clause was not intended to attach to the covenant to build, reference is made to that provision of the lease which gives the lessor, in lieu of the right to declare a forfeiture, a specific lien for rents, taxes, etc., paid by the lessor. The argument being, if we comprehend it, that this provision indicates that the paramount thought in the mind of the lessor was to secure the payment of the rents, taxes, etc., and, therefore, the provision for the summary remedy by declaration of forfeiture and re-entry should be limited to that object. Such alternative provision is usual in contracts of lease, giving the lessor the right of election, to rely upon the lien and continue the lease if he deem it more advantageous than to put an end to the tenancy. How from such alternative provision a reasonable inference can be drawn that it does not consist with the right of forfeiture for default in keeping any other important covenant in the lease is not manifest. As already attempted to be shown, by an analysis of the various paragraphs of the contract, construed in the light of the attendant circumstances, the obtaining of the rentals and the construction of the new building were the paramount objects of the scheme, and are in such co-

relation as to clearly indicate that the forfeiture clause applies indifferently to the allied covenants. Unless the expression in the contract fairly excludes this intentment it should prevail. Recognizing the embarrassment of the fact that the forfeiture clause follows the failure to make "payment of any of said rents, taxes, or assessments, or in the performance of any of the covenants or agreements on the part of the said (lessees) to be performed," resort is had by appellants' counsel to the rule of *ejusdem generis*, that the later general phrase should be limited to the like matters of rent, taxes, and assessments particularized as the antecedent. This rule has no controlling force in construing a contract where it is plain that a larger object was in fact in the minds of the parties to which the more general phrase can distinctly apply. *Given v. Hilton*, 95 U. S. 591-598, 24 L. Ed. 458, where it is said that "this rule of construction rests on a mere presumption, easily rebutted by anything that shows the larger subject was in fact in view." *Sutherland on Statutory Construction*, § 279, says:

"The sense in which general words, or any words, are intended to be used furnishes the rule of interpretation, and this is to be collected from the context; and a narrower or more extended meaning will be given, according as the intention is thus indicated. To deny any word or phrase its known or natural meaning in any instance the court ought to be quite sure that they are following the legislative intention. Hence, though a general term follows specific words, it will not be restricted by them when the object of the act and the intention is that the general word shall be understood in its ordinary sense."

No one particular class or thing is enumerated in the lease contract upon which the rule of *ejusdem generis* invoked can rest. The reference in the forfeiture clause is to things enumerated—the payment of rent, taxes, assessments, etc., and other covenants and agreements in the lease, among which is the covenant to build.

Reduced to its ultimate effect, the contention of appellants would allow the tenants to break every covenant in this lease except the mere obligation to pay rents, etc. They could commit waste, to the great injury of the premises; suffer the sidewalks, alleys and passageways to get so out of repair as to make the place inaccessible or uninhabitable; they could violate the party-wall contract, and fail to erect any new building; yet, so long as they complied with the single covenant in paying rents, taxes, etc., they could escape the entire forfeiture clause, notwithstanding the failure to perform the other covenants to be performed is expressly declared to be a ground of forfeiture. This is so obviously opposed to the whole scheme of the lease and the efficient means for enforcing observance of the material covenants as not to appeal to our approval.

Contention is made that the acceptance of the rent after the 1st day of July for the quarter ending October 1, 1905, constituted a waiver of the right to declare a forfeiture for the breach of the building covenant. The five years within which the lessees were to erect and complete the new building expired April 1, 1905; on August 1, 1905, notice to quit and surrender was given. Under the requirements of the four months' notice, the right to re-enter accrued De-

cember 1, 1905. No rent was paid beyond October 1, 1905. We understand the rule of law to be that a waiver in such instance applies where the rent has accrued and been accepted after the right of re-entry has attached on account of forfeiture; and not where it is paid and accepted as due for a period prior thereto. *Big Six Development Company v. Mitchell* (C. C. A.) 138 Fed. 279, 1 L. R. A. (N. S.) 332; *Douglas v. Herms*, 53 Minn. 204, 54 N. W. 1112; *Gluck v. Elkan*, 36 Minn. 80, 30 N. W. 446; *Norris v. Morrill*, 43 N. H. 213; *Campbell v. McElevey*, 2 Disney, 574; *Jackson v. Allen*, 3 Cow. (N. Y.) 220, 230; *Blecker v. Smith*, 13 Wend. (N. Y.) 531; *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33; *Price v. Norwood*, 4 Hurlstone & Norman, 511.

Objection is made to the service of the notice to quit. Service was made August 1, 1905, upon the corporation, Evans, Johnson, Sloane Company, by delivering to and leaving a copy with Rudolph Altshul, he being the treasurer of the corporation. In *Kansas City Railroad Company v. Daughtry*, 138 U. S. 305, 11 Sup. Ct. 308, 34 L. Ed. 963, the court said: "At common law, service was made on such head officer of a corporation as secured knowledge of the process to the corporation." 2 *Taylor on Landlord & Tenant*, § 481, says: "Notice to quit. When a corporation is tenant, the notice must be addressed to the corporate name, and served upon one of its officers." Under the general laws of Minnesota service of summons upon a corporation defendant in the district court in a civil action is by delivering a copy thereof to the president or other head of the corporation—secretary, cashier, treasurer, a director, or managing agent. Section 5199, Gen. St. Minn. 1894. As the lessees named in the lease contract were individuals it accounts for the absence of the usual prescription where the lessee is a corporation as to how the notice to quit should be served. The service of notice in this case we think was good under the local statute of the state, and was good at common law, made upon so important an officer as the treasurer as a means of conveying notice to the corporation. The service being good at the time when made upon the corporation, the subsequent adjudication of bankruptcy and the selection of trustees did not abrogate the service already made upon the corporation or necessitate reservice on the trustees in bankruptcy. In this respect the trustees succeeded only to the rights and stead of the bankrupt, and took the estate cum onere. Under such circumstances, the trustees stand simply in the shoes of the bankrupt at the time they succeeded to the estate. See *York Manufacturing Company v. Cassell et al.*, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; *Thompson v. Fairbanks*, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; *Yeatman v. Savings Institution*, 95 U. S. 764, 24 L. Ed. 589; *Hewit v. Berlin Machine Works*, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986.

The final contention of appellants' counsel is that the courts are adverse to forfeitures and that they are the abhorrence of courts of equity. Equity, however, still more abhors a failure of justice, as nature does a vacuum. In *Brewster v. Lanyon Zinc Company* (C.

C. A.) 140 Fed. 801, 819, the conditions under which a court of equity will assist in the enforcement of a forfeiture under lease contracts, are extensively discussed by Judge Van Devanter. His conclusion is aptly expressed in the following paragraph:

"The better view is that the rule is not absolute or inflexible, any more than is every forfeiture harsh and oppressive; that its influence and operation do not extend beyond the reasons which underlie it; and that in cases, otherwise properly cognizable in equity, there is no insuperable objection to the enforcement of a forfeiture when that is more consonant with the principles of right, justice, and morality than to withhold equitable relief. As said by Story, Eq. Jur. par. 439: "The beautiful character and pervading excellence, if one may so say, of equity jurisprudence, is that it varies its adjustments and proportions so as to meet the very form and pressure of each particular case in all its complex habitudes.'"

What would be the attitude of the lessor in this case if the court cannot declare a forfeiture and restore the possession of the premises to it so long as the trustees in bankruptcy may continue to pay the rentals and observe the other requirements of the lease, short of the erection of the new building? A suit for specific performance would hardly lie against the trustees in bankruptcy to erect the new building on the premises. Where would they get the funds applicable to such purpose? If they have other assets than the leasehold interest, the court of bankruptcy could not take that fund which it holds for the benefit of all the creditors of the estate and invest it in a permanent building improvement to run with the lease. Neither would the court of bankruptcy hold up the closure of the administration of the estate through a long period of time for the construction of such improvement as the lease contemplates, and await the result of the income therefrom for distribution among the creditors. The bankrupt law does not contemplate such proceeding. The only remedy, therefore, according to appellants' suggestion, would be an action for damages on the broken covenant to build. The fact of the adjudication of the corporation as a bankrupt shows it is insolvent. Its entire property, including the leasehold interest, has passed to the trustees in bankruptcy for administration among the creditors. Is the lessor to have its claim liquidated and then allowed against this estate, and then participate in a dividend that might not amount to 10 cents on the dollar of its claim? There is no provision of the lease contract which contemplates that such a judgment allowance would be a continuing lien upon the leasehold estate. Under the bankrupt law the leasehold interest would be sold, and the proceeds distributed pro rata among all the general creditors of the estate. If the lessor should present its claim for liquidation and allowance against the estate, the judgment therein would cover the entire present and prospective loss consequent upon the breach of the building covenant, as it is an indivisible unit. The purchaser of the leasehold interest under the sale by the trustees in bankruptcy would not be liable for any antecedent breach of the covenant to build; and if the claim for damages therefor were liquidated and allowed in the bankruptcy proceeding, in any view the purchaser would take the property unburdened of the building covenant. If the claim were not so liquidated, under appellants' the-

ory, even if the lessor should recognize the new tenant, there would be no default on his part as to the building covenant until after the expiration of another five years, and the only remedy of the lessor would be an action for specific performance against, or damages for the breach committed by, the purchasing tenant. It would be difficult to conceive of a situation that appeals more strongly to the equity jurisdiction of the court for protection and relief. The remedy adopted by the lessor in this suit was proper, and the remedy afforded by the decree of the District Court was just.

The findings and decree of the District Court are, therefore, affirmed.

NAUMBURG v. CITY OF MILWAUKEE.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906. Rehearing Denied June 18, 1906.)

No. 1,161.

MUNICIPAL CORPORATIONS—NEGLIGENCE OF SERVANTS—INJURIES TO THIRD PERSON—CORPORATE OR GOVERNMENTAL ACTS.

Milwaukee City Charter, c. 9, § 6, provides for the maintenance of certain drawbridges at the expense of the city; and section 5 requires the board of public works to appoint, subject to the approval of the common council, all bridge tenders, whose compensation shall be fixed by the common council, and who may be removed at the pleasure of the board of public works or the mayor. Chapter 2, § 1, declares that the officers of the city shall be a mayor * * * and as many bridge tenders, firemen, policemen, etc., as may be provided by the act or the common council may from time to time direct; and chapter 15, § 4, provides that the mayor and aldermen and harbor master and bridge tenders of the city shall severally exercise within the city all the powers of policemen, etc. *Held*, that where the tender of a drawbridge maintained by the city was guilty of negligence in the operation of the bridge, causing injuries to plaintiff, his act was an act of the city in its corporate, and not its governmental, capacity, for which the city was therefore responsible.

[Ed. Note.—For cases in point, see vol. 36, Cent. Dig. Municipal Corporations, §§ 1569-1576.

Liabilities of municipal corporations for torts of public officers, see note to Mayor, etc., of New York v. Workman, 14 C. C. A. 534.]

Baker, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Wisconsin.

The plaintiff in error filed his complaint in the Circuit Court of the United States for the Eastern District of Wisconsin, alleging in substance that he was a citizen of the state of New Jersey, and that the defendant was a municipal corporation having applied for and received its charter from the Legislature of Wisconsin; that within its limits the municipality maintained a certain draw, jackknife, or bascule bridge known as the "Grand Avenue Bridge," over the Milwaukee river; that said bridge is and was built and operated so as to allow the passage of boats and vessels along said river; that said bridge is and was divided in the center, so as to have two parts, each of which parts was attached to the abutments at either end of said bridge; that at the points where said parts were attached there were certain mechanical devices and arrangements for raising the parts of the bridge;

from the center; that said bridge was worked by electricity and was controlled and operated by men employed by and under the direction of the city, known as bridge tenders, all in accordance with the city charter; that defendant had not supplied any guards or warnings at said bridge, but left the approaches unguarded and unsafe; that said bridge was used and provided for the convenience of persons traveling the streets, and at the time of the acts complained of the said bridge and the streets leading thereto were crowded with people going to and from and upon said bridge and streets; that plaintiff was a traveling salesman in the employ of a New York firm, and about 7 o'clock p. m. on September 1, 1903, was traveling along said Grand avenue and approached the bridge for the purpose of crossing over it; that no warning of danger was given to plaintiff by the bridge tender, and no guard or device was put up to warn or caution him of any danger in crossing the bridge; that when he approached the bridge the bridge tender said to plaintiff, "Come on, you have plenty of time to cross," and while he was attempting to cross, the bridge tender raised the bridge and threw plaintiff off, from which he received the injuries complained of; that said injuries were caused by the negligence of the bridge tender, and without any fault on the part of plaintiff. To this complaint the city filed its demurrer for the want of sufficient facts. The demurrer was sustained, and judgment was rendered for the defendant.

The provisions of the city charter which bear upon the question here are as follows: Chapter 9, § 6: "Draw or swing bridges, with openings sufficient for the passage of vessels, shall be maintained and supported at the expense of the city, at the following places in said city, to-wit [among other places]: From Wisconsin street, in the Third and Seventh Wards, to Grand avenue in the Fourth Ward [the bridge in question]." Chapter 9, § 5: "The board of public works shall appoint, subject to the approval of the common council, all bridge tenders, whose number, duties and compensation shall be fixed and determined by the common council. Any bridge tender may be removed at pleasure by the board of public works, or by the mayor." Chapter 2, § 1: "The officers of said city shall be a mayor * * * and as many bridge tenders, firemen, constables, policemen, and such other officers and agents as may be provided by this act, or as the common council may from time to time direct." Chapter 15, § 4: "The mayor and aldermen and the harbor master and bridge tenders of the city * * * shall severally and respectively have and exercise within said city, all the powers of policemen of said city, without any compensation or claim to compensation therefor."

Charles Friend and A. D. Friend, for plaintiff in error.

Thomas H. Dorr, for defendant in error.

Before GROSSCUP and BAKER, Circuit Judges, and ANDERSON, District Judge.

After stating the facts, as above, the opinion of the court was delivered by ANDERSON, District Judge.

The cause of action set forth in the complaint is based upon the negligence of the bridge tender in opening the draw or lift of the bridge, when plaintiff was crossing, whereby the plaintiff was injured, while exercising due care. The sufficiency of the complaint turns upon the question whether the bridge tender was such an agent or servant of the municipality as that the latter is liable for his negligence—whether the doctrine of respondeat superior applies. The Circuit Court held that the question was one of local law, that under the decisions of the Supreme Court of Wisconsin the opening of the draw was a public or governmental service, and that the doctrine of respondeat superior did not apply.

It is well settled that municipal corporations have a dual character. They are governmental instrumentalities, endowed with powers and duties necessary for the establishment and maintenance of good government within their territory. In the exercise of these powers and discharge of these duties they are political divisions of the state, employed by it as a means through which it may perform the duties that it owes to all citizens alike. But they are more than mere governmental instrumentalities. "They are incorporated at the wish and special instance of the inhabitants for the advancement of their own private interests," and "extensive powers and privileges, which are to be exercised for the improvement of the territory within their limits and for its adaptation to the purposes of business and residence, are conferred upon them." While acting in their capacity as governmental instrumentalities they are, like the sovereign power itself, exempt from liability for acts done or omitted, unless such liability is expressly created by statute. On the other hand, when they are acting, not in their public or governmental capacity, but in their municipal or corporate capacity, exercising powers and privileges given them for their own corporate benefit, they are held liable for their acts and omissions in exercising these powers. Williams, *Municipal Liability for Tort*, §§ 4, 5, et seq., and authorities cited.

The Supreme Court of Wisconsin has repeatedly recognized and declared this doctrine, with its distinctions. In *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760, it was held that a municipality is not liable for the misconduct of its officers or employes when "the corporation is engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community." The defendant city was accordingly held not liable for the negligence of the fire department. In *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420, it was held that the city was not liable for the death of a child lawfully attending one of its public schools, when such death was caused by negligently allowing the sewer of the school building to become clogged up; and the court there said:

"This court early adopted and has consistently maintained the rule that a municipal corporation is not liable for injuries resulting from the acts or defaults of its officers when it is engaged in the performance of a merely public service, from which it derives no benefit in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants, or the community"—citing *Hayes v. Oshkosh*, supra.

This phase of the rule is illustrated in many other Wisconsin cases. *Schultz v. Milwaukee*, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779, and *Little v. Madison*, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793, are illustrations of the doctrine of nonliability in respect to the acts or omissions of police officers. In *Kuehn v. Milwaukee*, 92 Wis. 263, 65 N. W. 1030, the doctrine was applied to the acts of the board of public works in disposing of the city's garbage; and in *Manske v. Milwaukee* (Wis.) 101 N. W. 377, it was applied to a

case where a person was injured by the negligence of a fireman in loading coal for the fire department. In each of these cases it was held that the municipality was not liable because it was engaged in a public service—was acting in its governmental, and not in its corporate, capacity.

On the other hand, the Supreme Court of that state has held that a municipal corporation is liable for the acts and omissions of its officers and employes engaged in the performance of duties that pertain to the corporate rights and powers of the municipality. In *Wallace v. Menasha*, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804, it was ruled that the city was not liable for the acts of its treasurer in seizing and selling the property of one person for the taxes of another, and in the course of its opinion the court said:

"We have thus far considered the case upon the hypothesis that the treasurer is the agent or servant of the city, for whose torts the city may, in a proper case, be held liable. But, under the authorities, it may well be doubted whether the rule respondeat superior has any application to acts performed or torts committed by him in the collection of taxes. The levy and collection of taxes are governmental rather than municipal functions, delegated, it is true, to municipal officers for convenience, but still governmental. It may well be claimed that, in the exercise of those functions, such officers are public officers, discharging public and not municipal or corporate duties. If so, there seems to be no ground for holding the municipality liable for their torts committed in the exercise of those functions—no room for the application of the rule respondeat superior in such cases. A distinction is made in many well-considered cases between torts committed by municipal officers or agents in the discharge of such public duties, and those committed in the discharge of purely municipal or corporate duties by the officers or agents of the city or village; the municipality being held liable for the latter, but not liable for the former class of torts. In addition to the cases and authorities cited in the brief of counsel for the city, see 2 *Dillon on Munic. Corp.* §§ 464-470, inclusive, and cases cited; *Bailey v. Mayor, etc.*, of N. Y., 3 Hill (N. Y.) 531, 38 Am. Dec. 669; *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485. This distinction was recognized in *Hayes v. Oshkosh*, 33 Wis. 318, 14 Am. Rep. 760, and controlled the judgment of the court."

In *Durkee v. Kenosha*, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480, the city was held liable for the acts of its officers in seizing and selling property to pay a void special assessment for benefits from the opening of a street; and the court said:

"The laying out and opening of streets in a city, the assessment of damages and benefits resulting therefrom, and the collection of the sums so assessed as benefits, are strictly municipal functions, and the officers of the city by whom those functions are performed thereby discharge municipal or corporate duties, as distinguished from public or governmental duties. Hence this case is not within the rule established in *Hayes v. Oshkosh*, 33 Wis. 314, 14 Am. Rep. 760; *Schultz v. Milwaukee*, 49 Wis. 254, 5 N. W. 342, 35 Am. Rep. 779, and *Little v. Madison*, 49 Wis. 605, 6 N. W. 249, 35 Am. Rep. 793, which relieves the municipality from liability for torts committed by its officers in the discharge of merely public or governmental duties. Neither is the case within the rule of *Wallace v. Menasha*, 48 Wis. 79, 4 N. W. 101, 33 Am. Rep. 804, nor within the application of the rule of the cases above cited, suggested in the doubt expressed in the opinion. The rule of *Wallace v. Menasha* is that if the collecting officer seize the property of A. for non-payment of a tax assessed against B., and which the city authorities have directed him to collect of B., the city is not liable to A. in an action of

tort for such unlawful seizure of his property. The judgment went upon the grounds that the city had not authorized or directed its officer to make the seizure complained of and that he acted without any authority, real or apparent. In the present case the officer seized the property of the plaintiff in strict obedience to the mandate of the city council. The doubt expressed in *Wallace v. Menasha* is upon the question whether the rule of the cases first above cited is not also applicable to torts committed by the treasurer in the collection of taxes—whether the rule respondeat superior has any application in such a case. This point was not decided, and perhaps the suggestion of it might better have been omitted from the opinion, inasmuch as it did not aid in the determination of the case. However that may be, we were then speaking of the general taxes levied for the support of the government under authority of the government, and not of a mere local assessment for a municipal improvement in which the general public has no direct concern. The distinction between the two cases is obvious and substantial.”

In *Nicolai v. Town of Vernon et al.*, 88 Wis. 551, 60 N. W. 999, the distinction between the two classes of cases was declared and enforced in the case of a town. This was an action to restrain the defendants, the town, and the supervisors and path master of the town, from removing plaintiff's fences and taking a strip of his land for highway purposes. The town demurred to the complaint and its demurrer was sustained. The Supreme Court reversed the ruling of the lower court, holding that the act complained of was an “attempted discharge of a municipal or corporate duty, as distinguished from a public or governmental duty,” and said:

“In such cases the municipality is liable if the acts of its officers prove to be unlawful.”

It seems therefore to be settled in Wisconsin that if the city of Milwaukee, in the control and management of the bridge in question in this case, was performing a public service, acting in its public or governmental capacity, there is no liability; but it seems to be equally well settled that, if in such control and management it was acting in its municipal or corporate capacity, there is liability. The question, then, comes to this: In which capacity did the city maintain, support, and (through its bridge tender) attend this bridge? In so doing was it performing a governmental or municipal act? So far as our researches have gone this point has not been expressly ruled by the Wisconsin Supreme Court.

The case of *Weisenberg v. Winneconne*, 56 Wis. 667, 14 N. W. 871, has been called to our attention. The court in that case said:

“These are two writs of error in the same case, in the first of which the demurrer to the complaint was sustained, and in the second it was overruled. The complaint substantially charges that the deceased came to his death while navigating the Wolf river, in this state, with a vessel called the ‘North Star,’ of which he was part owner, by reason of the acts of malfeasance and misfeasance of the defendants in placing a bridge across said Wolf river, a navigable stream within said town and village, which obstructed the navigation thereof unless a certain draw therein had been opened, and that by the negligence of the officers, agents, and employes of said defendants such draw was not opened. In short, the complaint charges that the defendants obstructed said river and neglected to remove such obstruction, by reason whereof the deceased, while navigating the same, was killed. This would appear to be a straight common-law action, as well as warranted by section

1598, Rev. St. 1898. The defendant town became responsible for this obstruction by the purchase of the bridge, by virtue of chapter 216, p. 424, Priv. & Loc. Laws 1859, which required the town to keep such bridge in repair 'and attended.' The only right which either the town or village had to maintain this bridge by the law, or could have, was conditional that a draw should be constructed in the same and opened when the river at this point should be required for the navigation of boats and vessels, and the town clearly assumed the duty to so attend and manage such draw. When this duty was neglected, then the bridge became and was a complete obstruction to the navigation of the river, and the town was responsible therefor, and for all special damage occasioned thereby. The complaint alleges that the town did maintain and control this bridge when the accident occurred. It is not claimed that this special power, right, and duty imposed upon this town by the statute to maintain and attend this bridge were ultra vires, and the state clearly had the right to grant and the town had the right to assume such power, right, and duty; and, this being so, the town is liable for neglect of such special duty, as any corporation or individual would be under the same circumstances, Dillon on Munic. Corp. § 763. * * * There is certainly enough in this complaint to charge both defendants with the responsibility of maintaining this bridge and attending its draw, and their officers, agents, and employés with negligence in not opening the draw of the bridge, or otherwise removing the obstruction to the navigation, on due and proper notice and signal given by the deceased, and that by reason of such obstruction and negligence the deceased came to his death; and that is sufficient. There are no close or complicated questions of law in the case, and the liability of the defendants rests upon the plainest of elementary principles."

In the course of its opinion the court further said:

"The only highway in question in this case is this navigable river, and the liability of towns in respect to roads and bridges is not involved; for the deceased was not seeking to use the bridge for the purpose of travel, and it is complained of only as an obstruction to the navigation of the river as a common highway which he had the right to navigate and use without unnecessary obstruction."

The negligence charged was the negligence of the officers, agents, and employés of the town in not opening the draw. The town was held liable for neglect of this duty "as any corporation or individual would be under the same circumstances." The question whether the duty of the "officers, agents, and employés" of the town, to attend the bridge, was a public or governmental, or a municipal or corporate, duty, seems not to have been raised, but it is not easy to see how "the liability of the defendants rests upon the plainest of elementary principles" or how the town could be held liable "as any other corporation or individual would be," unless, in the light of the cases heretofore referred to, the duty to attend the bridge and open the draw was considered a corporate and not a governmental duty.

One of two propositions would seem to be clear: Either the Weisenberg Case holds that the maintenance and attendance of the bridge in that case was a corporate, and not a governmental, duty, or the question has not been decided by the Supreme Court of Wisconsin. In the latter event the question is one of general law. The rule by which this question is to be decided has been clearly stated in *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, in which Judge Folger, speaking for the court, said:

"There are two kinds of duties which are imposed upon a municipal corporation: One is of that kind which arises from the grant of a special power, in the exercise of which the municipality is as a legal individual; the other is of that kind which arises, or is implied, from the use of political rights under the general law, in the exercise of which it is as a sovereign. The former power is private and is used for private purposes; the latter is public and is used for public purposes. *Lloyd v. Mayor*, 5 N. Y. 374, 55 Am. Dec. 347. The former is not held by the municipality as one of the political divisions of the state; the latter is. In the exercise of the former power, and under the duty to the public which the acceptance and use of the power involves, a municipality is like a private corporation, and is liable for a failure to use its power well, or for an injury caused by using it badly. But where the power is intrusted to it as one of the political divisions of the state, and is conferred not for the immediate benefit of the municipality, but as a means to the exercise of the sovereign power for the benefit of all citizens, the corporation is not liable for nonuser, nor for misuser by the public agents. *Eastman v. Meredith*, 36 N. H. 284, 72 Am. Dec. 302."

And after full discussion he continues:

"This becomes the practical question: Are the acts, which are to be done by the commissioners of charities and correction, acts to be done by them in their capacity as public officers in the discharge of duties imposed upon them by the Legislature for the public benefit, or are they acts done for the defendant, in what might be called its private character, in the management of property or rights voluntarily held by it for its own immediate profit or advantage as a corporation, though inuring ultimately to the benefit of the public? *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485."

In *Oliver v. Worcester*, 102 Mass. 489, 499, 500, 3 Am. Rep. 485, cited in *Maximilian v. Mayor*, supra, the court said:

"The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity, in the discharge of duties imposed upon them by the Legislature for the public benefit, and for acts done in what may be called their private character, in the management of property or rights voluntarily held by them for their own immediate profit or advantage as a corporation, although inuring, of course, ultimately to the benefit of the public. To render municipal corporations liable to private actions for omission or neglect to perform a corporate duty imposed by general law on all towns and cities alike, and from the performance of which they derive no compensation or benefit in their corporate capacity, an express statute is doubtless necessary. * * * But this rule does not exempt towns and cities from the liability to which other corporations are subject for negligence in managing or dealing with property or rights held by them for their own advantage or emolument. Thus, where a special charter, accepted by a city or town or granted at its request, requires it to construct public works, and enables it to assess the expense thereof upon those immediately benefited thereby, or to derive benefit in its own corporate capacity from the use thereof, by way of tolls or otherwise, the city or town is liable, as any other corporation would be, for any injury done to any person in the negligent use of the powers so conferred. *Henley v. Lyme*, 5 Bing. 91, s. c. 3 B. & Ad. 77; 1 Scott, 29; 1 Bing. N. C. 222; 2 Cl. & Fin. 331; 8 Bligh (N. S.) 690; *Weet v. Brockport*, 16 N. Y. 161, note; *Weightman v. Washington*, 1 Black, 39, 17 L. Ed. 52; *Nebraska City v. Campbell*, 2 Black, 590, 17 L. Ed. 271; *Perley, C. J.*, in *Eastman v. Meredith*, 36 N. H. 289-294, 72 Am. Dec. 302; *Metcalf, J.*, in *Bigelow v. Randolph*, 14 Gray (Mass.) 543; *Child v. Boston*, 4 Allen (Mass.) 41, 51, 81 Am. Dec. 630."

The city of Milwaukee is by its charter required to maintain, support and provide bridge tenders for the bridge in question. The bridge tender's duties and compensation are "fixed and determined by the common council" and "any bridge tender may be removed at

pleasure by the board of public works or by the mayor." The bridge is maintained, supported, and attended at the expense of the city. The city derives benefit in its own corporate capacity from the use of the bridge, not by way of tolls, to be sure, but otherwise; for example, in "the improvement of the territory within its limits," and in "its adaption to the purposes of business and residence." The bridge is maintained, supported, and attended primarily for the benefit and convenience of the inhabitants of the city, though inuring ultimately to the benefit of the public. The right and privilege is given to the city for its own corporate benefit and immediate advantage. The maintenance, support, and attendance of the bridge are charged upon the city because of particular benefits to it. The bridge could not be maintained at all over this navigable river, except upon condition that it be managed with a draw so as to permit navigation of the river. Therefore the state, in granting the right and privilege to the city to maintain the bridge, granted it upon this condition and imposed upon the city the specific duty of managing the draw. The Supreme Court of the United States has spoken upon this point. In *Weightman v. Corporation of Washington*, 1 Black, 39, 17 L. Ed. 52, the question arose whether the city in the maintenance of a bridge within its limits was invested with power over the bridge as a public agent merely, or possessed its powers and was charged with its duties in that regard in its municipal or corporate capacity. The charter of the city provided that the corporation should have the sole control and management of the bridge and should be chargeable with the expense of keeping it in repair. The plaintiff alleged that the city negligently permitted the bridge to become out of repair, and unsafe and dangerous, and that, while he was lawfully passing over the bridge, it broke and gave way and he was injured. The court below instructed the jury to return a verdict for the defendant. On writ of error the city maintained that it was invested with power over the bridge as agent of the public and for public purposes exclusively, and therefore was not liable. The Supreme Court in disposing of this contention said:

"* * * The defendants insist that, being a municipal corporation created by an act of Congress, they are invested with the power over the bridge merely as agents of the public, from public considerations and for public purposes exclusively, and they are not liable for the nonfeasances or misfeasances of the persons necessarily employed by them to accomplish the object for which the power was granted. Municipal corporations undoubtedly are invested with certain powers, which, from their nature, are discretionary, such as the power to adopt regulations or by-laws for the management of their own affairs, or for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen, and for many other useful and important objects within the scope of their charters. Such powers are generally regarded as discretionary, because, in their nature, they are legislative; and although it is the duty of such corporations to carry out the powers so granted and make them beneficial, still it has never been held that an action on the case would lie against the corporation, at the suit of an individual, for the failure on their part to perform such a duty. But the duties arising under such grants are necessarily undefined, and, in many respects, imperfect in their obligation, and they must not be confounded with the burdens imposed, and the consequent responsibilities arising, under another class of powers usually to be found in such charters, where a specific

and clearly-defined duty is enjoined in consideration of the privileges and immunities which the act of incorporation confers and secures. Where such a duty of general interest is enjoined, and it appears, from a view of the several provisions of the charter, that the burden was imposed in consideration of the privileges granted and accepted, and the means to perform the duty are placed at the disposal of the corporation, or are within their control, they are clearly liable to the public if they unreasonably neglect to comply with the requirement of the charter; and it is equally clear, when all the foregoing conditions concur, that, like individuals, they are also liable for injuries to person or property arising from neglect to perform the duty enjoined, or from negligence and unskillfulness in its performance."

The case was accordingly reversed.

The defendant in error cites four cases to support the proposition that in the operation of the bridge the city is engaged in the performance of a purely governmental duty: *Daly, Adm'r, v. New Haven*, 69 Conn. 644, 38 Atl. 397; *Butterfield v. Boston*, 148 Mass. 544, 20 N. E. 113, 2 L. R. A. 447; *Corning v. Saginaw*, 116 Mich. 74, 74 N. W. 307, 40 L. R. A. 526; and *French v. Boston*, 129 Mass. 592, 37 Am. Rep. 393.

French v. Boston was an action for damages alleged to be caused by the detention of plaintiff's schooner by the superintendent of a draw in a bridge. The court held that the duty imposed was a public duty, and therefore held the city not liable. There is no discussion of the question, no recognition of the well-settled distinctions in such cases, and no authorities are cited. The conclusion reached in that case is precisely the opposite of that reached in the case of *Weisenberg v. Winneconne*, supra, while in their facts the cases are practically identical.

Butterfield v. Boston in its facts is much like the case at bar, but the scope of the decision may be seen by the first sentence of the opinion:

"This case was tried upon the second count in the declaration, and the only question before us is whether the defendant is liable by reason of a defect in a highway."

The opinion closes as follows:

"The injury to plaintiff was caused, not by any failure of the city to perform its duty, but, as we have before said, by a momentary negligence of the gateman or draw tender. For this negligence the city is not responsible, and it cannot be indirectly held liable, upon the theory that this negligence created a defect in the street which the city by reasonable diligence might have remedied."

There was no discussion of the question whose servant the draw tender or gateman was, nor in what capacity, governmental or corporate, the city acted in the management and control of the bridge.

Corning v. Saginaw involved a state of facts similar to those in *French v. Boston*, and, like the latter case, cannot be reconciled with *Weisenberg v. Winneconne*.

Daly, Adm'r, v. New Haven is in its facts much like the case at bar, and the court held the city not liable. In the course of the opinion it is said:

"The duty to provide and maintain this bridge as a part of a public highway over the river, and the duty to build, maintain, and operate a suitable draw in the bridge for the benefit of the public highway up and down the river, are public governmental duties"—citing several Connecticut cases and *French v. Boston*, *Butterfield v. Boston*, and *McDougall v. City of Salem*, 110 Mass. 21.

McDougall v. Salem was an action by one of the crew of a schooner, who received injuries while attempting to pass through a draw, by reason of the insufficiency of the draw. The court held that by the action of the county commissioners, under a certain statute, the bridge became a part of the highway, that the statute only required the city to keep the bridge safe for travelers on the highway, that the plaintiff was not such a traveler, and there could be no recovery. This case, like *French v. Boston* and *Corning v. Saginaw*, cannot be reconciled with *Weisenberg v. Winneconne*. So far as the Connecticut cases cited in *Daly v. New Haven* are concerned, it may be observed that the United States District Court for the District of Connecticut, in *Greenwood v. Westport*, 60 Fed. 560, after an exhaustive review of the decisions of that state and elsewhere, held, in a case which in its facts was like the case of *Weisenberg v. Winneconne*, that "the operating of a draw in a drawbridge was a mere private corporate duty."

In our opinion the duty to maintain, support, and attend the Grand Avenue Bridge in Milwaukee is not a governmental, but a corporate, duty, that the negligence of the bridge tender is the negligence of the city, and that the doctrine of *respondeat superior* applies.

GROSSCUP, Circuit Judge (concurring). I assume that in Wisconsin, following the New England group of states holding the same way, neither town, village nor city is liable for the negligence of its officers having in charge the "maintenance and repair of highways"; that such officers, though appointed by the town, village or city, as "to the maintenance and repair of highways," are the officers and agents, not of the municipality, but of the state; the municipality to that extent, performing a state governmental function.

I assume also that in determining whether this rule is applicable to the facts of any case arising in Wisconsin, not before adjudicated by the Wisconsin courts, the general trend of the Wisconsin cases—the way in which the Supreme Court of Wisconsin in cases of this kind has been facing—must be kept in mind and followed.

It is admitted, however, that the precise case now being considered has never been decided by the Supreme Court of Wisconsin. The question it presents, therefore, is an open one, even according to the Wisconsin law, and must be dealt with as such by this court in its effort to find out what the law on the subject is.

That question is this: The city being under duty to operate a bascule bridge across a stream made navigable by the laws of the United States, and having appointed a bridge tender to attend to such operation—all needful guards, railings and other means of warning travelers having been provided also, to prevent a traveler from going upon the bascule when it is in operation—is the city

liable to such traveler, who, through the negligence of the bridge tender has been led to go upon the bascule when in operation, and has received injuries therefrom? The question may, according to my view, be answered in the following propositions:

1. The operation of a draw or bascule is in no sense, in the contemplation of the Wisconsin law, within the meaning of what is meant by the phrase "the maintenance and repair of highways." The bridge at rest may be a part of the highway, so that for injuries through defects, say in a plank, there might be no recovery from the city. But the process of turning this bridge around, or lifting it up, so that the highway is for the time interrupted, and the process of restoring the highway from this interruption, is a special service arising out of the discharge of a special duty, not contained or contemplated in the ordinary duty of maintaining and repairing highways. To hold otherwise, would be to extend unwarrantably, it seems to me, that plain and well established subdivision of the law.

2. Where in the performance of such a special service, an agent is employed by the city, the city must respond for the negligence of the agent to him who, being at the time and place in the exercise of his own rights, and without contributory negligence, has received injuries as the result of such negligence, even though the injured person be a traveler on the highway.

3. The liability of the city in this respect does not grow out of special statute. It is a liability that grows out of the general law in Wisconsin, and is based upon the general principle that where it is the special duty of a city, as a city, to do a given thing, and it is engaged in the attempted performance of that duty through an agent, the city must respond for the negligence of the agent.

These propositions, it seems to me, are inherent in the principles on which the Wisconsin cases, approximating this case, have been decided. In *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565, the city was held liable for the negligence of its agent in the construction of the walls of a cistern whereby the plaintiff was injured, the court holding that it being the special duty of the city, as a city, to construct cisterns for fire purposes, and the city being engaged in the attempted performance of this duty through its own private agencies, the case was the common one of special employment for the performance of special service, for and on behalf of the city. The mere fact that the cistern was for the use of the fire department, was held not to make its construction a performance by the city of its duty under the governmental power to maintain a fire department; nor the fact that without such cisterns the governmental fire department would be practically useless; nor would the fact, I take it, that men otherwise connected with the fire department may have been employed to do this special service, have made the case a different one. The governmental function of the city, as to its fire department, is to put out fires. With the putting out of the fires, and the ordinary care-taking of the means through which that work is done, the governmental function begins and ends. What goes before, and what follows, though related to the putting out of

fires, and essential to the fire equipment, is to be regarded as a special service in whose performance the city, like any one else, is to be held responsible for the negligence of its agents. Note this then, the point of the case cited: That though the city be not liable for the way its officers perform the duty commonly known as fire protection, that exemption from liability begins and ends just where the duty of the fire department begins and ends—is not to be extended to any other performance of duty by the city, even though such performance may contribute to the means wherewith it performs its governmental duty. In other words, the Wisconsin court is not extending, as the case cited shows, the exemption of a duty beyond the plain, well defined class of governmental functions upon which the New England doctrine was built up.

In *Weisenberg v. Winneconne*, 56 Wis. 667, 14 N. W. 871, the city was held for the negligence of the bridge tender in not opening the draw in time to prevent collision with a vessel, whereby a traveler on the river vessel received injuries. Now the bridge was not in that case an obstruction, in law, of the river highway. The bridge was permitted, under the law; and was constructed in accordance with the law giving such permission. The fault of the city on which recovery was based, was not that the bridge, as constructed, was an unlawful obstruction, but that the draw, as negligently operated, made it for the time being, an obstruction resulting in injury to the traveler. The law contemplated that the bridge should be there just as it was, a part of the highway for travelers on land. The law contemplated also that the river should be there, just as it was, a highway for travelers on the river. But to the end that these two highways should be placed with reference to each other—so interlocked—that when one was in use, the other would not be open for use, the draw was interpolated, with a bridge tender to operate it; and because the operation of the draw was no part of the maintenance and repair of the highway, but was a special service that alternately opened and closed two intersecting highways, the rule applied to lack of "maintenance and repair" cases was not applied. Of course the decision related, in terms, only to the traveler by river. But I can see no reason why it should not apply, in principle, to the traveler on land as well—the point of the case being that the bridge tender was not an officer of the city, within the governmental duty of the city, to maintain and repair the highways, but a special servant to perform this special service, growing out of the intersection of the two highways, and the duty of the city, as a city, to so interlock them that both could be operated with safety.

Stephani v. Manitowoc, 89 Wis. 467, 62 N. W. 176, goes nearly to the extent of governing the case under consideration. Logically it discloses, I think, the principle that governs this case. The injury in that case was to a traveler on the land highway, falling into an open draw. The negligence for which the city was made responsible, was in not providing a guard, bar, or light, whereby the traveler would have been warned of the danger that an open draw presents. Now as to this traveler on the land highway, had it been the city's

duty, as a mere governmental division of the state performing a governmental function, to provide a bar, guard or light, that the traveler might not fall into the draw, the court would have been compelled to place the case among other cases relating to maintenance and repair of the highways, and have thus exempted the city from liability. But the court did not take that view. It held the city liable. And it could only have done this upon the principle that whatever might have been the ruling had the break in the continuity of the street been caused, say by some casual flood cutting through the highway, (though I am aware of no such case), the duty of safe guarding an open draw across the river, is a thing so different that, logically, it takes the draw bridge and its operation out of the rules that govern liability for lack of maintenance and repair of highways. And this being thus decided, the whole doctrine of immunity of cities under the Wisconsin law, from the consequences of negligence connected with the maintenance and repair of streets, stops short of the operation of a draw across a navigable stream, and the warning to be given travelers in that connection.

Indeed, I cannot discern upon what reasoning the law could hold the city liable to a traveler upon the river, under the doctrine of respondeat superior, and not hold it liable for the same character of negligence to a traveler on the land; or how it could hold the city liable to a traveler on land, for negligence in not providing a guard or warning lights, and not hold it liable, under the doctrine of respondeat superior, for the negligence of its agent in not using such guard or lights, after they were provided. An affirmance of the judgment below, it seems to me, would throw the whole law as already declared by the Supreme Court of Wisconsin, into disorder.

BAKER, Circuit Judge (dissenting). In addition to the averments recited in the statement of the case, the plaintiff alleged that the defendant "had not supplied or put in use any guards or warnings at the said approach to said bridge, but had left the approach from said Grand avenue to the bridge above described unguarded, unsafe and dangerous for pedestrians who desired to cross," and that on October 15, 1903, he served upon the city clerk a notice of the time, place and nature of his injury. At the argument plaintiff's counsel admitted that, inasmuch as the notice was not served within the time prescribed in the statute, no cause of action within section 1339, Rev. St. Wis., was stated in the complaint. Did the Circuit Court err in holding that, by the law of Wisconsin, no liability independent of the statute was shown?

The states are divided into two groups with antipodal views of the nature of the duty and resulting liability of a city in respect to the care of highways and bridges within its limits. The "general group" holds that the highways and bridges are the city's, and that the city is liable for negligence the same as a private corporation. This conclusion is sometimes based on the ground that the state has given the control to the city for its private advantage in "improving the territory within its limits" and in "adapting the territory to the pur-

poses of business and residence"; sometimes on the ground that the city, being a "voluntary" corporation as distinguished from the "involuntary" county and township corporations, and having sought charter advantages, will be held to have agreed to respond for negligence towards travelers, though the "involuntary" corporations are exempt. The theory of the "New England group," in holding that the city need not respond to travelers for the negligence of its highway and bridge officers in the absence of a statute expressly creating liability, is that all the highways and bridges are the state's; that the city, like the county, like the town (the township of the other group), is merely an agency of the state in performing the governmental service of caring for the public ways; that, though the city or county or town highway or bridge officers are servants of the city or county or town, the superior need not respond because the superior is an instrumentality of the state in this respect and no more liable to suit without leave than the state itself. This contrariety of view may have its roots in the differences between the Virginia "county" and the New England "town" governments in the old colonial days.

When a traveler asserts a city's liability for a negligent act or omission of a highway or bridge officer, the answer must be made according to the local law. Under no circumstances can the question become one of general law. Even in the absence of a statutory provision concerning the extent and conditions of liability, the question is bound to turn upon the construction of the local statutes which impose highway and bridge duties upon the cities. "It is purely local in its significance and extent. It involves simply a consideration of the powers and liabilities granted and imposed by legislative action upon cities within the state." *Detroit v. Osborne*, 135 U. S. 492, 498, 10 Sup. Ct. 1012, 34 L. Ed. 260.

Wisconsin transplanted the Massachusetts statutory scheme. *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553. Chapter 16, Rev. St. Wis. 1849, detailed the system of "Highways and Bridges." Upon municipalities, towns (townships), counties, villages and cities, the duty was laid alike as creatures of the state. For failure of duty to keep the highways and bridges open and safe for travel, section 103 of the chapter created an express liability. Section 109 required that "The provisions of this chapter relating to highways and bridges shall be construed to extend to all parts of the state, except where special provisions, inconsistent therewith, have been or shall be made by law in relation to particular towns, counties, cities or villages." The system continues in force. Rev. St. Wis. 1898, c. 52, §§ 1339, 1347.

This general scheme of duty and liability, cast by the state upon all her municipalities alike, with no distinction and no basis for distinction between "voluntary" and "involuntary" (for a city charter is not a contract, but governmental regulation, changeable at the will of the Legislature—*Washburn v. Oshkosh*, 60 Wis. 453, 19 N. W. 364), applies to Milwaukee. *Kittredge v. Milwaukee*, 26 Wis. 46; *Harper v. Milwaukee*, 30 Wis. 365; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553. The sections of the charter relating to the Grand Avenue Bridge are not in conflict, but entirely harmonious, with

the pre-existent duty. They merely direct how the subsisting duty shall be performed at the specific place, with no legislative attempt at increase or diminution of liability. Indeed, it has been ruled that a charter exemption, violative of the general scheme of highway duty and liability, is unconstitutional. *Hincks v. Milwaukee*, 46 Wis. 559, 1 N. W. 230, 32 Am. Rep. 735.

That Wisconsin should look to Massachusetts for interpretation of adopted legislation would naturally be expected. Section 103, c. 16, Rev. St. 1849, created liability without limitation of amount or condition of giving notice. *Milwaukee v. Davis*, 6 Wis. 377, decided in 1857, relied on by plaintiff to prove a liability independent of statute, holds the city answerable for negligence of highway officers without mentioning the statute, but in support of the ruling cites New England cases which show the liability to be purely statutory. After section 103 was amended (in line with New England statutes) by adding conditions and limitations, cases arose in which the conditions were combated, and the Wisconsin Supreme Court expressly ruled that the liability was wholly statutory and could therefore be cut down or taken away by the Legislature at will. *Stilling v. Thorp*, 54 Wis. 528, 11 N. W. 906, 41 Am. Rep. 60; *Harper v. Milwaukee*, 30 Wis. 365; *McLimans v. Lancaster*, 63 Wis. 596, 23 N. W. 689; *Sowle v. Tomah*, 81 Wis. 349, 51 N. W. 571; *Reed v. Madison*, 83 Wis. 171, 53 N. W. 547, 17 L. R. A. 733; *Daniels v. Racine*, 98 Wis. 649, 74 N. W. 553. In *Reed v. Madison*, the court, after holding that municipal liability for negligence of highway officers was wholly statutory and that even that liability was available only to travelers, considered a question which had not theretofore arisen in Wisconsin, whether recovery could be had by a child who was using the street for travel and at the same time for play. "This court, having followed Massachusetts in respect to other questions of statutory liability, may well accept the decisions of that state as sufficient authority on this question also." In *Stephani v. Manitowoc*, 89 Wis. 467, 62 N. W. 176, plaintiff's intestate fell into an open draw. Liability under section 1339 was upheld on account of failure to provide barriers and lights. Counsel for the city, among other contentions, claimed that the alleged cause of action was based on the negligence of the bridge tender and that there was no liability because such a case was not within the section. Answering this claim, the court said:

"If the city had provided suitable barriers and lights, and the bridge tender had omitted to use them, that would be a different case. It would be the case which the defendant argues. It would be like the question decided in *Butterfield v. Boston*, 148 Mass. 544, 20 N. E. 113, 2 L. R. A. 447, which would be a strong authority if applicable."

Wisconsin was free to join either of the opposing groups. With which she has allied herself seems unmistakable. What, then, is the duty of this court? To put ourselves in the Wisconsin atmosphere; to view the case from Wisconsin's attitude; to accept the premises, the arguments, the conclusions, the exclusions, of the Wisconsin court as indicating the Wisconsin law; for only the accident of

citizenship enabled plaintiff to come into the federal court with this question of local law.

The two doctrines start off facing in opposite directions. The "general group" furnishes no exact precedent on the facts of this case. The "New England group" does. If the question, as one of "case law," be taken as 10 miles from the parting of the ways, the "New England group" has traveled the whole distance, except that Wisconsin has gone only 9 as yet. To determine the direction of the next step Wisconsin would take, it is a wrong method to travel the 9 miles which the "general group" has gone in the opposite direction, infer what that group would do, and then drag Wisconsin 18 miles to take that step.

Since this record, like a patent case, must be read in the light of the particular art, no progress is made by pointing out the correspondences between the two groups in respect to the abstract propositions that a city is liable for private acts and is not for governmental, and the concrete instances of liability for proprietary acts and nonliability for acts of fire or police or health officers; for the split is not there. In *Maximilian v. Mayor*, 62 N. Y. 160, 20 Am. Rep. 468, the city was held not liable for the negligence of a city ambulance officer, on the ground that the service was for the public generally and not primarily for the city. The case would read as well for a street or bridge officer, if the New York statutes were construed to cast on cities the duty of caring for streets and bridges in the interest of the whole people and not in the private interest of the city. *Oliver v. Worcester*, 102 Mass. 489, 3 Am. Rep. 485, is an instance of the "New England group's" holding a city liable as a private proprietor. It does not touch the highway question. In *Weightman v. Washington*, 1 Black, 39, 17 L. Ed. 52, the Supreme Court sat as a local court for the District of Columbia, and construed local legislation along the theory of the "general group."

The particular art herein involved being the construction of Wisconsin's statutory scheme of highway and bridge duty and liability, it is a wrong method to take Wisconsin nonhighway and nonbridge decisions and from them attempt to prove that the Wisconsin Supreme Court logically should, and therefore probably would, hold that Milwaukee maintained and operated the drawbridge for its private benefit and advantage. And the attempt seems abortive.

In *Durkee v. Kenosha*, 59 Wis. 123, 17 N. W. 677, 48 Am. Rep. 480, the city was made to respond for the seizure of Durkee's goods under a void special assessment for the opening of a street. The officers acted under color of authority. The superior was liable because in truth the superior had no authority to take the property without due process of law.

To Nicolai's complaint against the town of Vernon and highway officers, who were about to include a part of his land within a highway (88 Wis. 551, 60 N. W. 999), the town demurred on the ground that it was not a proper party defendant. The officers in good faith attempted to act as officers of the town upon which was cast the duty of caring for the highway. The town was therefore enjoined from invading private property without right.

Little v. Madison, 42 Wis. 643, 24 Am. Rep. 435, involves the same

principle. The city licensed a bear show to be held in the streets. No authority; but there was color, by reason of the general power to license shows at proper places.

The nonapplicability of such decisions to a case of a highway officer's negligent performance of an imposed duty to travelers is quite obvious. The city, through its officer, in keeping the highway open and safe for travel, is performing a service for the sovereign (according to the theory of the "New England group"), and is not answerable in the absence of a statute creating liability. In doing acts not authorized by the sovereign, the city, of course, cannot plead the sovereign's exemption from suit. The court, in *Ziegler v. West Bend*, 102 Wis. 17, 78 N. W. 164, said:

"That rule applies only to the doing of something which the city has no right to do, rendering a street or highway dangerous for public travel, not to a failure to do properly what a city has a right to do."

And in *Bunker v. Hudson*, 122 Wis. 43, 99 N. W. 448:

"In grading the street the city was doing one of the things which, as a municipal corporation, it was authorized to do. That work was done in an improper or negligent manner, so as to invade (which it had no right to do) the rights of the plaintiffs, not as members of the public, but as adjoining proprietors. Towards them the city's act was not governmental, but proprietary."

Towards travelers on the highway, the same acts of the same officers would be public or governmental, and not private or proprietary.

In *Weisenberg v. Winneconne*, 56 Wis. 667, 14 N. W. 871, the injury resulted from the failure of the village's agents to open the draw in a bridge maintained by the village over Wolf river, a navigable waterway, whereby the vessel on which the injured person was traveling collided with the bridge. The court declared that the village's liability rested "upon the plainest of elementary principles." The complaint was bottomed on the charge that the village "obstructed the river and neglected to remove the obstruction." The village was granted by the state the right to maintain the bridge only on the condition that the draw should be opened "when the river at this point should be required for the navigation of vessels." "When this duty was neglected, then the bridge became and was a complete obstruction to the navigation of the river." These facts support a "straight common-law action," or one based on "section 1598, Rev. St. Wis. 1898" (which makes any obstructor of navigation liable for damages), or one, it may be added, founded on the admiralty jurisdiction of the United States. These are the fundamental principles on which the court predicated the village's liability. Of course, the question whether the village, in obstructing navigation, was entitled to plead the sovereign's exemption, was not raised or discussed by the court, for the very good reason that the state could not grant the exemption. This results from the difference in the state's relation to landways and waterways. Respecting landways, the United States may build and control a road through a state; but the roads built by the sovereign people within a state are the state's highways. The parts thereof within cities the state may require to be maintained by the cities. Wis-

consin had the right to adopt the plan by which the service is governmental and the cities are clothed with the state's exemption. Respecting waterways, Wisconsin had no such power. Over the navigable waters of the United States the several states by the Constitution (and Wisconsin as well by the Ordinance of 1787) have made the federal government the ultimate sovereign. The sovereignty has been exercised by taking jurisdiction of drawbridges and by declaring it to be unlawful to obstruct navigation by failure to open draws. Act July 5, 1884, c. 229, § 8, 23 Stat. 148 [U. S. Comp. St. 1901, p. 3532]; Act Aug. 18, 1894, c. 299, § 5, 28 Stat. 362 [U. S. Comp. St. 1901, p. 3538]; Act March 3, 1899, c. 425, § 17, 30 Stat. 1153 [U. S. Comp. St. 1901, p. 3534]. No obstructor of navigation, whether an individual, a business corporation, or a city, can rightfully plead a local statute or charter as a defense. And if a local court should deny a waterway traveler his rights under the paramount law, the federal courts, when properly invoked, will disregard the local decisions (*Workmen v. New York*, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314; *Greenwood v. Westport* [D. C.] 60 Fed. 560), though in respect to a landway traveler's rights the duty of the federal courts is to apply the local law (*Detroit v. Osborne*, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260). The Wisconsin Supreme Court reached its conclusion not merely by putting the common law of the state in line with the general maritime law, but also by calling attention to the fact that the Legislature had expressly declared a liability for obstructing navigation by failure to open the draw. And in order that this decision of a waterway case might not be confounded with Wisconsin's landway doctrine, the court said:

"The only *highway* [the italics are the court's] in question in this case is this navigable river, and the liability of towns in respect to roads and bridges is not involved, for the deceased was not seeking to use the bridge for the purpose of travel, and it is complained of only as an obstruction to navigation."

Thus the court in effect has declared that the only similarity between that case and this consists in the fact that in each there is a drawbridge, and that in principle they are as different as if Winneconne through her officer had obstructed navigation by dumping rocks into the river.

The conclusion that the Winneconne Case proves that the rule of respondeat superior applies to this controversy involves a further error than the rejection of the premises, the reasoning, the spirit and scope, of the decision as rendered by the Wisconsin Supreme Court. Because Winneconne was held liable to Weisenberg for the negligence of a bridge tender, it is assumed that a city would therefore be liable to any one who was injured through the negligence of a bridge tender, no matter what was the measure of duty owing by the city to the injured party. That in Wisconsin a city may be answerable for the acts of its highway officers to one injured person, and for the same acts of the same officers not to another, is clear. Liability depends on the nature of the right that can be asserted by the plaintiff, that right being the correlative of the duty owing to him by the city. For example: Highway officers in grading a highway negligently obstruct

a gutter, so that water flows over the sidewalk and into adjoining cellars. The water freezes and makes the walk dangerous, to the knowledge of the officers. The city is liable to any adjoining proprietor independently of statute, because it had no right to invade private property; not liable to a traveler on the highway independently of statute, because the officers were doing, though negligently, what they were authorized to do for the city on behalf of all public travelers; not liable, even under the statute, to one who uses the walk merely for skating, because to him no duty has been cast upon the city.

The irrelevancy of *Mulcairns v. Janesville*, 67 Wis. 24, 29 N. W. 565, is pointed out by the Wisconsin Supreme Court. The city claimed exemption on the ground that, in building the cistern it was performing, through officers appointed for that purpose, a governmental function. But the evidence was otherwise. The city specially employed a mason to manage the construction. "The distinction between the two cases is very wide and quite apparent. * * * It was the legal duty of the city to construct cisterns for fire purposes, and it was engaged in the attempted performance of this duty through its own private agencies, and not through the fire department or its officers, or other officers of the city whose duty it was to perform such work."

The supposition that *Stephani v. Manitowoc*, 89 Wis. 467, 62 N. W. 176, proves that a drawbridge is not ruled by the Wisconsin highway doctrine, discloses a misapprehension. It was because the failure to provide barriers and lights at the draw was a failure to maintain the highway in a safe condition for travel that the city was held liable. And that liability was predicated, not at all on the theory that the maintenance and operation of a drawbridge is a special, private function of a city, or on the fancy that a drawbridge is not a bridge, but on the statute, which creates the liability for failure to perform properly the governmental function. If the negligence in that case is of the same character as in the present one, the plaintiff here would be defeated by his failure to give the statutory notice.

Naumburg counts only on the duty Milwaukee owes to travelers of highways. Bridges, so far as land travelers are concerned, are merely parts of highways. Draws, as to them, are merely parts of bridges. Draws are put in, not in aid of navigation, but solely in aid of land travel and as a condition of maintaining bridges over navigable waters at all. Operation of draws requires bridge tenders. Milwaukee's charter makes bridge tenders city officers as clearly as it does firemen and policemen. Maintenance and operation are put upon Milwaukee in equal terms, without distinction of duty and liability. Indeed, operation is necessarily a part of the duty of maintaining the highway. On the basis, then, that the bridge tender was a highway officer whose duty was imposed in the interest of the general public, of which Naumburg was one, there is no reason to doubt what the Wisconsin Supreme Court, unless it should reverse a half century's unbroken trend, would do with this question of local law.

The judgment of the Circuit Court will be reversed, and the cause remanded, with directions to overrule the demurrer to the complaint.

LINDBLOM v. ROCKS.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,248.

1. ABANDONMENT—QUESTION FOR JURY.

In ejectment to recover a town lot located by plaintiff on a part of the public domain, evidence *held* to require submission of the question whether plaintiff had intended to abandon the property, to the jury.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abandonment, § 10.]

2. TRIAL—INSTRUCTIONS.

Where, in ejectment to recover a town lot located on the public domain, the court in another instruction charged with reference to defenses other than abandonment, an instruction that defendant was required by a preponderance of the evidence to establish plaintiff's abandonment set up as a defense to entitle him to a verdict, and if he did not so prove, the jury should find for plaintiff, was not erroneous, as withdrawing the other defenses from the jury.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, §§ 613, 614.]

3. VENDOR AND PURCHASER—BONA FIDE PURCHASER—RIGHT TO DEFENSE.

Where defendant's grantor had no title nor right of possession to the land in controversy at the time he attempted to sell such right of possession to defendant, defendant acquired no title to the subject-matter of his purchase, and could not therefore, avail himself of the defense of a bona fide purchaser for value.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, § 462.]

4. ABANDONMENT—BURDEN OF PROOF.

Where, in ejectment to recover possession of a town lot located by plaintiff on the public domain, defendant relied on the words of a former possessor to show an intention on plaintiff's part to abandon the property, the burden of proof was properly placed on defendant to prove that the words were spoken and that there was an actual abandonment.

5. EJECTMENT—PLEADING—ISSUES AND PROOF.

Where, in ejectment to recover a town lot located on the public domain, the answer alleged that prior to the time defendant purchased the lot, plaintiff had long since abandoned any claim she had made thereto, such pleading was insufficient to present the issue that plaintiff's failure to sue to recover the land until four years after her return from an absence from the country was itself sufficient to show abandonment.

6. ABANDONMENT—INTENT—EVIDENCE.

Where immediately on plaintiff's return to Alaska, she asserted claim to a town lot which she had previously located, and which was then in the possession of others, her failure to sue to recover possession for four years after her return did not of itself constitute an abandonment, but was competent only in connection with other facts as showing her intent to abandon.

7. SAME.

Where, in ejectment to recover possession of a town lot located by plaintiff in Alaska on the public domain, the only abandonment pleaded was one made long prior to defendant's purchase, and the only evidence of abandonment was that plaintiff had left Alaska, and of her declarations to her agent, an instruction that if she left the property in 1899 under circumstances, as shown by her acts and declarations, such as evidenced no intention to retain the property, then there was an abandonment; but, if she left it under such circumstances as showed an intention to retain it, then there was no abandonment, was not objectionable, as limiting plaintiff's intention to abandon to the time when she left the property.

In Error to the District Court of the United States for the Second Division of the District of Alaska.

The plaintiff in error was the defendant in an action brought by the defendant in error to recover the possession of a town lot in the city of Nome, Alaska, and for damages for the wrongful withholding of the possession thereof. In her complaint the defendant in error alleged that her estate in the premises was an estate in fee simple, except for the paramount title of the United States, being a legal right to the exclusive possession, use and enjoyment of said premises; that on or about August 12, 1899, while said land was still a part of the vacant, unoccupied, and unappropriated lands of the United States and open for location and occupation, she, being a citizen of the United States over the age of 21 years, peaceably and lawfully entered upon and took possession of said premises and continued to occupy the same until on or about the 1st day of May, 1900, when she was ousted by the defendant. The answer, after denying the material allegations of the complaint, alleged as a first separate defense that on November 22, 1899, the lot was vacant and unoccupied government land, and on that date Fred Tronsen entered and located the same as a town lot and built a house thereon, that on May 2, 1900, he with one J. A. Westby who had acquired an interest therein, conveyed the same to J. H. Lampe; that afterwards on May 14, 1900, J. H. Lampe for a consideration of \$1,500, sold and conveyed the same to the plaintiff in error. For a second separate defense the answer alleged that on or about May 14, 1900, the plaintiff in error found one J. H. Lampe in the peaceable and exclusive possession of said lot, claiming to hold and own the same as a town lot; that said Lampe had constructed on said lot a dwelling house, and that he and his grantors and predecessors in interest had held, possessed, occupied, and used the same ever since it was vacant and unoccupied public lands of the United States; that the plaintiff in error in good faith purchased said lot from said Lampe and paid therefor \$1,500; and that the plaintiff in error was entirely ignorant of any claim to said lot by the defendant in error, and did cause due and diligent inquiry to be made to ascertain if any person other than said Lampe had or made any claim to the said lot; that in the months of July and August, 1900, in good faith, and at the expense of more than \$1,000, the plaintiff in error built and constructed a dwelling house on said lot without any knowledge of any claim to the said lot by the defendant in error, and that the defendant in error never did until long subsequent to the building and completion of said dwelling house notify the plaintiff in error of her said claim to said property or make any claim to said property. For a third separate defense the plaintiff in error, after alleging the facts set forth in the second separate defense, averred that, prior to the time when he purchased the said lot from Lampe, the defendant in error had long since abandoned any claim she theretofore had or made to said lot or any part thereof. Upon the issues so raised, the cause was tried before a jury, and a verdict was returned in favor of the defendant in error, and a judgment was rendered adjudging her to be entitled to the possession of said premises and to damages in the sum of \$1,250 for the wrongful detention of the same.

J. C. Campbell, W. H. Metson, F. C. Drew, C. H. Oatman, and Ira D. Orton, for plaintiff in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

We find no merit in the contention that the trial court should have instructed the jury to return a verdict for the plaintiff in error. The evidence was not disputed that the defendant in error arrived in Nome, July 14, 1899, and that on August 12th of that year she staked the lot

in question and placed a location notice thereon, and that thereafter she dug a ditch around the lot, put a fence around it, and put up thereon a tent with a board floor and frame, and that she lived on the lot until November 1, 1899, when she left Nome for the States. She testified that she left the lot in charge of Capt. Tronsen, who lived near by, and also asked a friend, a Mrs. Rauna, to watch the lot for her; that she left in the tent personal property, consisting of a bed, bedding, stove, cooking utensils, chairs, and a table, all in charge of Capt. Tronsen, who promised to look after them until she returned the following spring; that she said to him: "All these things I leave here to hold my lot"; that on June 14, 1900, at the opening of navigation, she returned to Nome, went to her lot and found it occupied, and found that it had been sold to others. She testified that she did all that she could in the summer of 1900 to regain possession of her lot; that there were four persons who said that they owned the lot; that in November of that year she brought suit against one of them, and recovered a judgment; that the plaintiff in error told her that he had nothing to do with the lot and to look to Lampe; that Lampe told her he had a lawyer and was going to fight; that both Lampe and the plaintiff in error refused to do anything about it; that in 1901 she was ill and had to leave Nome; that she came back in 1903 and was, and for a long time remained, sick. The only testimony in the record tending to show that the defendant in error intended to abandon her property when she left it in the fall of 1899, is that of Capt. Tronsen who said that when she went away, she told him that if he wanted the lot he could take it. In view of the admissions made by Capt. Tronsen on his cross-examination, it is not surprising that the jury discredited his testimony and found for the defendant in error. But whether his testimony was true or false, there was clearly sufficient evidence to go to the jury to sustain the claim of the defendant in error to the right of possession of the property, and, if credited, to negative the contention that she at any time abandoned or intended to abandon it.

It is assigned as error that the court, after instructing the jury that the plaintiff in the action must establish by a preponderance of the evidence each of the allegations of her complaint, and that otherwise the verdict should be for the defendant, proceeded to charge as follows:

"On the other hand the defendant must, by a preponderance of the evidence in the case, establish the abandonment set up as a defense to entitle him to your verdict. If he do not so prove an abandonment, your verdict should be for plaintiff."

It is urged against this instruction that it gave the plaintiff in error the benefit only of the defense of abandonment, and that it excluded consideration of his other defenses. It is evident, however, from reading the instruction which is complained of, that it was directed solely to the particular defense of abandonment, and the jury must have so understood, for the court elsewhere fully instructed them that if they believed from the evidence that Lampe found Tronsen in the quiet, peaceable, and exclusive possession of the lot, residing

thereon, and claiming to own the same, and that Lampe in good faith, having made such reasonable inquiries as a prudent man would do under like circumstances, and obtaining no information or notice of plaintiff's claim, purchased said lot from Tronsen and his co-owner, and paid a valuable consideration therefor, and thereafter Lampe for a valuable consideration sold and conveyed the lot to the defendant, who purchased the same in like good faith after like reasonable inquiry, and without any notice of plaintiff's rights or claims, the verdict should be for the defendant. The plaintiff in error was thus given the benefit of his other defenses. This is a sufficient answer to the contention. But there is another answer, and that is that the facts set forth in the other defenses would, if true, constitute no defense to the cause of action alleged in the complaint. They do not show that the plaintiff in error was an innocent purchaser of the right of possession of the property. In order to obtain protection on the ground that he is an innocent purchaser for value and without notice a purchaser must have acquired title to the subject-matter of his purchase. *Young v. Schofield*, 132 Mo. 660, 34 S. W. 497; *Wells v. Walker*, 29 Ga. 450; *In Vattier v. Hinde*, 7 Pet. (U. S.) 270, 8 L. Ed. 675. Chief Justice Marshall said that the rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. In *Sampeyreac v. United States*, 7 Pet. (U. S.) 222-241, 8 L. Ed. 665, it was said that a grantor can convey no more than he possesses. Lampe, from whom the plaintiff in error purchased, was in no better position to convey the right of possession than if he had held under a forged deed. The doctrine of bona fide purchaser without notice does not apply where the purchaser buys no title at all. His good faith cannot create title. *Dodge v. Briggs* (C. C.) 27 Fed. 160, 166; *Texas Lumber Mfg. Co. v. Branch*, 60 Fed. 201, 8 C. C. A. 562. In addition to this both Lampe and the plaintiff in error held under quitclaim deeds. It is the general rule, that the grantee in a quitclaim deed is a purchaser with notice, and that he takes only the interest of his grantor in the premises. *May v. Le Claire*, 11 Wall. (U. S.) 217, 20 L. Ed. 50; *Villa v. Rodriguez*, 12 Wall. (U. S.) 323, 20 L. Ed. 406; *Baker v. Humphrey*, 101 U. S. 494, 25 L. Ed. 1065; *Runyon v. Smith* (C. C.) 18 Fed. 579; *Dodge v. Briggs* (C. C.) 27 Fed. 167; *Gest v. Packwood* (C. C.) 34 Fed. 368; *Baker v. Woodward*, 12 Or. 3, 16 Pac. 173; *American Mortgage Co. v. Hutchinson*, 19 Or. 334, 24 Pac. 515; *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678.

It is urged that the court erred in instructing the jury that the burden of proof on the issue of abandonment was upon him who alleged abandonment. The plaintiff in error cites *Sabariago v. Maverick*, 124 U. S. 261-300, 8 Sup. Ct. 461-482, 31 L. Ed. 430, in which the court said:

"It follows that in cases where the proof on the part of the plaintiff does not show a possession continuous until actual dispossession by the defendant or those under whom he claims, the burden of proof is upon the plaintiff to show that his prior possession has not been abandoned."

The language so used was applied to the particular facts in the case then before the court, and it expresses the doctrine that if the plaintiff's possession is not continuous until actual dispossession by the defendant or those under whom he claims, the burden of proof to rebut the presumption of abandonment is placed upon the plaintiff. But, in the present case, the proof was, and there was no evidence to contradict it, that the possession of the defendant in error was continuous up to the time of her dispossession by Tronsen. Abandonment consists in the intention to abandon and the external act by which the intention is carried into effect. *Stevens v. Norfolk*, 42 Conn. 377; *Livermore v. White*, 74 Me. 452, 43 Am. Rep. 600. According to all the testimony the defendant in error was in possession up to the time when she left Nome, and she testified that she then placed Tronsen in possession as her agent. It is not shown that there was at any time when the premises were unoccupied. The evidence of abandonment upon which the plaintiff in error relied was Tronsen's testimony that when she left Nome the defendant in error said to him: "You can take the lot," and that two or three weeks later he concluded to take up her offer and took possession. In brief, the whole proof of the purpose of the defendant in error to leave the property without the intention to return consists in the words which she is said to have uttered to Tronsen and the fact that she went away from Nome. It is too plain to require discussion that where a defendant in such an action as this, relies upon the words of the former possessor to show an intention to abandon, the burden of proof is upon him to prove that the words were spoken, and that in the absence of facts sufficient to shift the burden of proof, it must always rest upon him who asserts the abandonment. 1 Cyc. 7; *Tayon v. Ladew*, 33 Mo. 205. This is not a case such as *Sabariego v. Maverick*, in which the premises were left unoccupied and possession was not demanded by the former possessor for so long a period as to require proof that he did not intend to abandon. In this connection the plaintiff in error argues that the fact that the present action was not commenced until four years after the return of the plaintiff in error to Nome is in itself sufficient to show abandonment. To this there are two answers: First, that such is not the abandonment which is pleaded. The answer alleges that prior to the time when the plaintiff in error purchased the lot, the defendant in error had long since abandoned any claim she had made thereto. Second, it is shown by the evidence and it is not disputed that immediately on her return to Nome and her discovery that she had been deprived of the possession the defendant in error demanded the possession of and asserted her claim to the lot, and that she never admitted any right in the plaintiff in error. The case does not come within the rule of such cases as *Whitney v. Wright*, 15 Wend. (N. Y.) 172, which was approved in *Sabariego v. Maverick*. In *Whitney v. Wright* the court held that the omission by the first possessor to bring an action against the disseisor claiming a title adverse for a period of 13 years, with knowledge of the adverse entry and the continuous possession under it, would authorize a jury to find an abandonment by the prior possessor; but in that case the plaintiff was

aware that his tenant had abandoned the premises and that thereafter the possession had passed into adverse hands. Without any excuse for the omission, he neglected for 13 years "to assert his right in any manner whatever." In the present case the defendant in error asserted her right, but omitted for a period of four years to bring her action. The most that can be said of her delay in bringing her action is that it might be taken into consideration in connection with other circumstances to throw light upon her intention. *Sweeney v. Reilly*, 42 Cal. 402-408.

The plaintiff in error assigns as error the following instruction:

"If she left the property in 1899 under circumstances, as shown by her acts and declarations, such as evidenced no intention to retain the property, then there was abandonment; if, on the other hand, she left it under such circumstances as showed an intention to retain it, then there was no abandonment."

The objection made to this instruction is that it told the jury that the intention to abandon must have existed at the time when the defendant in error left the property, and the plaintiff in error contends that if at any time subsequent thereto up to the time of bringing the action she abandoned it, it was a good defense. But, as we have already seen, the only abandonment pleaded was an abandonment made long prior to the purchase by the plaintiff in error. The only evidence tending to show such abandonment was the evidence of her leaving Nome, and of her declarations to Tronsen. There was no evidence of an intention to abandon after she returned to Nome. The court did not err therefore in conforming the instructions to the issues and to the evidence in the case.

We find no error for which the judgment should be reversed.

It is accordingly affirmed.

HARK et al. v. C. M. ALLEN CO. et al.

(Circuit Court of Appeals, Third Circuit. June 28, 1906.)

No. 15.

1. BANKRUPTCY—PETITION—AMENDMENT—ACTS OF BANKRUPT.

An original bankruptcy petition alleged the act of bankruptcy to be the removal, transfer, and concealment of its property from their designated places of business "with intent to hinder, delay and defraud creditors." At the trial, the bankrupts admitted their insolvency and testified that they did not remove or transfer any of their stock "with intent to hinder, delay, or defraud creditors," but that they disposed of all of their merchandise and the cash realized from the sale thereof by transferring it to certain of their creditors in payment of alleged debts due them. *Held*, that it was not an improper exercise of the trial court's discretion, after setting aside a verdict in favor of petitioners and granting the bankrupts a new trial, to permit petitioners to amend their petition by alleging as acts of bankruptcy that the bankrupts removed and sold their merchandise and assets and transferred the same to various creditors with the intent to prefer them.

2. SAME—AMENDMENT NUNC PRO TUNC.

The original petition having been filed within four months after the making of such transfers, it was proper for the court to permit the amendments, which were not filed until after the four months had ex-

pired, to be filed nunc pro tunc as of the date of the filing of the original petition.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

For opinion below, see 142 Fed. 279.

See 136 Fed. 986, 135 Fed. 603.

Henry N. Wessel, for petitioners.

Harry S. Mesiror, for appellees.

Before DALLAS and GRAY, Circuit Judges, and CROSS, District Judge.

GRAY, Circuit Judge. The petitioners ask this court, under the provisions of section 24b of the bankrupt act (Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) to revise in matter of law certain proceedings in bankruptcy against the petitioners, in the District Court for the Eastern District of Pennsylvania, in relation to the leave granted by said court to the petitioning creditors named in the caption hereof, to amend their original petition in involuntary bankruptcy.

This original petition represented that the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, were insolvent, and that within four months next preceding the date of the petition, had individually and as a partnership, committed an act of bankruptcy, in that between the 10th and the 15th days of October, 1904, and at other times, they had "removed, transferred and concealed a large portion of their property, consisting of pieces of woollen goods, silks, linens, etc., from their place of business at 821 Cherry Street, Philadelphia, with intent to hinder, delay and defraud their creditors." The indebtedness of the alleged bankrupts to the petitioning creditors, is stated to be \$1,356, and the value of the goods removed to be at least \$10,000. The petition prayed that the said Benjamin W. and Harry A. Hark, individually and trading as Hark Brothers, should be adjudged bankrupts. It was filed on October 21, 1904. In response to the order to show cause, made by the court, the defendants appeared and filed an answer on the 9th day of November, 1904, in which they excepted to the petition as insufficient in its averments, and also, without waiving the alleged defects in the said petition, made answer, denying the allegation that, at the time mentioned in said petition, or at any other time, they had transferred or concealed any part of their property, with intent to hinder, delay or defraud their creditors. They also demanded a trial by jury, of the issues presented by creditors' petition and their answer. The exceptions to the petition were considered in the light of a demurrer by the learned judge of the court below, and were overruled March 13, 1905. On the 12th day of June, 1905, a jury trial was had on the issues raised by the petition and answer, as prayed for by the defendants, and a verdict rendered in favor of the plaintiffs, that the defendants, "individually and trading as Hark Brothers, did commit an act of bankruptcy, as set forth in plaintiffs' petition filed."

On the 15th day of June, 1905, the defendants moved the court for a new trial, upon reasons filed. On August 10th, 1905, a new trial was granted. On August 25th, 1905, the petitioning creditors filed a petition in the said court below, sitting in bankruptcy, praying "for leave to amend the creditors' petition filed in the above case, by adding the following acts of bankruptcy:

"And your petitioners further represent that the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, while insolvent, and within four months next preceding the date of filing of this petition, committed an act of bankruptcy, in that they did, between the 1st of September and the 15th of October, 1904, transfer merchandise consisting of ladies' skirts, etc., amounting to \$1,500, to Sax Brothers of the city of Philadelphia, creditors of the said alleged bankrupts, with intent to prefer the said Sax Brothers over the other creditors of the said alleged bankrupts.

"That the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, while insolvent, and within four months next preceding the date of the filing of this petition, committed an act of bankruptcy, in that they did, between the 1st and 15th day of October, 1904, transfer the sum of \$250 in cash to Jennie Hark of Philadelphia, one of their creditors, with intent to prefer the said Jennie Hark over their other creditors.

"That the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, while insolvent, and within four months next preceding the date of the filing of this petition, committed an act of bankruptcy, in that they did, between the 1st and 15th day of October, transfer the sum of \$300.00 in cash to Mr. Lebowitz, of Philadelphia, one of their creditors, with intent to prefer the said Mr. Lebowitz over their other creditors.

"That the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, while insolvent, and within four months next preceding the date of the filing of this petition, committed an act of bankruptcy in that they transferred to Miller & Pleet, of Philadelphia, creditors of the said alleged bankrupts, the sum of \$49.43 in cash, on September 21, 1904; the sum of \$200 in cash, on September 29, 1904; the sum of \$57.10 in cash on October 1, 1904; the sum of \$49.70 on October 4, 1904; the sum of \$28.54, on October 7, 1904, and the further sum of \$650 between the 1st and 15th of October, 1904, with intent to prefer the said Miller & Pleet over the other creditors of the said alleged bankrupts.

"That the said Benjamin W. Hark and Harry A. Hark, individually and trading as Hark Brothers, while insolvent, and within four months next preceding the date of the filing of this petition, committed an act of bankruptcy, in that they did, between the 1st of August and the 15th of October, 1904, transfer the sum of \$1263.77 in cash to Harry Miller, of Philadelphia, one of their creditors, or to the Girard National Bank, or to both, with intent to prefer the said Girard National Bank or the said Harry Miller, or both, over the other creditors of the said alleged bankrupts."

The petitioners further pray for leave to amend their petition, "by adding after the words, in the allegation of the act of bankruptcy, 'between the 10th day of October, A. D. 1904, and the 15th day of October, 1904, and at other times,' the words, 'to wit, between the 1st day of September, 1904, and the 10th day of October, 1904'; your petitioners being informed and believe that the words, 'and at other times,' in the original petition are too indefinite."

On December 27th, 1905, these amendments were allowed by the court. To this order allowing the said amendments, the defendants excepted, and in their petition, ask this court to revise in matter of law the proceedings aforesaid in the district court, and to dismiss

the said petition of the petitioning creditors, for leave to amend the original petition in involuntary bankruptcy in this case.

The contention of the petitioners is, that by the amendments, the petitioning creditors were allowed to allege a new cause of bankruptcy against the defendants, and that the amendments were filed more than four months after said alleged acts of bankruptcy.

A liberal policy in regard to the allowance of amendments to pleadings, both at common law and in equity, is to be encouraged, where the amendments proposed tend to prevent a failure of justice through technicalities, and where their allowance does not affect injuriously any just right of the opposite party. Statute law has recognized the wisdom of this policy, both in this country and in England, by enlarging the discretion of the courts in that regard, and the trend of judicial opinion has stamped it as an enlightened policy, tending to promote the ends of justice.

We do not think the learned judge of the court below in this case transgressed the legitimate bounds which limit his discretion in such cases. The original petition stated the act of bankruptcy to be the removal, transfer and concealment of the defendants' property from their designated place of business in Philadelphia, with intent to hinder, delay and defraud their creditors. In asking for leave to amend their petition after the verdict in their favor had been set aside by the court, the petitioning creditors state that the original allegation was founded upon the only information then procurable, as to the alleged acts of bankruptcy. This information was, that on the 15th day of October, 1904, the place of business of the alleged bankrupts, was found closed and their entire stock in trade gone; that a few days previous to the date last mentioned, divers persons had seen large quantities of merchandise at said place of business, and that divers other persons had witnessed the removal thereof under suspicious circumstances; that they were informed that this merchandise was not disposed of in the regular course of business, but was transferred or concealed for the purpose of defrauding creditors. Upon this information, not unreasonably, the petitioning creditors allege such a transfer and concealment as an act of bankruptcy. At the trial before the jury, they allege that the defendants themselves testified that they neither removed nor transferred any of their stock "with intent to hinder, delay or defraud their creditors," but that they disposed of all their merchandise, and the cash realized from the sale thereof, by transferring the same to certain of their creditors, in payment of alleged debts due said creditors; that the alleged bankrupts admitted their insolvency at the trial, and also admitted an act of bankruptcy, though different from the one alleged in the creditors' petition.

Such being the testimony, the trial judge was clearly justified in setting aside the verdict against the defendants, as the act of bankruptcy alleged was not proven. That all the goods were removed from defendants' place of business, as alleged in the petition, was not denied, but it was denied that they were removed or concealed with the particular intent charged in the petition. It was, however, admitted that

they were removed and disposed of to certain preferred creditors, with the intent to prefer them over the other creditors. The substantive physical act of removal of the goods from the place of business, under circumstances that did not advertise to the creditors and public what disposition had been made of them, was the same as alleged in both the original and amended petitions. It was not in the power of petitioning creditors to ascertain just how the goods removed were disposed of, or with what particular intent the suspicious removal was made. No laches or want of diligence can be imputed to them, in not being able to truly characterize the admitted act of bankruptcy until the information was acquired by the testimony of the defendants themselves at the trial. No injustice is done the defendants, by allowing the creditors to truly characterize the acts alleged by them in their original petition. The act of bankruptcy alleged in the amendment, was not a new act of bankruptcy, but was the same act of the defendants as set forth in the original petition, differently characterized.

No surprise could possibly be worked to the defendants by the amendments, and no new proofs were necessary to sustain or defend against the amendments. It is true, that the date at which the amendments were filed, was more than four months after the act alleged in the amendments and in the original petition, but no reason presents itself why, in justice to all the parties concerned, the amendments should not be taken as of the date of the original petition. To do otherwise, it seems to us would be to allow the defendants to escape the just consequences of their own conduct, upon the merest technicality, and defeat unnecessarily the beneficent ends had in view in the enactment of the bankrupt law.

We think that none of the numerous decisions cited by the petitioners (and we have examined them all) would support the order prayed for under the circumstances disclosed in this record.

It is true, that the enumeration of some of the articles of property in the original petition differed in description from those enumerated in the amendment, but in both cases, those enumerated only purport to be a specification of part of what is embraced in the general description of the property transferred. The allegation in the first instance refers to an entire transfer of all defendants' property, so that the property alleged to have been transferred in the amendment, must necessarily be included therein. At all events, it is in both instances a transfer of property of defendants.

We think the learned trial judge, with the knowledge of all the facts proven in the jury trial, was abundantly justified in allowing the amendments prayed for.

The petition of review is therefore dismissed.

LEE YUEN SUE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 19, 1906.)

No. 1,262.

1. ALIENS—CHINESE — DEPORTATION PROCEEDINGS — CITIZENSHIP — BURDEN OF PROOF.

Where, in proceedings for the deportation of a Chinaman, he claimed to be a native-born citizen of the United States, the burden of proof of such fact was on him, as provided by Act May 3, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322].

[Ed. Note.—Citizenship of the Chinese, see notes to *Gee Fook Sing v. United States*, 1 C. C. A. 212; *Lee Sing Far v. United States*, 35 C. C. A. 332.]

2. SAME—TRIAL—EXAMINATION OF ACCUSED.

Where the evidence in Chinese deportation proceedings left the question as to defendant's alleged citizenship in doubt, it was not error for the judge to cause defendant, accompanied by his counsel, to be brought before him, and to further examine defendant concerning the evidence.

3. SAME—EVIDENCE.

In proceedings for the deportation of a Chinese person, evidence *held* insufficient to establish that he was a native-born citizen of the United States.

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

Daniel Landon, for appellant.

Jesse A. Frye, U. S. Atty., Alfred E. Gardner, Asst. U. S. Atty., and Edward E. Cushman, Sp. Asst. to Atty. Gen.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. Appellant was arrested by immigration inspectors in the state of Washington for being unlawfully in the country without any certificate of registration, and taken before a commissioner, who, upon hearing, ordered him to be deported. He took an appeal to the United States District Court, claiming to be a native-born citizen of the United States. When the case came before the court, it was regularly referred to a United States commissioner at Seattle, who took and reported the testimony of appellant. Pursuant to a stipulation, several depositions of witnesses were taken in San Francisco, and duly reported to the court, and the cause was regularly submitted. Before any decision was rendered, the judge caused appellant to be brought into court, and without the appellant or the interpreter being sworn, the appellant was interrogated by the court. Thereafter the court, not being satisfied or convinced from all the testimony, that appellant was born in the United States, entered a decree affirming the order of deportation. From this decree, the present appeal is taken.

The industry of counsel for appellant alleges 15 assignments of error, but his contentions really present but two grounds for the

consideration of the court: (1) That the evidence does not support the decree. (2) That the court erred in its procedure of interrogating appellant after the testimony had been submitted.

We are of opinion that the contentions of counsel for appellant cannot be sustained.

The statutes of the United States cast the burden upon appellant to prove to the satisfaction of the court that he was born in the United States. Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319]; Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322]. *United States v. Sing Lee* (D. C.) 125 Fed. 627, 628; *Chin Bak Kan v. United States*, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121.

Appellant testified before the commissioner that he was born at 741 Commercial street, San Francisco, Cal., 26 years ago; that his father, whose name was Lee Quey Won, kept a Chinese grocery store on Commercial street in San Francisco, Cal., for 15 years; that his mother, whose name was Chong Shee, died when he was 4 or 5 years old; that appellant lived in San Francisco until he was 10 years old, and then moved to Portland, Or., with his father, where he lived for 11 years; that his father lived in Portland until 1897, when he went to China, where he now lives; that appellant has for the past 5 years lived in Seattle, Port Townsend, and Bremerton. The testimony of his witnesses tended, if free from doubt, to corroborate his own statement; but, to some extent, there was a conflict between his testimony and some of the witnesses, enough, at least, to create a suspicion in the mind of the court as to the truthfulness of the testimony.

Appellant, after his arrest by the immigration commissioners, had procured from San Francisco, Cal., a copy of a paper purporting to be a birth certificate, issued July 23, 1902, which was filled out upon a blank requiring the "name of physician or midwife," the answer not being given, except "Remarks: Affidavit of Jim Roy and Charles A. Bond." This affidavit was sworn to before a notary public in San Francisco, and stated that Lee Yuen Sue "is a native-born citizen of the United States, having been born in San Francisco, California; * * * that your affiants cause this affidavit to be prepared to facilitate the travels of the said Lee Yuen Sue. Signed and sworn to September 5, 1902." In the certificate of birth appears: "Date of birth, May 5th, 1880." In appellant's testimony before the commissioner when he was charged with being unlawfully in the country, he was asked:

"Q. Where did you get this paper? A. San Francisco. Q. Were you in San Francisco when you got this paper? A. No. Q. How did you get the paper? A. Lee Mee [his cousin] got it for me."

This paper was not legal evidence. It was not prepared as required by law (*Deering's Ann. St. & Codes Cal. 1903*, §§ 3075, 3078), and was of no force whatever as a legal document. The facts were brought out before the court by the testimony taken immediately after his arrest, and were certainly sufficient when read by the court, to induce a close examination of all the testimony taken in the case.

The testimony of one of appellant's white witnesses contains statements which appear incredible upon their face. This witness testified, among other things:

That he had lived in San Francisco 29 years, and had been employed in Chinatown 19 years as doorkeeper in the Broadway Theater, and that he personally came in contact with many Chinese during all that time. "Q. Did you know a Chinaman by the name of Lee Yuen Sue? A. Yes, sir. Q. Where was he born, if you know? A. I was informed by his father that he was born in this city. * * * Q. When did you last see Lee Yuen Sue? A. About three years ago, in this city."

He further testified that he knew appellant's father and mother, and had frequently seen the boy in his father's store and recognized his photograph attached to the interrogatories in the depositions. Upon his cross-examination he testified:

That this was "the fifth time" he had been called upon to testify in Chinese cases "as to the place of birth of the Chinese. * * * I was simply asked to come here when they called the persons to my recollection, if I recollected them, the same as in this case." That appellant "went away from here some 15 years ago, and for 12 years I did not see him at all up to 3 years ago. * * * Q. And during that time you were not acquainted with him? A. No, sir. Q. Did you know him when he came back to San Francisco at the end of 12 years? A. He came there and spoke to me, and I did not know him. He told me who he was, and called things to my recollection, and mentioned his father, and he told me that he had been in Portland and was going to China or somewhere. * * * Q. He stopped you and particularly called your attention to the fact that he was Lee Yuen Sue, on this occasion? A. Yes, sir. * * * Q. Did he call your attention again to the fact that he was born in the city and county of San Francisco? A. Yes, sir. * * * Q. He stopped you and told you all about his father again? A. Yes, sir. * * * Q. If you did not know Lee Yuen Sue when he came back and reported to you three years ago, how do you know that you ever saw him when he was young? A. Because he called my attention to things when I did know him. Q. What did he call your attention to? A. I kicked him out of the theater one morning when I was doorkeeper of the theater. Q. You remember that distinctly? A. Yes, sir. Q. That was 15 years past? A. Yes, sir. I had forgotten the circumstance."

The above is sufficient to illustrate the character of all this testimony on these and similar points. When the court, after the case was submitted, read over the testimony, it evidently noticed that there were some discrepancies, some conflict therein, and that much of the testimony was in the nature of hearsay, and unsatisfactory. If the court had acted upon it, he would doubtless have entered an order of deportation, but in order to ascertain the truth, the court deemed it proper to call appellant and give him an opportunity to explain matters. This action was favorable to appellant. It does not involve any question as to the regular methods of procedure in the trial of ordinary cases. When appellant was brought before the court his counsel was present, and the court proceeded to ask appellant several questions, to which no objection or exception was taken. Among other things, the following:

"Q. In your previous statements you have said that this paper was obtained for you by a cousin of yours who is now in China, and that he sent it to you when you were in Seattle, how do you explain that? A. I did not remember about it. Q. When you were in San Francisco at the time of

receiving this paper, did you meet any white men there that you knew? A. Yes, I met Charley Bond and Jim Roy. Q. Did those two men go with you to the recorder's office when you obtained this certificate? A. Yes; they are the men that went with me. * * * Q. Do you remember anything that happened in San Francisco when you were a little boy, before you left San Francisco to go to Portland? A. No; I do not remember. * * * Q. Did you ever go to a Chinese theater when you were a child without your parents being with you, and were you ever chased away from a theater when you were there? A. No; I never been chased away. Q. Did the doorkeeper ever kick you out from a Chinese theater in San Francisco when you were a little boy? A. No. Q. When you were in San Francisco at the time of obtaining this certificate did you meet a white man who was doorkeeper in a Chinese theater, and talk to him, and tell him anything about kicking you out of a Chinese theater when you were a little boy? A. No; I did not."

This testimony explains itself. The court in rendering its decision said:

"The testimony in behalf of the appellant to support his claim that he is a native of San Francisco is not convincing, and for that reason I am unable to make a finding in his favor."

The rule in this class of cases is universal:

"That the judgment of the District Court should not be interfered with unless the case shows clearly that an incorrect conclusion has been reached." *Lee Sing Far v. United States*, 94 Fed. 834, 837, 35 C. C. A. 327; *Woey Ho v. United States*, 109 Fed. 888, 48 C. C. A. 705; *United States v. Leung Sam* (D. C.) 114 Fed. 702; *Lee Ah Yin v. United States*, 116 Fed. 614, 54 C. C. A. 70; *United States v. Lee Huen* (D. C.) 118 Fed. 442, 457 et seq.; *United States v. Sing Lee* (D. C.) 125 Fed. 627, 629; *Chew Hing v. United States*, 133 Fed. 227, 61 C. C. A. 281; *Mar Sing v. United States* (C. C. A.) 137 Fed. 875, 876; *Quock Ting v. United States*, 140 U. S. 417, 420, 11 Sup. Ct. 733, 851, 35 L. Ed. 501.

In *Woey Ho v. United States*, supra, this court said:

"It is true that in all the Chinese cases this court has been enabled and taken pains, to point out the unreasonable, improbable, and unsatisfactory points in the testimony which justified the trial court in disbelieving it. This duty, however, rests with the trial courts, and, in a certain sense, may be said to be optional with them. If no reasons are given for their action, this fact does not of itself furnish a sufficient ground to justify a reversal. Error must affirmatively appear. This court cannot assume that the court below acted arbitrarily in refusing to believe the testimony of any witness."

Speaking of the burdens cast by the law upon this class of aliens, the court, in *Chin Bak Kan v. United States*, supra, said:

"The legislation, and the circumstances considered, compliance with its requirements cannot be avoided by the mere assertion of citizenship. The facts on which such a claim is rested must be made to appear. And the inestimable heritage of citizenship is not to be conceded to those who seek to avail themselves of it under pressure of a particular exigency, without being able to show that it was ever possessed."

The suggestion made by appellant's counsel that the court acted arbitrarily is absolutely without foundation. The conclusion reached by the court is fully sustained by the evidence.

The decree of the District Court is affirmed.

McDOUGALD v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Ninth Circuit. June 19, 1906.)

No. 1,270.

1. INSURANCE—POLICY—MATURITY OF PREMIUM—CONSTRUCTION.

A policy was signed and delivered October 4, 1895, to take effect as of the 30th day of June of that year. It provided for grace of one month in the payment of premiums, and authorized reinstatement within six months after nonpayment of any premium, subject to evidence of good health satisfactory to the company, and declared that it could not be forfeited after it had been in force three full years as thereafter provided. At the time the policy was issued, the insured gave his note for two years' premiums. *Held*, that treating the note as payment, the policy became subject to forfeiture at the expiration of the month of grace after June 30, 1897.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 913.]

2. STATUTES—RETROSPECTIVE OPERATION.

A statute is not retrospective in operation because a part of the requisites for its action is drawn from another statute existing before the passage of the act in question.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Statutes, §§ 342, 343.]

3. INSURANCE—FORFEITURES—STATUTES.

Laws N. Y. 1897, p. 92, c. 218, § 2, declares that no life insurance corporation doing business within the state shall, within one year after default in the payment of premium, forfeit the policy, unless a written or printed notice, etc., shall have been duly addressed and mailed to the insured or the assignee of the policy. *Held*, that where an insurer subject to such act made no attempt to cancel a California policy until more than a year had elapsed after default in the payment of premium, such act was inapplicable.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 703, 904, 1917.]

In Error to the Circuit Court of the United States for the Northern District of California.

This is an action on a policy of life insurance issued on October 4, 1895, to J. D. McDougald for \$10,000, payable to his estate on his death. Prior to his death, which occurred November 17, 1898, he assigned said policy to his sister-in-law, Mrs. Margaret McDougald, as security for an indebtedness, which, after his death, was assumed by his widow (plaintiff in error).

The policy provides that: "The company further agrees that this policy shall be incontestable after it has been in force one full year from the date of the execution of this contract if the premiums have been duly paid as provided herein. This contract is made in consideration of the written application for this policy, which is hereby made a part of this contract, and in further consideration of the sum of six hundred and thirty-nine dollars and ——— cents, to be paid in advance (being the premium for two years' term insurance), and of the payment of four hundred and sixty-five dollars and ——— cents (being the life premium) on the thirtieth day of June in every year thereafter during the continuance of this policy. The benefits and provisions placed by the company on the next page are conditions precedent and are a part of this contract. * * *

Among the benefits and provisions of the policy which are referred to as conditions precedent are the following: "If any premium is not paid on or before the day when due, this policy shall become void, and all payments previously made shall remain the property of the company, except as here-

inafter provided. A grace of one month will be allowed in payment of subsequent premiums after this policy shall have been in force three months, subject to an interest charge at the rate of 5 per cent. per annum for the number of days during which the premium remains due and unpaid. During the month of grace this policy remains in force, and the unpaid premium, with interest as above, remains an indebtedness to the company, which will be deducted from the amount payable under this policy if the death of the insured shall occur during the month. This policy will be reinstated on written application therefor within six months after nonpayment of any premium, subject to evidence of good health satisfactory to the company, and payment of premiums to date of reinstatement with interest at the rate of 5 per cent. per annum. * * * This policy cannot be forfeited after it shall have been in force three full years, as hereinafter provided." At the time the policy was issued McDougald gave his note in payment of the two-year premium, but never paid the note. The annual life premium was never paid in whole or in part.

The answer of the defendant in error sets up nine separate defenses. In the fifth it is alleged: "(1) That on the 11th day of September, 1895, at the city of Stockton, within this district and state of California, one John D. McDougald made written application to defendant for the issuance and delivery to him of a policy of insurance upon his life, in which application said John D. McDougald expressly contracted and agreed with defendant that if said policy should be issued and delivered to him, no suit should be brought against defendant after two years from the time when a cause of action should have arisen thereon, nor after two years from the time of said applicant's death. (2) That on the 4th day of October, 1895, in compliance with said application, defendant made, executed and delivered to said John D. McDougald and the latter accepted the policy of life insurance applied for, * * * but said policy was so made, executed, and delivered as of, and intended and considered by the parties thereto as commencing on the 30th day of June, 1895, at the request of said John D. McDougald, and in order that he might thereby secure a lower rate and premium upon said policy than if said policy commenced to run at its date aforesaid. (3) Defendant denies that said John D. McDougald or the alleged assignee of said policy, Mrs. John D. McDougald or plaintiff herein, or they or either or any of them, have or has duly or at all performed or complied with all or any of the conditions or provisions of said policy, or any thereof, upon their or each of their part to be kept or performed. (4) That more than two years have elapsed from the time that the alleged cause of action arose which is set forth in the complaint herein to the time when the above entitled action was brought, and the same is therefore barred by the provisions of said application hereinbefore referred to." The court rendered judgment in favor of defendant.

It is assigned as error: (1) That the Circuit Court "erred in deciding that the first life premium referred to in the complaint became due and payable by its terms on June 30, 1897, or within, or at the expiration of 30 days thereafter, or at any time prior to June 30, 1898, or within, or at the expiration of 30 days thereafter; (2) that the court erred in deciding that the New York notice law, as amended by the act of April 8, 1897, is applicable to the policy sued on, and erred in deciding that the act of October 1, 1892, was not applicable to said policy."

* Budd & Thompson and Van Ness & Redman, for plaintiff in error.
Charles Page, Edward J. McCutchen, and Samuel Knight, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

The contention of the plaintiff in error is: (1) That by the terms of the policy itself it was in full force at the time of McDougald's death; (2) that if the first ground is untenable, then, under the laws of the state of New York, the defendant in error was obliged to mail notices of premiums to Mrs. McDougald, the assignee of the policy, and that said notices were never sent. Can either of these contentions be sustained? The record does not contain any of the evidence offered at the trial. The complaint sets forth the policy in full, and the contentions of counsel are based exclusively upon the terms of the policy. This being true, it necessarily follows, under the familiar and well-settled rules, that all intendments are in favor of the regularity of the action of the court, and that error will not be presumed, but must affirmatively appear in the record. In the answer of the defendant there are many allegations of fact, which, under the rule above stated, in the absence of the testimony, should be considered as having been proven. We shall, however, consider the contentions of the respective counsel as to the proper construction of the policy and the statutes of New York applicable thereto.

1. The argument of counsel for the plaintiff in error is to the effect that, inasmuch as the policy by its terms was signed and delivered October 4, 1895, the two years' term insurance covered the time of McDougald's insurance to October 4, 1897; that the first 30th day of June occurring after the expiration of the two year's term insurance was in 1898, and that a payment of the annual life premium on that day would, if it had been made, have covered the insurance from the preceding October 4, 1897, to October 4, 1898, or at the earliest to June 30, 1898, and that the premium for the first two years' term insurance was paid by the promissory note, and the next premium did not become due until June 30, 1898; the premiums upon the policy must be construed as having been paid up to June 30, 1898; that under the table of guaranties contained in the policy, the full amount of the insurance was continued without further payment of premiums to January 30, 1901, and McDougald having died prior thereto, to wit, on November 17, 1898, he was covered by the insurance, and the assignee was entitled to recover the full amount of the policy. This contention is based upon an erroneous theory as to the true date of the policy, is wrong in theory, and cannot be sustained.

In the light of all the facts, without extended discussion, we are of opinion that the policy, under its terms, must be construed as having fixed the time when the insurance thereunder commenced to run as June 30, 1895. If any ambiguity exists in the policy upon this subject, it is removed by the application of McDougald for the policy, which, in express terms, is made a part of the policy. It is apparent that it was the intention of the applicant and the insurer that the time when the insurance mentioned in the policy commenced was June 30, 1895, although the policy was not signed until October 4th of that year. The language of the policy indicates, of itself, that this was the contract. The life premium is payable on the 30th day of each June. The 20-year accumulation period expired

on the 30th of June, 1915. The 30th day of June, 1905, designates the day on and after which the company will pay an amount equal to the total premium, together with the amount of the policy, if it shall become a claim. It was also agreed that the policy should not be forfeited after it had been in force three full years (under certain conditions), and by the table of guaranties, the third full year, if the premiums were paid, expired "June 30, 1898." Each year mentioned in the table of guaranties expires June 30th. It necessarily follows that according to the terms of the policy, even conceding for the purpose of this opinion, that there was a payment of premium by the giving of the note by McDougald, the policy became forfeited at the expiration of the month of grace after June 30, 1897, namely, July 31, 1897.

2. An extended argument is presented by the plaintiff in error and numerous authorities cited, to show that the policy in question is a New York contract; that the law of New York relating to the mailing of notices must be complied with; that the policy could not be forfeited except by giving the statutory notice, and finally that the policy is subject to the act of 1892, and not the act of 1897, as claimed by the defendant in error. We deem it unnecessary to discuss at any length the provisions of the various statutes and decisions of the courts of New York based upon the respective statutory provisions. As a general rule, all statutes must be construed, and their provisions enforced, with reference to their object and purpose, and the intention of the Legislature in passing them. So far as the present case is concerned, after examining the statutes in question, we are of opinion that if the laws of New York are applicable to this insurance contract, it must be the statute of 1897 instead of the statute of 1892, that is to govern.

The act of 1897 reads as follows:

"Section 1. Section sixteen of chapter six hundred and ninety of the laws of eighteen hundred and ninety-two, entitled 'An act in relation to insurance corporations, constituting chapter thirty-eight of the general laws,' and known as the insurance law, as amended by chapter nine hundred and seventeen of the laws of eighteen hundred and ninety-five, is hereby amended so as to read as follows:

* * * * *

"Sec. 2. Section ninety-two of said chapter is hereby amended so as to read as follows:

"Sec. 92. No forfeiture of policy without notice.—No life insurance corporation doing business in this state shall within one year after the default in payment of any premium, installment or interest declare forfeited or lapsed, any policy hereafter issued or renewed and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of nonpayment when due of any premium, interest or installment, or any portion thereof required by the terms of the policy to be paid, within one year from the failure to pay such premium, interest or installment unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it shall be paid, and the person to whom the same is payable, shall have been duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address in this state, postage paid by the corporation, or by any officer thereof, or person appointed by it to collect such

premium, at least fifteen and not more than forty-five days prior to the day when the same is payable. * * * No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued."

Laws 1897, pp. 91, 92. c. 218.

The act of 1897 went into effect April 8, 1897, and the default in payment of premiums due occurred June 30, 1897. The general rule which we deem applicable to the present case is clearly stated in Black on Interpretation of Laws (section 133, pp. 359, 360), as follows:

"When an amendatory act provides that the original statute shall be amended 'so as to read as follows,' and thereupon repeats some of the clauses or provisions of the amended statute and omits others, and at the same time introduces certain new clauses or sections, there are three points which must be chiefly noticed in regard to its operation and effect. In the first place, as to those portions of the original statute which the amendatory act simply retains, it is not generally to be construed as a new enactment. It does not repeal those provisions and then re-enact them in the same terms, but they are to be considered as remaining in force from the time of the original enactment, and as being merely continued in operation by the amendatory statute. * * * In the second place, those provisions which are newly added by the amendatory statute are not to be considered as having been in force from the beginning. They take effect from the time of the enactment of the amendatory act, and derive their whole efficacy and vitality from the amending law, and not from that amended. * * * In the third place, all those provisions of the original statute which are not repeated in the amending statute are abrogated or repealed thereby, and are thereafter of no force or effect whatever,"—citing *Ely v. Holton*, 15 N. Y. 595; *Moore v. Mausert*, 49 N. Y. 332, and numerous other cases.

See, also, *Estate of Prime*, 136 N. Y. 347, 352, 32 N. E. 1091, 18 L. R. A. 713; *Rosenplaenter v. Provident Sav. Soc.* (C. C.) 91 Fed. 728; *Id.*, 96 Fed. 721, 37 C. C. A. 566, 46 L. R. A. 473; and authorities there cited; *Florida C. & P. R. Co. v. Foxworth* (Fla.) 25 South. 338, 343, 79 Am. St. Rep. 149; *Shadewald v. Phillips* (Minn.) 75 N. W. 717; *Somers v. Commonwealth* (Va.) 33 S. E. 381; *Railway v. Broulette*, 65 Minn. 367, 67 N. W. 1010; *Kennedy v. Adams*, 24 Nev. 217, 221, 51 Pac. 840; *Endlich Interp. Stats.* §§ 196, 490.

It is true that a statute is generally to be construed so as to operate prospectively only, unless on its face the contrary is manifest beyond reasonable question. "But a statute is not retrospective, in the sense under consideration, because a part of the requisites for its action is drawn from a time antecedent to its passing." *Endlich Interp. Stats.* § 280.

As was said by the court below:

"In the case at bar the insurance company made no attempt to cancel the policy within one year after default in payment of premium. The default occurred June 30, 1897; the cancellation by the company of the policy did not occur until July 14, 1898, therefore the law of the state of New York, so far as it relates to the matter of notice neither affects nor modifies the express terms of the contract, and such being the case, they are controlling, and by their plain provisions, the policy was null and void at the time this action was instituted, hence action cannot be maintained thereon."

The result thus announced by the court below is fully sustained by the decisions of the Supreme Court.

In *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 30, 23 L. Ed. 789, the court said:

"It must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for, out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of 30 days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, etc. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is in extremis, to meet a premium coming due, demonstrates the common view of this matter. The case, therefore, is one in which time is material and of the essence of the contract. Nonpayment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence."

In *Mutual Life Ins. Co. v. Hill*, 193 U. S. 551, 559, 24 Sup. Ct. 538, 541, 48 L. Ed. 788, the court said:

"Under those circumstances the insured failed to pay, and continued such failure for four years prior to his death. Yet, notwithstanding his failure to perform his part of the contract—and performance by the insured underlies the obligation of the insurance company to perform on its part—this action was brought to compel the same performance by the company that would have been due if he had performed. It is simple justice between two parties to a contract containing depending stipulations that neither should be permitted to exact performance by the other without having himself first performed. It is true cases arise in which one party is enabled to take advantage of some statutory provision and exact compliance from the other without having himself first complied, and courts may not ignore the scope and efficacy of such statutory provisions, but, nevertheless, a judgment for failure to perform against one party in favor of the other, when the latter was the first delinquent, is offensive to the sense of righteousness and fair dealing. We have had before us a series of cases coming from the same jurisdiction in which, when the insured had for a series of years neglected to pay their insurance premiums or perform their parts of the insurance contract their heirs or beneficiaries have, on their deaths, sought to obtain judgments against the insurance company for the amounts which would have been due on the policies if the insured had performed their stipulations in respect to the payment of premiums. Courts have always set their faces against an insurance company which, having received its premiums, has sought by

technical defenses to avoid payment, and in like manner should they set their faces against an effort to exact payment from an insurance company when the premiums have deliberately been left unpaid."

The judgment of the Circuit Court is affirmed.

MIOCENE DITCH CO. v. JACOBSEN et al.

(Circuit Court of Appeals, Ninth Circuit. June 19, 1906.)

No. 1,304.

1. WATERS AND WATER COURSES—RIGHT OF WAY FOR DITCH IN PUBLIC LANDS—ACQUISITION—PRIORITY OF RIGHT.

Where complainant appropriated certain water rights and began the construction of a ditch, flume, and pipe line in 1901, its right to acquire a right of way over certain mining claims located in 1902 was not affected by the fact that the ditch was not completed over such located ground until after such location, provided proper diligence was used in constructing the ditch.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Waters and Water Courses, § 17.]

2. EMINENT DOMAIN—PUBLIC USE—STATUTES.

Under Alaska Code, c. 22, § 204 (31 Stat. 522), declaring that the right of eminent domain may be exercised in behalf of the following public uses, to wit, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water, and for roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, a corporation organized for the purpose of working mines and maintaining an artificial waterway had power to condemn a right of way for the purpose of carrying water to work mining claims owned by it, claims owned by others, and for private and public uses.

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Eminent Domain, § 75.]

3. SAME—FAILURE TO CONDEMN—CONSTRUCTION BY LANDOWNER.

Where a corporation entitled to condemn a right of way over defendants' mining claim for a water ditch or flume constructed the ditch over defendants' land without instituting condemnation proceedings, or paying damages for such right of way without objection or protest on defendants' part for a period of two years, and defendants thereafter refused to sell a right of way, but offered to sell their entire claims, they were not authorized to treat the construction of the ditch as a trespass, and destroy the same in the ordinary course of their mining operations.

4. INJUNCTION—PROTECTION OF PROPERTY—PERMANENT INJURY.

Where complainants constructed a water ditch or flume across defendants' mining claims without objection, and without condemning the right of way to which they were entitled, defendants being only entitled to damages for the construction of such ditch, complainants were entitled to an injunction restraining defendants from continuing to destroy the same pendente lite in the course of defendants' mining operations.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 102.]

Appeal from the District Court of the United States for the Second Division of the District of Alaska.

This is an appeal from an order dissolving a temporary restraining order, and refusing to grant an injunction pendente lite. The suit was commenced

September 18, 1905. The complaint, among other things, alleges, in substance, that plaintiff was and had been since February 27, 1902, a California corporation, doing business in Alaska, and had complied with all the laws of the United States relating to foreign corporations doing business in Alaska; that by its charter "plaintiff was and is authorized and empowered, among other things, to own and operate mines and mining claims within the district of Alaska, to own and appropriate water and water rights for private and public use, and to build canals, ditches, flumes, and aqueducts, and to lay pipes for supplying its mines with water, and for the general use of the public in the district of Alaska"; that since June, 1902, it had been continuously engaged in said business, and was at the times mentioned in the complaint "the owner of, in the possession of, and entitled to the possession of, a ditch, flume, and pipe line extending from Nome river to Anvil creek, in the Cape Nome precinct, district of Alaska; that the construction of said ditch, flume, and pipe line was commenced in the year 1901 by plaintiff's granters, and completed by plaintiff in the year 1903"; that the capacity of said ditch from Nome river to Hobson creek was 2,100 miners' inches of water, and from Hobson creek to Anvil creek 5,000 miners' inches, and the construction cost, including laterals and pipes, exceeded \$350,000; that since said ditch was completed in 1903 plaintiff had continuously used all the available waters of Nome river to the full capacity of said flume and pipe line from the intake on Nome river, some 30 miles, to Anvil, Glacier, and Dexter creeks and vicinity, where the water was used partly in working placer mining claims owned and leased by plaintiff, and partly farmed out for hire to be used by other persons, corporations, and the public generally for mining purposes; that on September 11, 1905, "the defendants, their servants, agents, and employes, wrongfully and unlawfully, at a point on plaintiff's ditch between Divide creek and Dorothy creek, both tributary to Nome river, by means of water under pressure above plaintiff's ditch, washed out, broke, and destroyed plaintiff's said ditch, without any right whatever upon the part of the defendants so to do"; that plaintiff repaired its said ditch, and commenced again to use the same, and that defendants threatened to again destroy it at the same and other points; that the use of the water in said ditch at the points where the same was destroyed was \$5,000 per day, and if interfered with plaintiff would be damaged \$5,000 per day; that said damage was irreparable and a continuing one, and the defendants were insolvent; that the plaintiff had no plain, speedy, or adequate remedy except by injunction, enjoining the alleged wrongful acts of defendants.

The complaint also contained the following additional averments: "That the climatic and other conditions in and around that portion of the district of Alaska wherein plaintiff's ditch, flume, and pipe line is situated are such that the lands therein lying are valuable only for mining, and are useful for no other purpose whatsoever, and mining is the one, sole, exclusive, and only productive industry in and around the aforesaid portion of the district of Alaska; that the aforesaid ditch, flume, and pipe line of plaintiff is the only available one for conducting the said waters of Nome river to the mining localities aforesaid, and many of the mines in said locality owned and operated by plaintiff and the public generally are entirely dependent upon said source of water supply, and without the same would become utterly worthless and unprofitable as mining claims; that plaintiff is under contract for the furnishing of water from its said ditch, flume, and pipe line to numerous consumers, and will render itself liable in damages to said consumers if prevented from obtaining a supply of water from Nome river through its said ditch, and will also be prevented from working, sluicing, and hydraulicizing the placer mining claims owned and leased by said plaintiff."

Upon the filing of said complaint, accompanied by affidavits supporting its allegations, the court issued an order for the defendants to show cause why an injunction pending the determination of the action should not be granted, and in the meantime the defendants were enjoined from interfering with said ditch. No answer was filed to the complaint. A hearing was had upon affidavits and depositions of the respective parties, and upon such hearing the court dissolved the temporary restraining order, and refused to issue an order of injunction pendente lite. Only three of the mining claims which defendants

owned were located in the month of March, 1902, the other claim, the Moonshine, was not located until after the completion of the plaintiff's ditch. Other facts are stated in the opinion.

The statute of Alaska, which is referred to in the opinion, reads as follows: "The right of eminent domain may be exercised in behalf of the following public uses * * * canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines and farming neighborhoods with water. * * * (5) Roads, tunnels, ditches, flumes, pipes, and dumping places for working mines." 31 Stat. p. 522, c. 22, § 204.

W. H. Metson and Ira D. Orton (Charles S. Wheeler, of counsel), for appellant.

P. C. Sullivan (W. A. Gilmore, of counsel), for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Did the court err in dissolving the temporary restraining order and in refusing to grant an injunction pendente lite? It is admitted that the preliminary order in the first instance was properly issued; that a clear prima facie case was established by the complaint and affidavits filed in support thereof. The rule to show cause why it should be dissolved was heard upon the complaint, and upon affidavits and depositions offered by the respective parties.

It is contended by the appellees that upon the facts presented at the hearing it affirmatively appears that the appellant constructed its ditch over the mining claims owned by appellees without proceedings had to condemn the right of way for a ditch over said claims, without agreement, license, or other legal right, and that appellant's entry upon and use of appellees' property being wrongful, appellant was a trespasser upon appellees' domain. The court below sustained this view, and further held upon the facts that appellees were the owners of valuable mining claims which were trespassed upon by appellant; that the injuries of which appellant complains were committed by the appellees while "in the usual and ordinary course of their mining operations, and upon the land owned by some of them," and that they, being prior in point of time, were prior in right, and dissolved the restraining order.

It will be observed from the statement of facts that the location of the mining claims was made March 21, 1902, and that the construction of the ditch, flume, and pipe line of appellant was commenced in 1901 and completed in the year 1903. The rights acquired by appellant did not depend upon the completion of the ditch, if proper diligence was used in its construction.

In *Osgood v. El Dorado W. & G. Co.*, 56 Cal. 573, 581, the court, in construing the act of Congress of July 26, 1866, c. 262 (14 Stat. 251), relative to the prior appropriation of water on the public land, and the amendatory act of July 9, 1870, c. 235 (16 Stat. 217), said:

"The defendants' grantors, therefore, had the right to appropriate the water in controversy, and if they acquired a vested right therein prior to the issuance of the plaintiff's patent, the plaintiff's rights, by express statutory enactment, are subject to the rights of the defendant. This, of course,

depends on the question whether the grantors of the defendant made a valid appropriation of the water, and this, in turn, on the question whether they gave proper notice of their intention to appropriate it, and, if so, whether they prosecuted the work in that behalf with reasonable diligence. If they gave sufficient notice, and prosecuted the work with reasonable diligence, there can be no doubt that, on the completion of the work, their rights related back at least to the commencement of the work."

In *Flint & P. M. Ry. Co. v. Gordon*, 41 Mich. 420, 430, 2 N. W. 648 (a controversy as to the right of way for a railroad and the rights of a homestead entryman), the court said:

"The homestead entry vested no title in the defendant, but it gave to him under the law a right of possession which he might perfect by continued occupancy and improvement. If he failed so to perfect it, what right he had reverted to the United States. If he perfected it, he was entitled to a patent, which related back to the time when his entry was made, and took date with it. *French v. Spencer*, 21 How. 228, 16 L. Ed. 97; *Shepley v. Cowan*, 91 U. S. 337, 23 L. Ed. 424; *Johnson v. Ballou*, 28 Mich. 379. * * * But in this case there is what seems at first blush to be a conflict of grants. The defendant made his entry first, but the complainant completed its road over the land before the defendant obtained his patent. To acquire the benefit tendered by the act of 1866, nothing more was necessary than for the road to be constructed. No patent is required in such cases, but the offer and the acceptance, taken together, are equivalent to a grant. The complainant, therefore, by accepting the offer of the government, obtained a grant of the right of way, which was at least perfectly good as against the government, and must be held to be perfectly good as against this defendant unless his patent antedates it by relation, or unless the equities springing from his possession and improvement would preclude any right being acquired adversely."

These general principles are well settled. It may be that the record does not present this question sufficiently to have it determined, but, so far as the record goes, it tends to show that the appellant was prior in time and prior in right. We have simply referred to this matter for the purpose of directing attention to the fact that it was overlooked by the court below, and that the court proceeded upon an erroneous theory of the case.

Can appellant sustain its right to an injunction; it being shown that no proceedings were instituted by it to condemn the right of way for its ditch? Appellees claim that appellant could not condemn the land for the purpose of working other mining claims owned by it, and for working mining claims owned by others, because it was but an individual private use, and was not for a public use.

The decision of this court in *Miocene Ditch Co. v. Lyng* (C. C. A.) 138 Fed. 544, 548, fully sustains the proposition that appellant could have exercised the right of eminent domain, and condemned the right of way over the land claimed by appellees. The court in that case, after stating that "the right of eminent domain can only be exercised in behalf of a public use authorized by law, and in the taking of property necessary to such public use the complaint or petition in such proceedings must show plainly and affirmatively the existence of the statutory authority for the public use, and the necessity of the property for such use," and after reviewing the authorities, and holding that the complaint was defective in not "showing a public need for the proposed ditch," said:

"Now, it may be made to appear that this ditch was for a public use, as has been attempted in the complaint; and, if this public use is made to clearly appear, does it not follow that the plaintiff is entitled to exercise the right of eminent domain under the statute? We think this is the intent and fair construction of the statute, and that the demurrer on this ground should have been overruled,"

—and leave was granted to amend the complaint in this particular.

The complaint in the present case clearly shows that the ditch was constructed for a public use. We think that under the provisions of the Alaska Code, which we have copied, the appellant had the unquestioned right in the first instance to condemn the land.

In *Clark v. Nash*, 198 U. S. 361, 367, 25 Sup. Ct. 676, 49 L. Ed. 1085, which was rendered subsequently to the decision of this court in *Miocene Ditch Co. v. Lyng*, supra, the court had occasion to discuss the question of the right of eminent domain under the provisions of the Utah statute, which in all essential respects is similar in its provisions to the Code of Alaska. See *Nash v. Clark*, 27 Utah, 159, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953. Upon this subject the court said:

"The plaintiffs in error contend that the proposed use of the enlarged ditch across their land for the purpose of conveying water to the land of the defendant in error alone is not a public use, and that, therefore, the defendant in error has no constitutional or other right to condemn the land, or any portion of it, belonging to the plaintiffs in error, for that purpose. They argue that, although the use of water in the state of Utah for the purpose of mining or irrigation or manufacturing may be a public use where the right to use it is common to the public, yet that no individual has the right to condemn land for the purpose of conveying water in ditches across his neighbor's land, for the purpose of irrigating his own land alone, even where there is, as in this case, a state statute permitting it. In some states—probably in most of them—the proposition contended for by the plaintiffs in error would be sound. But whether a statute of a state permitting condemnation by an individual for the purpose of obtaining water for his land or for mining should be held to be a condemnation for a public use, and therefore a valid enactment, may depend upon a number of considerations relating to the situation of the state and its possibilities for land cultivation, or the successful prosecution of its mining or other industries. Where the use is asserted to be public, and the right of the individual to condemn land for the purpose of exercising such use is founded upon or is the result of some peculiar condition of the soil or climate, or other peculiarity of the state, where the right of condemnation is asserted under a state statute, we are always, where it can fairly be done, strongly inclined to hold with the state courts when they uphold a state statute providing for such condemnation. The validity of such statutes may sometimes depend upon many different facts, the existence of which would make a public use, even by an individual, where, in the absence of such facts, the use would clearly be private. Those facts must be general, notorious, and acknowledged in the state, and the state courts may be assumed to be exceptionally familiar with them. They are not the subject of judicial investigation as to their existence, but the local courts know and appreciate them. They understand the situation which led to the demand for the enactment of the statute, and they also appreciate the results upon the growth and prosperity of the state, which in all probability would flow from a denial of its validity. These are matters which might properly be held to have a material bearing upon the question whether the individual use proposed might not in fact be a public one."

See, also, *Strickley v. The Highland Boy Gold Min. Co.* (Feb. 19, 1906) 200 U. S. 527, 26 Sup. Ct. 301, 50 L. Ed. 581; *The Otis*

Co. v. The Ludlow Mfg. Co. (March 12, 1906) 201 U. S. 140, 26 Sup. Ct. 353, 50 L. Ed. 696; Oury v. Goodwin, 3 Ariz. 255, 26 Pac. 376; Ellinghouse v. Taylor, 19 Mont. 462, 48 Pac. 757; Dalles Lumber Co. v. Urquhart, 16 Or. 67, 19 Pac. 78; Lewis County v. Gordon, 20 Wash. 80, 54 Pac. 779; Nash. v. Clark, 27 Utah, 158, 75 Pac. 371, 1 L. R. A. (N. S.) 208, 101 Am. St. Rep. 953; Dayton, G. & S. M. Co. v. Seawell, 11 Nev. 394; Kansas & Texas Coal Ry. Co. v. N. W. C. & M. Co., 161 Mo. 289, 310, 61 S. W. 684, 51 L. R. A. 936, 84 Am. St. Rep. 717.

Were appellees justified, upon the ground that appellant had not instituted proceedings prior to completing its ditch across and over their mining claims, two years after the ditch had been completed over their land, without objection or protest on their part, by means of water under pressure above appellant's ditch, after dark, without lights or sluices upon their mining claims, wash out, break, and destroy said ditch "in the usual and ordinary course of their mining operations?" As was said by appellee Jacobsen:

"We turned on the water about a hundred and twenty-five feet above the ditch, through a pipe—probably five hundred inches of water, maybe more and maybe less—for to sluice the top of the muck off, as it was necessary for us to do so, and we cut across the ditch, as the pay lies right under the ditch."

Waiving, for the present, at least, the conflicting testimony as to whether or not the ground of the appellees consisted of valuable mining claims, we proceed to consider the undisputed questions of fact as shown by the record.

The affidavits on the part of appellant were clear and direct upon the point that no objections were made to the construction of the ditch over the land in question. There was no evidence on the part of the appellees that they made any objections at that time. Appellee Spullis testified that he was on the ground in September, 1903:

"Q. Was the Miocene building their ditch there then? A. Yes. Q. You saw them there, building their ditch? A. I did. Q. Make any objections to it? A. I did not."

Appellee Jacobsen was on the ground in the fall of 1903 and winter of 1903-04, but did not testify that he ever made any objection to the construction of the ditch. May and Kemter were never on the claims at any time, and never made any objections to the building of the ditch. It is true that appellee May, on August 31, 1904, after the completion of the ditch, served upon appellant the following notice:

"Nome, Alaska, August 31, 1904.

"To the Miocene Ditch Company and J. M. Davidson, President of Said Company—Gentlemen: You will please take notice that I intend to mine by hydraulic and ground sluicing process my placer mining ground upon which your ditch crosses just above Discovery gulch, a tributary of Nome river. It is my intention to crosscut our claims and benches on and above said gulch, and you are hereby notified that unless you pipe or flume your water across said ground immediately that we will not be responsible for any damages that may result to your ditch on any of our ground where we hydraulic or ground sluice from the water above."

A short time before the injury complained of by appellant was committed, appellees Jacobsen and Chognon were working on their claims, and claimed that appellant's ditch had overflowed its banks, discharging water upon them and damaging them, and upon demand this claim was settled, and the following receipt given:

"Nome, Alaska, Aug. 2, 1905.

"Received from Miocene Ditch Co. four hundred and six 00/100 dollars, being payment in full for all damage and causes of action whatsoever to date.
"\$406.00/100.

John Jacobsen.

"A. B. Chognon."

At the time this receipt was given, no objection was made to the existence of the ditch over their ground. After the injury to the ditch, and after it was repaired, and while appellees were openly threatening to again wash it out and destroy it, claiming that they had the right so to do, certain negotiations were had, and appellees said they would not sell a right of way for the ditch, but would sell the entire claims over which the ditch passed for \$7,500. In the light of all the facts, is it not manifest that the course pursued by appellees in injuring the ditch and threatening to destroy it was unlawful and without any legal right whatever? Their remedy, if any they had in the premises, would be restricted to the damages for injuries occasioned by reason of the construction of the ditch.

The rules and principles of law upon this subject are well settled.

In *Roberts v. Northern P. R. R.*, 158 U. S. 1, 11, 15 Sup. Ct. 756, 39 L. Ed. 873, the court said:

"It has been frequently held that if a landowner, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute, requiring either payment by agreement or proceedings to condemn, remains inactive, and permits them to go on and expend large sums in the work, he will be estopped from maintaining either trespass or ejection for the entry, and will be regarded as having acquiesced therein, and he restricted to a suit for damages,"—

—citing many authorities.

This same doctrine was announced in *Northern P. R. R. Co. v. Smith*, 171 U. S. 260, 275, 18 Sup. Ct. 794, 43 L. Ed. 157; *United States v. Lynah*, 188 U. S. 445, 467, 23 Sup. Ct. 349, 47 L. Ed. 539; *Maffet v. Quine* (C. C.) 93 Fed. 347, 349; *Cowley v. City of Spokane* (C. C.) 99 Fed. 840, 843; *Sherlock v. Railway Co.*, 115 Ind. 22, 30, 17 N. E. 171.

In *Maffet v. Quine*, *supra*, it was declared by the court that the construction of a flume to convey lumber from mills to a city is a work of such a public character as will authorize the condemnation of right of way therefor under the statutes of Oregon. The facts of the case were that the defendant therein had acquired the ownership of land over which the flume had previously been constructed by a mill company, and continued to reside upon it for a number of years, without making any objections to the maintenance of the flume, until he sought to collect a claim from the mill company for wages. The court held that the company was entitled to a prelimi-

nary injunction to restrain him from committing a threatened injury to the flume.

There are numerous state authorities cited in the decisions of the Supreme Court to which we have referred that announce the same general principles. A ditch of the character of the one in question bears a close analogy to a railroad, dependent, as each is, upon its right to protect its entire line without the breaking of any links along its general course. There are many cases where the right of condemnation has been granted and judgment rendered for the damages without payment until after possession has been taken of the property condemned, where the same principles above enunciated have been applied.

In *McAulay v. Western V. R. R. Co.*, 33 Vt. 311, 321, 78 Am. Dec. 627, which was an action of ejectment, it was held that payment of damages is a condition precedent to the acquiring of title by a railroad company of lands taken by condemnation for their road; but it was also held that such a condition was for the benefit of the landowner, and might be waived by him even by parol. It was admitted that the landowner had full knowledge of the proceedings of the railroad company to locate and construct its road upon the land before and during all the time of the construction, and that he did not interfere in any way to prevent the occupation of the land for the purposes of the road otherwise than by forbidding the men employed to work thereon until the damages were paid. The question was whether the landowner could, upon the facts, maintain an action of ejectment for the land. In the course of the opinion the court said:

"In these great public works the shortest period of clear acquiescence, so as fairly to lead the company to infer that the party intends to waive his claim for present payment, will be held to conclude the right to assert the claim in any such form as to stop the company in the progress of their works, and especially to stop the running of the road after it has been put in operation, whereby the public acquire important interests in its continuance."

In *Dodd v. St. Louis & H. Ry. Co.*, 108 Mo. 581, 585, 18 S. W. 1117, the court said:

"It is equally well settled that a party who with full knowledge stands by and permits a company to expend large sums of money in the construction of a railroad through his land without objection forfeits his right of ejectment. [Citing cases.] This right is forfeited by virtue of the application of the doctrine of estoppel, as well as the intervention of public interests. Property in a railway is peculiar. A railway may be likened to a chain, which is worthless with one link out. The ejectment of the company from a mile or half a mile of its track almost wholly destroys the value of the entire line. The landowner knows this, and when he stands by and sees large sums of money expended on his land, and probably millions expended in the construction of the whole road, and interposes no objection, every consideration of justice and fair dealing requires that he should not be permitted to destroy such vast interests by wresting possession of a part of the road from the company, and thus severing its connections. * * * In such case we can pertinently say that he who will not speak when he should ought not to be permitted to speak when he would."

We recognize the full force and effect of the rule announced by the courts that the granting or refusing an injunction is largely

within the sound discretion of the court, and ought not ordinarily be reversed upon appeal; but if the principles of law have been departed from, the appellate courts should never hesitate to act. Certain principles in this connection are well settled.

In *Allison v. Corson*, 88 Fed. 581, 584, 32 C. C. A. 12, the court below refused to grant a temporary restraining order, and upon appeal its action was reversed. The court said:

"The controlling reason for the existence of the right to issue a temporary injunction is that the court may thereby prevent such a change of the conditions and relations of persons and property during a litigation as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. Undoubtedly, an injunction ought not to be issued unless substantial questions of law or fact, whose decision in favor of the moving party would entitle him to ultimate relief, are presented. If it is reasonably clear that he cannot ultimately succeed—if his pleading discloses no cause of action or defense—no injunction should be granted. But if the questions to be ultimately settled are serious and doubtful, and if the injury to the moving party will be certain, great, and irreparable if the motion is denied and the final decision is in his favor, while if the decision is otherwise the inconvenience and loss to the opposing party will be inconsiderable, and may well be indemnified by a proper bond, if the injunction is granted, it is the duty of the chancellor to issue it. A preliminary injunction, maintaining the status quo, may properly issue whenever the questions of law or fact to be ultimately determined in a suit are grave and difficult, and injury to the moving party will be immediate, certain, and great if it is denied, while the loss or inconvenience to the opposing party will be comparatively small and insignificant if it is granted."

In addition to the authorities there cited, see *Cartersville L. & P. Co. v. Mayor* (C. C.) 114 Fed. 699; *Denver & R. G. Co. v. United States*, 124 Fed. 156, 161, 59 C. C. A. 579; *Harriman v. Northern Securities Co.* (C. C.) 132 Fed. 464; *Hoy v. Altoona Midway Oil Co.* (C. C.) 136 Fed. 483, 484, and numerous authorities there cited.

The order of the District Court dissolving the temporary restraining order, and refusing to grant the injunction *pendente lite*, is overruled.

EMERICK & DUNCAN CO. v. HASCY et al.*

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,284.

STIPULATIONS—PERFORMANCE—RESCISSION—RETURN OF BENEFITS.

Pursuant to a stipulation defendant confessed the bill by failing to appear and perform other conditions all of which involved more or less cost and trouble and some of which could not have been compelled by any decree that could have been rendered in the case. Plaintiffs procured their decree on the stipulation after which they asked the court to relieve them from the only thing they agreed to do, to wit, to satisfy the judgment in so far as it awarded damages, profits, and costs, because of defendant's alleged failure to fully perform one of the conditions of the stipulation. *Held*, that in the absence of an offer to put defendant in statu quo by permitting a vacation of defendant's default and the interlocutory decree to the end that defendant might contest the suit on the merits, plaintiffs were bound to satisfy their judgment for damages, etc.

*Rehearing denied October 29, 1906.

Appeal from the Circuit Court of the United States for the Northern District of California.

The appellees commenced this suit on the 4th day of April, 1904, in the United States Circuit Court for the Northern District of California, against the appellant, then doing business under the corporate name of W. W. Adams & Co., alleging in their bill, among other things, in substance, that the complainants and their predecessors in interest have continuously for a period of over 70 years been engaged in the manufacturing and selling of brushes throughout the United States, under the firm name and style of J. J. Adams & Co.; that by reason of the care, skill, and fidelity used by the complainants and their predecessors their brushes have acquired a great reputation throughout the United States, so that they are, and for many years past have been, universally known and described by the trade and users of brushes throughout the United States simply as the "Adams Brush," and that the production and sale of their brushes has from time to time greatly increased in magnitude, and that a large demand for them has been created and exists under and by the name of the "Adams Brush" throughout the United States, and elsewhere, which is a source of great profit to the complainants; that in order that their brushes should be universally known and recognized, the complainants and their predecessors have been in the habit of stamping upon them either the word "Adams" or the words "J. J. Adams," and that those words appearing upon a brush are now, and for many years have been recognized by buyers and consumers throughout the United States as indicating "The Adams Brush" so-called, and as the product of the complainants and their predecessors exclusively. That for more than 70 years the complainants and their predecessors in business have held and enjoyed exclusively the reputation of being the makers of the "Adams Brush," and have been in the sole and undisturbed possession and enjoyment of the use of the said trade-names and trade-marks "Adams" and "J. J. Adams," and that their exclusive rights in the premises have been universally admitted and recognized by the trade and public, without dissent, so that when in a few instances there has been a use of the said trade-names or trade-marks by others, such use has been speedily discontinued on demand, or suppressed and enjoined by legal proceedings; that in the year 1902 the defendants Emerick, Williams, Maunder, Hill, and William W. Adams, were severally engaged as dealers and jobbers in or salesmen of articles of merchandise in connection with which brushes are commonly sold, and were each and all fully informed of the great reputation of the "Adams Brush," and the large trade therein enjoyed by the complainants, and that the defendants wrongfully and fraudulently intending to engage in the business of selling brushes as and for the "Adams Brush," but not manufactured or sold by the complainants, on or about August 2, 1902, organized a corporation under and by virtue of the laws of the state of California, ostensibly, as declared by the articles of incorporation, "to do a general mercantile business, to buy and sell goods of all kinds and classes, to enter, buy, deal in, and mortgage real estate, to use, deal in, buy, and speculate in stocks, bonds and other securities," but in reality to trade upon the reputation of the complainants, and fraudulently abstract from them a large part of good will of their trade, and that the defendants, in order to mislead the public and consumers, and to cause confusion and mistake in the minds of the public and of the trade, and in order that the public and consumers might, by reason of the similarity of the two names be misled to purchase their product supposing the same to be the complainants' manufacture, adopted the corporate name of W. W. Adams & Co.; that the defendant W. W. Adams was given by the other defendants five shares of the capital stock of that corporation, in order to exhibit some color of right in the adoption of said corporate name; that the defendant W. W. Adams & Co. is the corporation thus organized and existing, and that it carries on the business of selling brushes throughout the state of California and elsewhere which are stamped with the words "W. W. Adams & Co." in fraudulent imitation of the complainants' trade-mark and trade-name, and which are sold as the "Adams Brush," but are not manufactured or sold by or for the complainants.

The complainants prayed, among other things, for a writ enjoining the defendants, and each of them, from directly or indirectly selling, offering for sale, or putting up any brushes not made by the complainants upon which shall be placed, stamped, or applied in any form or manner, the word "Adam," or the word "Adams," or the words "J. J. Adams," or the words "W. W. Adams," or any word like or substantially like the word "Adams" in sound or appearance, and from in any form or manner making use of the word "Adam," or "Adams," or any word substantially like the words "Adams," in connection with the manufacture or sale or offering for sale, of any brushes not made by the complainants; that the defendants be directed to forthwith apply to the superior court of the state of California in and for the county in which the articles of incorporation of the defendant W. W. Adams & Co. were originally filed or in which the property of such corporation is situated, for a change of its corporate name to another name in no manner like the firm name of the complainants, and to diligently pursue such application until they shall obtain a proper order of such court authorizing such change of name, in pursuance of the statutes of that state; that the defendants be required to deliver up to be destroyed all brushes in their possession or under their control in any manner designed to imitate the complainants' brushes, or capable of being substituted or sold as and for the complainants' brushes, and that an accounting be had and the defendants be adjudged to pay all such damages and profits to the complainants as may be shown, with costs of suit.

Before the time fixed for the appearance of the defendants in the suit, negotiations for a settlement thereof were initiated by the defendants and culminated in the following written stipulation, to wit: "It is hereby stipulated and agreed that this suit shall be settled in the manner following; that is to say: (1) The defendant corporation will immediately commence, and diligently pursue proceedings to change its corporate name from W. W. Adams & Co. to some name which shall not contain the word 'Adams' or 'Adam.' (2) The defendant corporation will, in such manner as shall be satisfactory to complainants, obliterate or remove from all brushes that it now has in stock the words 'W. W. Adams & Co.' and the words 'Adams' or 'Adam.' (3) The defendant corporation will furnish to complainants a true list of the names and addresses of all the manufacturers of the brushes heretofore bought by it, and of all its customers for brushes heretofore sold by it. (4) The defendant corporation will furnish to the complainants a true list of the names and addresses of all its officers and stockholders. (5) The defendant corporation will confess the bill of complaint by failing to appear in response to the subpoena. (6) The complainants shall thereupon take a decree in all respects in accordance to the prayer of the complaint, but immediately on the entry of the decree will mark the same fully satisfied in respect to damages, profits, and costs."

The record shows that the appellant, who was defendant in the court below, procured its corporate name to be changed from "W. W. Adams & Co." to "Emerick & Duncan Company," and removed from all of its brushes in stock the words objected to by the complainants, furnished to the complainants a list of appellant's officers and stockholders, and a "list of manufacturers whom we are buying paint brushes from," and of its customers who had bought brushes from it, which list of manufacturers, however, did not show, as the appellees claim the stipulation required it to do, the names of the manufacturers who had stamped "W. W. Adams & Co." upon the appellant's brushes. The list was conveyed to the complainants' solicitor by letter dated September 19, 1904, and the defendant, having confessed the bill of complaint by failing to appear in response to the subpoena, an interlocutory decree was entered on the 7th day of October, 1904, for the complainants, granting the relief prayed for by them, and referring the matter to the standing master to take an account.

A copy of the interlocutory decree, and of the letter containing the list of the stockholders and directors of the defendant W. W. Adams & Co., and the list of manufacturers from whom that company had bought its brushes, having been sent to the complainants by its solicitor, the complainants

objected to such list, upon the ground that it did not state that such manufacturers had supplied the defendant company with brushes stamped "W. W. Adams & Co.," whereupon the solicitor of the complainants demanded of the appellant a list of the manufacturers who had stamped its brushes "W. W. Adams & Co.," with which demand the appellant refused to comply, claiming, among other things, that it had already fully complied with the requirements of the stipulation. The complainants thereupon, on the 10th day of November, 1904, proceeded with an accounting before the master, in accordance with the provisions of the interlocutory decree, whereupon the following proceedings were had:

"Mr. Jacobs (Counsel for Defendants): If your honor please, as a preliminary objection to these proceedings, I introduce in evidence this stipulation by Mr. Wright. The part thereof to which I particularly desire to refer (Reads clauses 5 and 6 of the stipulation). Now, if the decree is here, your honor will see that the only thing for which it was referred to your honor was: 'That it be referred to E. H. Heacock, Esq., standing master in chancery in this court, to take an account of the damages which complainants J. J. Adams & Co., have sustained and the profits which defendants W. W. Adams & Co., its officers and stockholders, have made by the practices set forth in the bill of complaint, and report the same to this court, and that said complainant shall have and recover of and from said defendant the damages and profits which shall be found by the said master, and have execution therefor.' This decree was made, of course, without the filing of this stipulation. This stipulation has never been filed, as a matter of fact. I will file it now. So that the filing of this stipulation, the genuineness of which is admitted, renders futile, nugatory, and valueless and a waste of time, the taking of testimony that your honor alone is authorized to take. In other words, your honor is authorized to do that and nothing else. Bates' Equity Procedure, 746. (Argument.) The situation is simply this: I ask at this time a continuance for a week; that is, past the first law and motion day of the court, at which time I will ask the court to direct the counsel to comply with this stipulation, and order a satisfaction entered in respect to the damages, costs, and profits; and I think the request is reasonable under the circumstances. The stipulation was not before the court when it made the decree, otherwise possibly the decree might have been different. But I do not even question that. I do not care what the form of the decree is. The master is not going to take his time and the time of the parties doing a futile act. (After argument by Mr. Wright.) Mr. Wright, do you admit that the first provision of the stipulation has been complied with? That is, that the corporate name has been changed?

"Mr. Wright: Yes, that has.

"Mr. Jacobs: Do you admit that the second provision of the stipulation has been complied with; that is, the obliteration of the name of 'W. W. Adams & Co.' and the words 'Adams' and 'Adam' from the brushes?

"Mr. Wright: I have no means of knowing whether that has been complied with or not.

"Mr. Jacobs: Don't you know that your company saw that it was done?

"Mr. Wright: I do not.

"Mr. Jacobs: Did not Mr. Brawner so inform you?

"Mr. Wright: I decline to answer any such question. It is not a proper question to put to me. But I will say that he did not inform me to that effect. Mr. Brawner informed me to the effect that he had seen the defendant corporation in the act of apparently removing the name from some brushes, but Mr. Brawner never informed me as to whether that portion of the stipulation had been complied with. That is a frank answer.

"Mr. Jacobs: The third is that the defendant corporation will furnish to the complainants a true list of the names and addresses of the manufacturers of brushes heretofore bought by the defendants and the brushes heretofore sold by it. Now do you deny that the corporation defendant furnished you a list which purported to be a true list?

"Mr. Wright: They furnished me a list which clearly, upon its face, was an evasion.

"Mr. Jacobs: Have you that list here?

"Mr. Wright: I think I have.

"Mr. Jacobs: Will you be good enough to produce it?

"Mr. Wright: No, I decline to produce it, on the ground that you are intending to make a motion in court, as you say, and I will produce it there and explain my reasons. I will say, furthermore, that these questions are answered by me purely as a matter of civility.

"The Master (after argument): I take it that that stipulation is to be considered by the master as one whole. It is by virtue of a decree that I am to take an accounting. By virtue of the last clause of that stipulation I am to do a useless act in taking the accounting if that stipulation has been carried out. Now, if, in fact, each and every of the objects incorporated in the stipulation has not been carried out in good faith, the stipulation in my judgment has and no part of it has, any binding effect, and therefore the master would not be doing a useless act in proceeding with the accounting.

"Mr. Wright (after argument): Mr. Duncan, the president of the defendant corporation, and Mr. Emerick, the secretary, each requested me to take proceedings upon the ground that they did not like to disclose the names of the manufacturers. They asked me to take these proceedings to force a disclosure of the names.

"The Master (after argument): I will continue the case for one week, and, in the meantime, counsel can take such steps as they may deem advisable. At that time, unless I am otherwise directed by the court, I shall proceed with the accounting. (It is stipulated by the respective parties that if the master is still authorized to proceed with the accounting after the making of such motion before the court as counsel for defendant proposes to make, that the master shall proceed with such accounting within five days after the court shall have decided the motion made by defendant's counsel, without notice except notice of the decision of the motion.)

"Mr. Jacobs: If your honor please, if Mr. Wright is correct in his understanding as to the attitude of the parties defendant, I will merely not appear, but will let the proceedings be had before the master in my absence.

"Mr. Wright: I would prefer that your honor postpone the hearing to a day certain, and direct the witness to be here, unless otherwise relieved by order of court.

"The Master: Then let the witness be sworn."

The secretary of the defendant corporation was thereupon sworn as a witness, and the hearing continued and resumed on the 21st day of November, 1904, but without any further appearance on the part of counsel for defendants. The testimony of the secretary of the defendant corporation before the master disclosed the names of the manufacturers who had stamped "W. W. Adams & Co." on the brushes bought by them and also that for the 4,505 5-12 dozen brushes marked "W. W. Adams & Co.," which it had bought it paid \$16,690.68, of which brushes it sold 3,809 5-12 dozen for \$19,286.53, and that the defendant corporation paid the freight on the brushes so purchased by it, amounting to 5 per cent. on their cost.

Concluding his testimony before the master, the secretary of the defendant corporation was asked by counsel for the complainants: "Q. Have you made a statement of the profits of W. W. Adams & Co., the defendant corporation, upon all the brushes sold by you which bore the name 'W. W. Adams & Co.?' A. Yes, sir. Q. Have you got that figure? A. Yes, sir. Q. How much was it? A. Four thousand one hundred and ninety-one dollars and sixty-five cents. Q. Then I understand you to say you admit the defendant corporation W. W. Adams & Co. made a profit of how much? A. Four thousand one hundred and ninety-one dollars and eighty-five cents. Q. On the brushes sold by it bearing the name 'W. W. Adams & Co.?' A. Cross (gross) profit; yes, sir.

"Mr. Wright: Complainant does not ask the master to consider the question of damages other than profits."

The proceedings before the master were concluded November 30, 1904, and on the 7th day of December, thereafter, he made his report, stating the profits to be \$4,468, and that the appellees had waived an inquiry as to dam-

ages. No exception to the master's report was filed, nor was the matter in any way brought to the attention of the court by either party until April 25, 1905. Some time after the time within which exceptions to the report might have been filed, counsel for the appellees demanded of the appellant payment of the costs of the accounting, amounting to \$72.90, but not the amount of profits reported by the master.

On the 25th day of April, 1905, complainants' counsel gave notice of a motion for a final decree in the cause for the complainants and against the defendants, for the sum of \$4,468, the profits reported by the master to have been made by the defendants by the practices set forth in the complaint, and for the costs, and to be relieved from that part of the stipulation whereby the complainants agreed immediately on the entry of the decree to mark the same fully satisfied in respect to damages, profits, and costs; so that notwithstanding such stipulation, the complainants might have execution for the profits found by the master, and costs, the grounds of such motion being: "(1) That the master's report in respect to such profits has been on file more than 30 days, and no exceptions thereto have been filed. (2) That the stipulation of the complainants to waive damages, profits, and costs was made on the faith of statements by the defendants that they had made little or no profits by the practices set forth in the bill of complaint, which statements were untrue. (3) That the stipulation of the complainants to waive damages, profits, and costs was made on the faith of a promise by the defendants to furnish a true list of the names and addresses of all the manufacturers of brushes theretofore bought by the defendants bearing the name 'Adams' or 'W. W. Adams' stamped on them; which promise the defendants afterward refused to perform. (4) That by the refusal of the defendants to perform their said promise the complainants have been subjected to unnecessary costs and charges. (5) That there is a failure of consideration for the stipulation made by complainants."

The appellants did not, either in making the motion or at any time, restore or offer to restore or make compensation for anything they had received under the stipulation; or to set aside the decree entered upon the default provided for by the stipulation. The motion was granted without conditions, and a final decree entered awarding the injunction as prayed for, and judgment for the profits reported by the master, and providing "that the complainants * * * be not required to enter satisfaction of this decree as provided by the sixth clause of the stipulation filed herein upon the 3d day of December, 1904."

The appeal is from that decree.

Frohman & Jacobs and Jesse W. Lilienthal, for appellant. John A. Wright for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge, after making the foregoing statement of the case, delivered the opinion of the court.

On the hearing of the appellees' motion in the court below, conflicting affidavits were presented on behalf of the respective parties, that on behalf of the appellees' tending to show, among other things, that in the negotiations leading up to the making of the stipulation, the appellant represented to the appellees' counsel that it had made little or no profits by the sale of the brushes in question, and that the appellant was so poor that a judgment against it for damages, profits, and costs would be worthless, and that the appellees' stipulation to waive damages, profits, and costs was made in reliance upon the truth of those representations.

The affidavits on behalf of the appellant are to the effect that no such representations were made, and, further that if made they were substantially true, the affidavit of Emerick being to the effect that while the gross profits from the sale of the brushes stamped "W. W. Adams & Co.," were as stated in his testimony before the master \$4,191.65; that the net profits of the appellant during the two years and more that they were engaged in selling the brushes, from all brushes sold by it, were \$466.25, which amount includes the sale of brushes of other kinds, and not stamped "W. W. Adams & Co." The affidavits filed on behalf of the appellant also tended to show that the defendants composing the corporation called "W. W. Adams & Co." in the negotiations leading up to the stipulation, insisted that they were not guilty of the frauds alleged against them in the bill, and had the right to sell the brushes they did sell, but represented that they were poor, and but starting in business, and could not afford to enter into costly litigation, and that those considerations induced them to enter into the stipulation in question. We do not find it necessary to determine those conflicting questions of fact; for the stipulation was, as a matter of fact, entered into, pursuant to the provisions of which the appellant failed to enter its appearance to the suit, by reason of which default a decree was passed without contest for the complainant. Nor is it denied on the part of the appellees that, pursuant to the provisions of the stipulation, the appellant procured its corporate name to be changed from "W. W. Adams & Co." to "Emerick & Duncan Company," not only necessarily involving the appellant in expense, but an act deemed by the appellees valuable to them, and which they could not have compelled by their suit; and, further, that the appellant removed from the brushes in their possession the name "Adams" in a manner satisfactory to the appellees, furnished the appellees with a list of its customers to whom it had sold brushes, and a list of the manufacturers from whom it bought the brushes. It is insisted on the part of the appellees that the latter list was incomplete in that it did not give the names of the manufacturers who placed the objectionable stamp on the brushes. The stipulation in that regard is this:

"The defendant corporation will furnish to the complainants a true list of the names and addresses of all the manufacturers of the brushes heretofore bought by it, and of all its customers for brushes heretofore sold by it."

Obviously there is nothing in this language requiring the appellant to furnish the appellees with the names of the manufacturers who stamped the brushes. Assuming that it was the intention of the parties that the stipulation should have so provided, and that the appellees' counsel, who, it appears, drafted the stipulation, omitted such a provision by mistake or through inadvertence, it affords no justification to the court on this appeal, or to the court below on the motion made to it, to read into the instrument an agreement not there found. We have, then, a stipulation of the parties, pursuant to which the appellant confessed the averments of the bill by failing to enter an appearance thereto, and pursuant to which it performed other conditions of the stipulation, all of which involved more or less

cost and trouble, and some of which could not have been compelled by any decree that could have been rendered in the case, upon which stipulation alone the appellees procured their decree against the appellant. Procuring, as they did, that decree upon and by virtue of the stipulation, the appellees, without restoring or offering to restore what they had received thereunder, asked the court below to relieve them from doing the one and only thing they agreed to do as a consideration for those benefits, namely, their obligation to satisfy the judgment in so far as it awarded them damages, profits, and costs. And the court below, by its final decree here appealed from, gave them that relief.

It is a fundamental principle of equity that one party to an agreement, by whatever name called, whether contract, stipulation, or anything else, cannot be relieved of its burdens while holding on to its benefits. That is exactly what the appellees sought to do, and what they were permitted to do by the court below. They did not offer to put the appellant in statu quo, even to the extent that it was possible to do so; they did not offer to permit the appellant's default to be set aside and the interlocutory decree to be vacated, to the end that the appellant might, if it elected to do so, contest the suit on the merits; but, holding on to the substantial advantages secured by virtue of the stipulation, they asked to be, and were, by the judgment appealed from, relieved of the one and only obligation they agreed to perform as a consideration for the benefits thus received.

In this there was manifest error, for which the judgment appealed from must be, and is, reversed, with instructions to strike out that portion thereof providing "that the complainants * * * be not required to enter satisfaction of this decree, as provided by the sixth clause of the stipulation filed herein upon the 3d day of December, 1904."

KENTUCKY VERMILLION MINING & CONCENTRATING CO. v. NORWICH UNION FIRE INS. SOC.

(Circuit Court of Appeals, Ninth Circuit, June 19, 1906.)

No. 1,291.

1. EVIDENCE—PAROL EVIDENCE—INSURANCE POLICY—TERMS.

A policy on a concentrating plant warranted that at all times when the property should be idle a constant day and night watchman should be kept on duty, and declared that the assured was "privileged to make alterations, additions and repairs incidental to the business, to remain idle subject to the conditions of the watchman's clause." *Held*, that the term "watchman's clause" was neither indefinite nor uncertain, and that parol evidence was therefore inadmissible to show that such term had a well-defined and understood meaning by custom and usage in the insurance business, together with what such meaning was.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 2104.]

2. INSURANCE—VACANCY PROVISION—REASONABLENESS.

A provision of a fire policy that if the property be idle or shut down for more than 30 days at any one time notice must be given to the company, and permission to remain idle for such time must be indorsed on

the policy or it should immediately cease and determine, was not objectionable for unreasonableness.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 759.]

3. SAME—WAIVER—EVIDENCE.

Where a policy on a concentrating plant provided that it should be void if the property was permitted to remain vacant for more than 30 days at a time without the consent of the insurer indorsed thereon, parol evidence that the insurer had knowledge that the property insured was idle during the life of an immediately preceding policy, and that insurer had made inquiries as to the status of the property, was inadmissible to show a waiver of such clause.

4. EVIDENCE—PAROL EVIDENCE—PAROL NEGOTIATIONS.

Where a policy was delivered and accepted, all parol negotiations, understandings, and agreements were merged in the written contract, and could not be controlled, modified, or changed by parol.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 1818-1824.]

5. INSURANCE—CONDITIONS—BREACH—FORFEITURE.

Where insured, the owner of a concentrating plant, permitted the same to remain idle for more than 30 days at one time without obtaining the consent of the insurer, the policy thereby terminated by its express provisions.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, § 759.]

6. SAME—PREMIUM—RETURN.

Where the premium on a fire policy was paid by insured on delivery of the policy, insurer's failure to return such premium before action brought did not amount to a waiver of its right to forfeit the policy for non-compliance of the insured with the positive terms of the policy.

[Ed. Note.—For cases in point, see vol. 28, Cent. Dig. Insurance, §§ 1041-1055.]

7. APPEAL—THEORY OF CAUSE—BURDEN OF PROOF.

A party who with the acquiescence of his adversary assumes the burden of proof of an issue will be held to that position on appeal.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1064.]

8. INSURANCE—WARRANTIES—COMPLIANCE—BURDEN OF PROOF.

Where insured warranted that, if the property described in the policy should be idle or inoperative, a constant day and night watchman should be kept on duty, the burden of proof, in an action on the policy, that insured had complied with such provision, was on it.

9. SAME—EVIDENCE.

Where insured warranted to keep a night and day watchman on duty whenever the plant should be idle or inoperative, proof of the presence of the watchman for 30 days prior to the date of the fire was insufficient to show a compliance with the warranty.

In Error to the Circuit Court of the United States for the Eastern Division of the Eastern District of Washington.

This is an action upon a fire insurance policy to recover for a loss alleged to have been sustained thereunder. The amended complaint, upon which the case was tried, shows that plaintiff, a corporation of the state of Washington, owned certain buildings and machinery situated therein (a concentrating plant) within the state of Montana; that upon May 1, 1902, defendant issued a policy of insurance in the sum of \$5,000 against loss by fire thereon, which policy it is alleged was renewed by the issuance of an identical policy, except as to date of commencement and termination of insurance, upon May 1, 1903; that on August 15, 1903, during the life of the latter policy, the buildings and machinery insured were destroyed by fire, causing a loss within

the terms of the policy in the full amount covered thereby. A copy of the policy sued upon was attached to the complaint as an exhibit. Attached to and made a part of the policy was a typewritten slip, which contained the following material provisions: "Privileged to make alteration, additions and repairs incidental to the business, to remain idle subject to the conditions of the watchman's clause, and to use coal oil and electricity for lights. Warranted by assured that the plant will not be operated during the life of this policy except upon notice to this company and the payment of additional premium. Warranted at all times when the property herein described shall be idle or inoperative, a constant day and night watchman shall be kept on duty; and provided that if such property be idle or shut down for more than thirty days at any one time, notice must be given this company and permission to remain idle for such time must be indorsed hereon or this policy shall immediately cease and determine."

In the complaint it is alleged that: "On the 1st day of May, 1902, the property insured by the policy in suit was idle and not in operation, and so continued during all of the time from May 1, 1902, to May 1, 1903, with the knowledge and consent of the defendant, but plaintiff kept a constant day and night watchman on duty in the premises with the knowledge and consent of the defendant. At the time of the issuance of the policy sued upon, and at all time, until the destruction of the property by fire, the property continued idle and inoperative, with the knowledge and consent of the defendant, but plaintiff kept a constant night and day watchman on duty in said premises. It was understood and agreed between plaintiff and defendant, at the time of issuing the policy, that the property might remain idle and inoperative, but in charge of a constant night and day watchman, and that the policy should continue in force and effect notwithstanding. Both parties to the contract understood, at the time of the issuance of said policy, that to be the true intent and meaning of the policy. Both parties had that understanding throughout the life of the policy, and after the destruction of the property by fire, and until this suit was brought. The provisions of the policy in suit means in insurance circles and amongst insurance men, and is understood to mean, that the insured property may remain idle and inoperative during the life of the policy, if a constant night and day watchman be kept on duty by the insured." The defendant admitted the issuance of the policy, the loss, and that it was notified thereof; that proper proofs of loss were made out and forwarded it; that the property insured was idle and inoperative when the policy sued on was issued and remained so until the time of the loss. All other allegations save those merely formal were denied. It set up as an affirmative defense that the property insured was, at the time of the fire which caused the loss, and continuously for more than 90 days prior thereto had been, idle and inoperative, and that no notice thereof was given defendant, and no permission to remain idle indorsed upon the policy; that the policy was therefore void, and on May 4, 1904, it had tendered back the premium paid. With the exception of the making of the tender on May 4, 1904, and the remaining idle, the allegations of the affirmative defense were denied by plaintiff's reply. The cause was at issue upon: (1) The meaning in insurance circles and among insurance men of the term "watchman's clause," as used in the policy sued upon; and (2) if its meaning was other than plaintiff contended, the waiver of that clause by the defendant.

In order to sustain the issue upon its part the plaintiff offered to read in evidence the deposition of John W. Luke, defendant's agent who issued the policies of 1902 and 1903. A question relating to the negotiations regarding the policy of 1902 was objected to, upon the ground that anything connected with the issuance of the policy of 1902 was immaterial in the present action, a suit upon the policy issued in 1903. The objection presented the questions whether evidence was receivable to show the trade meaning of the clause in the policy above quoted, and whether a waiver of the clause could be shown by parol. The objection was sustained. The plaintiff then made sundry offers of proof, which are set out in the assignments of error, which were rejected. The plaintiff then introduced evidence tending to prove that it had kept a constant day and night watchman upon the premises insured during

the life of the policy, and that defendant had not kept its tender good to return the premium, and rested. The defendant declined to offer any evidence, whereupon the plaintiff moved that the jury be instructed to render a verdict in its favor, on the ground that defendant had not kept its tender good. The motion was denied, and the court then directed the jury to return a verdict in favor of the defendant.

Graves & Graves and E. H. Belden, for plaintiff in error.

Goodfellow & Eells and Happy & Hindman, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge, after making the foregoing statement, delivered the opinion of the court.

Did the court err in refusing to allow parol evidence to be admitted to explain the meaning of the term "watchman's clause"?

Plaintiff in error does not claim that evidence of a usage or custom may be received to control or vary the positive stipulations of a written contract, or to contradict them, but its contention is that the phrase "watchman's clause" is a trade term, which has a well-defined and understood meaning by custom and usage in the insurance business, and that the courts in construing the policy must ascertain the meaning of that term in the insurance business in order to arrive at the intention of the contracting parties. It is further claimed by the plaintiff in error, independent of the "question of trade, custom and usage" that the court erred in rejecting plaintiff's offer to prove by parol that the clause "warranted at all times" and concluding with the words "this policy shall immediately cease and determine" is a stock clause placed on all insurance policies issued on the Pacific Coast, while the permission "to remain idle," subject to the conditions of the "watchman's clause," was one peculiar to this risk, and only intended to be applied to manufacturing plants which were in operation at the time the policy was issued, and provided for a contingency that might thereafter arise. It further claims that the policy was ambiguous, not only from the language used in the policy, but also from the condition of the parties.

We are of opinion that the court did not err in excluding parol testimony as to the meaning of the term "watchman's clause." There were no words or phrases used therein which required any parol evidence in order to explain their meaning. The contract was in writing, and was, in its entirety, susceptible of a reasonable construction by the court. The rule is well settled that:

"Where a written contract is susceptible on its face of a plain and unequivocal interpretation, resort cannot be had to evidence of custom or usage to explain its language or qualify its meaning." *Hunt v. Fidelity & C. Co.*, 99 Fed. 242, 245, 39 C. C. A. 496.

Having "satisfied ourselves that the policy is susceptible of a reasonable construction on its face, without the necessity of resorting to extrinsic aid, we have at the same time established that usage or custom cannot be resorted to for that purpose." *The Insurance Companies v. Wright*, 1 Wall. 456, 470, 17 L. Ed. 505.

The decisions of the courts upon the questions in dispute between the respective parties have not been entirely uniform. In *Barnard v. Kellogg*, 10 Wall. 383, 390, 393, 19 L. Ed. 987, the court said that, while it would be hard to reconcile all the cases, "it may be safely said they do not differ so much in principle, as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it." In the course of the opinion several cases were cited, and it was directly held that:

"A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined. * * * A usage, to be admissible, must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

See, also, *Lillard v. Kentucky D. & W. Co.* (C. C. A.) 134 Fed. 168, 173, and authorities there cited.

Even if it should be conceded that the term "watchman's clause" should not be held to include the words after the last proviso requiring notice to the company and permission to remain idle to be indorsed upon the policy, it is difficult to see how the plaintiff in error could be benefited thereby. If oral testimony had been given to the effect that the watchman's clause only referred to the keeping of watchmen on duty, this would not annul the latter provision; that would remain as an independent proviso, and would have to be construed as such. A written contract solemnly entered into and executed by the parties to it must bind the parties. Courts do not make contracts, but interpret and construe them whenever any question arises as to what are their terms and conditions. *Petit v. German Ins. Co.* (C. C.) 98 Fed. 800, 804. The proviso "that if such property be idle or shut down for more than thirty days at any one time notice must be given this company and permission to remain idle for such time must be indorsed hereon or this policy shall immediately cease and determine," must be construed—whether considered as a part of the watchman's clause, or as an independent condition of the contract—according to the sense and meaning of the terms which the parties used. The language is clear and unambiguous, and must be taken in its plain, ordinary, and popular sense, and, so construed, it is fatal to the right of recovery by the plaintiff in error, as it is admitted by it that it was not complied with. It was within the power of the defendant in error to insist upon such a provision, and it cannot be claimed that the terms thereof were unreasonable.

In *Imperial Fire Ins. Co. v. Coos County*, 151 U. S. 452, 462, 14 Sup. Ct. 379, 38 L. Ed. 231, the court said:

"The terms of the policy constitute the measure of the insurer's liability, and in order to recover the assured must show himself within those terms, and if it appears that the contract has been terminated by the violation, on the part of the assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recover. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made. * * * It is entirely competent for the parties to stipulate, as they did in this case, 'that this policy should be void and of no effect, if, without notice to the company, and permission therefor indorsed hereon, * * * the premises shall be used or occupied so as to increase the risk, or cease to be used or occupied for the purposes stated herein * * * or the risk be increased by any means within the knowledge or control of the assured.' * * * These provisions are not unreasonable. * * * These terms and conditions of the policy present no ambiguity whatever. The several conditions are separate and distinct, and wholly independent of each other."

In *Delaware Ins. Co. of Philadelphia v. Greer*, 120 Fed. 916, 921, 57 C. C. A. 188, 61 L. R. A. 137, the court said:

"The obvious meaning of their plain terms is not to be discarded for some curious hidden sense which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover. Contracts of insurance, like other contracts, are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, their terms are to be taken in their plain, ordinary, and popular sense." *Kiesel & Co. v. Sun. Ins.*, 88 Fed. 243, 246, 31 C. C. A. 515; *McGlothter v. Providence M. Ac. Co.*, 89 Fed. 685, 689, 32 C. C. A. 318; *Brown v. United States Casualty Co.* (C. C.) 95 Fed. 935, 956.

The court did not err in refusing to allow the plaintiff in error to introduce parol testimony to the effect that the defendant had knowledge or notice that the property insured was idle during the life of the first policy, or in rejecting the other offers as to the inquiries made by the company or its officers or agents as to the status of the property, for the avowed purpose of showing, or attempting to show, a waiver or forfeiture by the insurance company of the clause under consideration. The second policy was not a mere continuation of the first, although in its terms and conditions it was identical with the first, except as to dates. It was not in any manner dependent upon any acts or conduct of the parties under the first policy. The minds of the respective parties met, upon the issuance of the policy by the insurance company and the payment of the premium by the insured. The second policy then became a new, separate, and independent contract between the parties.

In *Brady v. Northwestern Ins. Co.*, 11 Mich. 425, 444, the court said:

"We have no doubt that each renewal of the policy was a new contract. Each was upon a new consideration, and was optional with both parties. At the expiration of the year over which the original policy extended, the obligation of the insurer was ended, and it was only by the concurrence of the will of both parties that the obligation could be continued. This concurrence is manifested by the payment of a consideration by the one party and a renewed promise by the other, and an obligation revived or continued under such circumstances is an original obligation. It must be asked for by the one, and may be assumed or refused by the other, and the policy, which is its evidence, is therefore only continued by the positive act of both parties."

To the same effect, see *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; 16 Am. & Eng. Ency. L. (2d Ed.) 868, and authorities there cited.

The second policy, as delivered and accepted, must therefore be presumed to express the entire contract between the parties. The rule is well settled that all parol negotiations, understandings, and agreements are merged in the written contract, and are not to be controlled, modified, or changed by parol evidence in relation thereto. *Union Nat. Bank v. German Ins. Co.*, 71 Fed. 473, 476, 18 C. C. A. 203, and authorities there cited; *Blake v. Pine Mountain I. & C. Co.*, 76 Fed. 624, 654, 22 C. C. A. 430, and authorities there cited; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 70, et seq., 30 C. C. A. 532, and authorities there cited; *McMaster v. New York Life Ins. Co.*, 99 Fed. 856, 863, 40 C. C. A. 119; *Northern Assurance Co. v. Grand View B. A.*, 101 Fed. 77, 83, 41 C. C. A. 207; *Id.*, 183 U. S. 308, 321, 22 Sup. Ct. 133, 46 L. Ed. 213.

No fraud or imposition was attempted to be shown, and it must be presumed that the plaintiff in error read and understood the plain and positive terms of its agreement in the policy, and well knew that its failure to comply with its promissory warranty would at once avoid the policy and relieve the defendant from liability. It also knew from the express provisions of the policy how to obtain a modification of this warranty. *West End Co. v. American Fire Ins. Co.* (C. C.) 74 Fed. 114, 117.

It follows from the views we have expressed that proof that the property was idle and vacant at the time the policy was issued would be of no avail to the insured. It would not amount to a forfeiture of the clause, or a waiver thereof by the defendant in error. There was no offer to prove that the defendant in error, or its authorized agents, ever agreed to waive the clause under consideration, or that it, or they, gave permission to the plaintiff in error to leave it idle and unoccupied except upon compliance with the terms of the policy. The plaintiff in error could not have been misled or deceived by any information or knowledge which the defendant in error had as to the previous condition of the property. Under the terms of the policy, if the property remained idle "for more than thirty days at any one time," the policy ceased and terminated, it became void and of no binding force and effect, unless the insured gave notice to the company and obtained permission to leave it idle for a longer time by having such time indorsed on the policy. *England v. Westchester Fire Ins. Co.*, 81 Wis. 583, 51 N. W. 954, 29 Am. St. Rep. 917; *Bart-*

lett v. The British America A. Co., 35 Wash. 525, 77 Pac. 812; Brehm Lumber Co. v. Svea Ins. Co. (Wash.) 79 Pac. 35, 68 L. R. A. 109; Ranspach v. Teutonia Fire Ins. Co. (Mich.) 67 N. W. 967. Terms of warranty are conditions precedent to the right of recovery and must always, if not waived or forfeited, be complied with by the insured. American Credit I. Co. v. Carrollton F. M. Co., 95 Fed. 111, 112, 36 C. C. A. 671; McKenzie v. Scottish Ins. Co. (Cal. Sup.) 44 Pac. 922, 924.

The premium was paid by the insured upon the receipt of the policy. The failure to return it before this action was brought does not amount to a waiver of the right of defendant in error to forfeit the policy for a noncompliance of the insured with the positive terms of the policy.

In *United States Life Ins. Co. v. Smith*, 92 Fed. 503, 508, 34 C. C. A. 506, 512, the court said:

"The objection that no defense going to the original invalidity of the contract can be made without tendering back any premium received remains to be considered. This is not a suit by the company for the cancellation of the policy, but is an action by the beneficiary based upon it as a valid contract. The general rule is that, if a risk never attaches under a policy, the premium is not earned, and, if paid, may be recovered, unless the insured has been guilty of fraud. *Jones v. Insurance Co.*, 90 Tenn. 604, 18 S. W. 260, 25 Am. St. Rep. 706; *May, Ins.* § 4. But we know of no rule which prohibits the defense here made except upon condition of a previous tender of the premium paid."

See *Georgia Home Ins. Co. v. Rosenfield*, 95 Fed. 358, 362, 37 C. C. A. 96, et seq., and authorities there cited.

"A waiver cannot be inferred from the insurer's mere silence or nonaction. * * * It may wait until claim is made under the policy, and then allege the forfeiture in denial thereof, or in defense of a suit commenced therefor." 16 Am. & Eng. Ency. L. (2d Ed.) 939, and authorities there cited.

The views we have expressed are conclusive of the questions involved in this case, but there is one other question that ought perhaps to be noticed. The plaintiff in error alleged in its complaint that "plaintiff kept a constant night and day watchman on duty" at the premises insured, which averment was denied in the answer of the defendant in error. The plaintiff in error, assuming it to be essential on its part to prove its averment in this respect, produced testimony to establish the fact, and, failing to obtain sufficient evidence on this point, upon appeal claims that the burden of such proof rested upon the defendant in error. This contention cannot be sustained. The general rule is that "a party who, with the acquiescence of his adversary, assumes the burden of proof of an issue, will be held to that position on appeal." 21 Ency. Pl. & Pr. 668, and authorities there cited. The provision in question was made a warranty, and the burden of proof in regard thereto rested upon the plaintiff in error to prove a compliance upon its part with this provision. *Imperial Fire Ins. Co. v. Coos County*, supra; *American Credit I. Co. v. Wood*, 73 Fed. 81, 84, 9 C. C. A. 264; *McLoon v. Commercial Ins. Co.*, 100 Mass. 472, 97 Am. Dec. 116, 1 Am. Rep. 129; *Van Wickle v. Insurance Co.*,

97 N. Y. 350, 353; *Craig v. United States Ins. Co.*, 1 Pet. (C. C.) 410, Fed. Cas. No. 3,340. There was no proof whatever to show that the watchmen were on duty before June 1st. One watchman testified that he commenced work June 1, 1903, and quit when the mill burned. It was stipulated that the testimony of Branscombe (president of the plaintiff in error) taken in another case might be, and was, admitted, but upon examination it shows that the inquiry there made of Branscombe as to the employment of watchmen was specifically limited to commence August 1st, which was the date of the policy in the case in which he gave his testimony. The hiatus in the testimony is claimed by counsel not to have been noticed by any one at the trial. We do not understand counsel to contend that the proof of the presence of the watchmen for 30 days prior to the time of the fire would be a compliance with the warranty. The law is otherwise.

In *Cronin v. Fire Ass'n of Philadelphia* (Mich.) 82 N. W. 45, the court said:

"It seems to be claimed that the policy should not be held void if the machinery was being operated within the 10 days immediately preceding the fire, but such is not the law. We have frequently held that the breach of such a condition renders the policy immediately and wholly void, as the following cases cited by counsel show"—citing many authorities.

Our conclusion is that the court did not err in instructing the jury to find a verdict in favor of the defendant.

The judgment of the Circuit Court is affirmed.

HARKINS et al. v. WILLIARD.

(Circuit Court of Appeals, Fourth Circuit, July 10, 1906.)

No. 653

1. INTERNAL REVENUE—VIOLATION OF LAW—FORFEITURE OF SPIRITS—STAMPS.

Rev. St. § 3334 [U. S. Comp. St. 1901, p. 2183], declares that all distilled spirits forfeited to the United States, sold by order of court, or under process of distraint, shall be sold subject to tax, and the purchaser shall immediately, and before he takes possession, pay the tax thereon; that, if any tax-paid stamps are affixed to any cask or package so condemned, the stamps shall be obliterated and destroyed before sale. *Held* that, where stamped liquors were forfeited for a violation of the internal revenue law, the forfeiture included the stamps as well as the property.

2. SAME—SALE OF PROPERTY—APPLICATION OF PROCEEDS.

The proceeds of a sale of spirits forfeited to the United States for violation of the internal revenue law belong exclusively to the government, and cannot be applied to the payment of the tax thereon.

3. SAME.

Distilled spirits are subject to forfeiture for misconduct of the distiller, even though the tax on the same may have been paid in full.

4. SAME—SALE OF UNSTAMPED SPIRITS—FORFEITURE—PURCHASE OF STAMPS BY BUYER—REDEMPTION.

A distiller sold certain casks of unstamped spirits to plaintiff, which were then in the government warehouse, and on March 10, 1902, plaintiff paid the tax on the spirits, but before the attachment of stamps the spirits were seized on the same day for violation of the internal

revenue law by the distiller, discovered March 4, 1902, after which the spirits were forfeited to the government and sold. *Held*, that as Act Aug. 27, 1894, c. 349, § 48, 28 Stat. 563 [U. S. Comp. St. 1901, p. 21091], requires the payment of the tax by the distiller and the issuance of stamps to him, plaintiff was not entitled to recover from the United States the internal revenue tax so paid.

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Greensboro.

James J. Britt, Asst. U. S. Atty. (A. E. Holton, on brief), for plaintiffs in error.

J. E. Alexander, for defendant in error.

Before GOFF and PRITCHARD, Circuit Judges, and WADDILL, District Judge.

PRITCHARD, Circuit Judge. This case arose from the seizure by H. S. Harkins, collector of internal revenue, Fifth district of North Carolina, on March 10, 1902, of three packages of spirits as forfeited to the United States for violation of the internal revenue laws, at grain distillery No. 651, of C. S. Pitts, Winston-Salem, N. C. Tax on these spirits, amounting to \$127.16, was paid March 10, 1902, but spirits were seized same day before attachment of stamps. Seizure was made for violations discovered March 4, 1902. Defendant in error, Williard, loaned distiller Pitts the tax money, purchased the stamps himself, but they were issued in the name of Pitts, the distiller, and was to have spirits when withdrawn in payment of a debt owed by Pitts. Pitts died in July, 1902, intestate, and no administrator was ever appointed. Unattached stamps remained in the hands of Williard, and in January, 1903, he made application to the commissioner of internal revenue for their redemption, which application was rejected for several reasons, the principal one of which was that Williard was not a proper party in interest. Suit was then brought in the state court and removed to the Circuit Court of the United States at Greensboro, and at April term, 1905, a judgment for \$127.16 with interest was obtained.

Upon the foregoing facts the court below charged the jury, among other things, as follows:

"(1) It appears in this case, from undisputed evidence, that \$127.16 was paid by Mr. Williard to the defendants. As this was Mr. Williard's money, he is the real party in interest, and is entitled to maintain the action.

"(2) In no view of the case was it right or lawful to receive money from Mr. Williard in payment of the taxes due on property already forfeited. The government had no right to receive this money after the forfeiture of the property."

It is contended by the plaintiff in error that the court erred in submitting these instructions to the jury, and that the same were not warranted by the law governing this case.

In order to correctly determine the merits of this controversy, it is necessary to decide whether the plaintiff below had the right to institute an action against the collector of internal revenue for money which he had paid for the distiller Pitts as tax due the government on certain casks of spirits. Prior to 1894, the law in relation to taxes

on distilled spirits was as follows: "That the distiller, owner or person having possession" of the spirits could pay the tax on the same. On that date, however (Act. Aug. 27, 1894, c. 349, § 48, 28 Stat. 563 [U. S. Comp. St. 1901, p. 2109]), the law was so amended so as to read:

"That the tax herein imposed shall be paid by the distiller of the spirits on or before their removal from the distillery or place of storage, except in case of removal therefrom without payment of tax as provided by law."

The statute as amended clearly limits the payment of tax and the receipt of the stamps therefor to the distiller and contains no provision which authorizes the recognition of any other person for that purpose. The stamps that were issued to the distiller were only evidence of the fact that the tax had been paid, and, inasmuch as the spirits had passed into the possession of the government as forfeited property, the fact that they were not attached to the casks can have no bearing upon the questions involved herein. Where taxes are paid and stamps are attached to casks of spirits in case of forfeiture, both stamps and tax (for which stamps are receipts) are forfeited.

Section 3334 of the Revised Statutes [U. S. Comp. St. 1901, p. 2183], which relates to this subject, reads as follows:

"All distilled spirits forfeited to the United States, sold by order of court, or under process of distraint, shall be sold subject to tax; and the purchaser shall immediately, and before he takes possession of said spirits, pay the tax thereon. And any distilled spirits heretofore condemned, and now in the possession of the United States, shall be sold as herein provided. If any tax-paid stamps are affixed to any cask or package so condemned, such stamps shall be obliterated and destroyed by the collector or marshal after forfeiture, and before such sale."

Thus it will be seen that the law provides for the forfeiture of the stamps as well as the property, and requires the destruction of the stamps which were originally attached thereto as evidence of the payment of the tax. It also requires the purchaser at the sale to pay the taxes and affix stamps thereto in order to authorize the removal of the spirits. If the taxes are paid at the time of forfeiture, then the government has no further claim against the distiller for taxes, but the proceeds of a sale of property thus forfeited to the government on account of violations of the internal revenue laws belongs exclusively to the government and cannot be applied to the payment of tax. For instance, forfeited spirits, tax-paid or otherwise, in case of forfeiture and sale, belong to the government, and even though there should be an excess arising from such sale, if the tax on the property forfeited has not been paid, the distiller and the sureties are liable for the tax. In the case of *United States v. United States Fidelity & Guaranty Co.* (D. C.) 144 Fed. 866, Judge Platt held that the proceeds of forfeited spirits could not be applied to the payment of taxes thereon; that if taxes are paid both spirits and taxes are forfeited, and the sureties on the distiller's bond were liable for all taxes aside from the forfeiture. The court said:

"If the distiller had paid the taxes, the liquor would have been forfeited, tax and all. The property has disappeared under the forfeiture, but the taxes remain unpaid, and the sureties are responsible. It is not thought

that the lien upon the property can be said to continue upon the proceeds after the property has been forfeited and sold."

Primarily the distiller is liable for the taxes due on the spirits distilled, and, in case of default, his sureties are also jointly liable for the same. Nevertheless, in that event the tax must be paid in the name of the distiller, and the stamp, which is in the nature of a receipt, can only be issued to him.

In pursuance of the provision of the law in regard to the payment of taxes by the distiller, the defendant in error paid the tax in question on the 10th day of March, 1902, but before the stamps were attached to the packages by the gauger, as required by law, all of the casks of spirits were seized on account of violations of the internal revenue laws which had been discovered on the 4th day of March, 1902. The payment of the tax under these circumstances by the defendant in error was as much the act of the distiller as if he had in person handed the money to the collector. This is true because the law provides that only the distiller shall have the right to pay the tax on distilled spirits. Therefore, when the defendant in error paid the tax, he acted as the agent of the distiller, and the fact that the receipts for the amount paid were issued in the name of the distiller clearly negatives the contention that the defendant in error had any lawful claim to the same.

A careful reading of the debates in Congress at the time the amendment of August 28, 1894, was under consideration, shows that it was the purpose of Congress to limit the payment of taxes exclusively to the distiller in order to avoid multiplicity of claimants in case of controversy between the government and the distiller as to the payment of taxes. After a thorough consideration of the matter, it was deemed best to limit the payment of taxes to the distiller alone, and by doing so the right to contest the payment of taxes which might be deemed to be improper is reserved to the distiller only; while, on the other hand, the statute renders it impossible for claimants, other than the distiller, to present their claims before the commissioner of internal revenue, thus eliminating the consideration of questions which were never intended to be settled by that official. Congress has wisely provided that, where a controversy shall arise as to the payment of taxes, only the distiller shall have the right to apply to the Commissioner of Internal Revenue for a settlement of the same, and, if there are claimants other than the distiller, the controversies as to their rights must be settled in the proper forum in the same manner as the title to property is determined between individuals.

Distilled spirits are liable to forfeiture on account of the acts of the distiller, even though the tax upon the same may have been paid in full. In this instance it appears that the premises of the distiller, together with all the spirits and other property therein, were forfeited to the government on account of the misconduct of the distiller and the packages claimed by the defendant in error were seized on account of such violations and forfeited to the government while in the possession of the distiller, Pitts. Therefore, even though the stamps had been attached to the casks upon which the tax was paid, they

would have been forfeited to the government as completely as though no stamps had been attached thereto and the tax had not been paid by any one. Under such circumstances, the distiller, Pitts, or his personal representative, could, upon a proper showing, have asked the government to refund any amount shown to have been improperly paid; but this is a right which the distiller and his personal representative possess, and no one else is permitted by law to institute proceedings of this character before the commissioner of internal revenue. The claim of the defendant in error is to the effect that, some time prior to the seizure of the distillery, the distiller, Pitts, became indebted to him, and agreed to sell to him certain packages of unstamped whisky which were then in the distillery warehouse and in the possession of the government. He does not undertake to say that the possession of the whisky was delivered to him in pursuance of an agreement made with the distiller, and, if he were to make such a contention, it would be untenable because the spirits were in the possession of the government, subject to a lien that was paramount to all other liens, and the distiller was powerless to make any delivery of the spirits held by the government until he had paid the tax and the same had been duly stamped and marked by the gauger and delivered to him. To hold otherwise would be to render uncertain the security of the government for its taxes and to defeat the very purpose of the internal revenue laws, to wit, the collection of taxes due upon distilled spirits manufactured under the supervision and control of the government. The distiller undoubtedly had the right to contract for the sale of the spirits while in the warehouse, but he could only do so, subject to the lien of the government for its taxes, and for penalties incurred and fines imposed for violations of the internal revenue laws; but it is admitted that this property was forfeited to the government before the stamps had been attached to the casks in question, and therefore the defendant in error did not possess the right to enforce his claim against the property at the time of the seizure, and this of itself is sufficient to show that the claim which he now seeks to enforce is unfounded. "Tax-paid spirit stamps," as they are technically called, are nothing more than receipts authorized to be issued by the government to indicate the payment of taxes on distilled spirits, and under the law as amended can only be issued to the distiller and are therefore without value, except for the purpose for which the same are issued, and that purpose can be ascertained by an inspection of the stamps. Under these circumstances, such stamps do not constitute the basis for an action against the government in the hands of one to whom they were not issued and who does not sustain the relation of a distiller to the government. Therefore these receipts, being issued to the distiller Pitts, do not constitute such a claim against the government in the hands of the defendant in error as entitles him to bring his action against the collector of internal revenue for the purpose of collecting the sum involved therein.

The contention that the government has no right to receive money in payment of taxes due on property forfeited cannot be sustained. From the very nature of the contract entered into between the distiller

and the government the taxes remain due until paid, and it was therefore the duty of the collector of internal revenue to receive the same at any time, either before or after the property had been forfeited, because the liability assumed by the distiller and his sureties continues to exist until the taxes are paid and could only be extinguished by the payment of such taxes as were shown to be due by the distiller to the government, and the payment of the same must necessarily be treated as an effort on the part of the distiller to comply with the requirements of the obligations which he assumed at the time he was granted authority to operate his distillery.

There is no view of this case in which the government would be liable to the defendant in error. There is not a scintilla of proof to show that the government entered into a contract with the defendant in error in regard to the payment of the tax, upon which this action is instituted; nor is there any evidence to show that the government ratified or in any way acquiesced in the alleged sale of the packages in question to the defendant in error. Such being the case, the only remedy left the defendant in error is to sue the representative of Pitts for the sum which he paid the collector of internal revenue on account of taxes due as aforesaid.

We are of opinion that the court erred in its instructions to the jury. Therefore the judgment of the Circuit Court is reversed, and a new trial granted. The case is remanded, to the end that further proceedings may be had in conformity with the views herein expressed.

Reversed.

In re L'HOMMEDIEU.

(Circuit Court of Appeals, Second Circuit. June 20, 1906.)

No. 232.

1. BANKRUPTCY—CLAIMS—LIENS—PRIORITY.

Where a judgment against a bankrupt was a lien on certain real estate of which the bankrupt's father had died seised, and from a sale of which the fund subject to distribution arose, such claim was entitled to priority.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 531.]

2. SAME—VOID CLAIMS.

The holder of a claim against a bankrupt which was void for usury, and was secured by an assignment of funds to which the bankrupt was entitled from his father's estate, filed such assignment in the proceedings in the Surrogate's Court for the settlement of the estate, and there appeared and filed objections to the executor's account which were overruled, the account settled and the estate divided; the bankrupt's share being transferred to his trustee in bankruptcy to be distributed in the bankruptcy court as it should direct. The claimant consented to a transfer of the controversy to the bankruptcy court without formal pleadings, appeared there and litigated the questions in dispute, where his claim was litigated by the holders of junior lien creditors and assignees. *Held*, that the claimant was not in the position of a party brought into court against his will, so as to require payment from the fund at least of the consideration received by the debtor, but that the claimant was an active party to the proceeding, and his claim, being void for usury, should be disallowed in toto.

Appeal from the District Court of the United States for the Eastern District of New York.

On appeal from an order of the District Court for the Eastern District of New York, dated June 29, 1905, directing the distribution of a fund of \$6,802.77, held by the trustee in bankruptcy, which fund represents the share of the bankrupt in the estate of his father. The referee in bankruptcy to whom, as special commissioner, the claims of the various parties were referred, reported that the following creditors had presented secured claims in the following chronological order: 1. Alfred B. Hilton, judgment for \$1,097.96, docketed in Queens county, January 21, 1897. 2. William B. Hewlett, assignment for \$3,000, October 8, 1897. 3. Francis Gilman, assignment for \$5,000, November 8, 1901. 4. Mary R. King, assignment for \$1,000, February 14, 1902. 5. William J. Jenner, assignment for \$1,120, August 15, 1903.

The claims of Hewlett, King and Jenner were allowed by the referee and the court. The Hilton claim was disallowed by the referee but was allowed by the court. The Gilman claim was disallowed by the referee but was allowed by the court in the sum of \$1,800. The appeal presents only the question of the validity of the Hilton and Gilman claims. If these claims are defeated the appellant, Mary R. King, will realize the full amount of her claim.

The opinion of the District Court, where the important facts are stated, is reported in 138 Fed. 606.

Edmund L. Baylies and Langdon P. Marvin, for appellant.

Horace Russell, and James S. Darcy, for executors representing the Hilton claim.

William R. Willcox and Robert D. Murray, for Gilman.

Before WALLACE, LACOMBE, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). The District Court found that the Hilton judgment was entitled to priority because it was a lien upon certain real estate of which the bankrupt's father died seised and out of which the fund arose. We find it unnecessary to add anything to the reasoning of the court below in reaching this conclusion, which, we think, is amply sustained by the authorities cited in the opinion. The Gilman claim remains to be considered.

Upon the judicial settlement of the final account of the executor of James H. L'Hommedieu, the father of the bankrupt, the surrogate of Queens county made an order, dated April 29, 1904, which recites, *inter alia*, that all persons interested in the estate were cited to attend the settlement of said account and on the return day of such citation Francis Gilman appeared by his attorneys and objected to the account of the executor which objection was overruled, the account settled and the estate divided. The order, after reciting that the trustee in bankruptcy of Howard A. L'Hommedieu was a party to the proceedings in the surrogate's court and that divers persons had appeared and claimed to be entitled to the share of the bankrupt in his father's estate, adjudged as follows: First. That the executor pay to the trustee in bankruptcy \$6,802.77, the amount of such share, to be distributed by him as the court having jurisdiction of the bankruptcy proceedings shall direct. Second. "That the liens by mortgage, assignment, judgment or otherwise, proved, or sought to be proved in this pro-

ceeding, shall have the same force, validity and effect upon the said funds in the hands of said trustee after the same have been paid over by the said executor as the same now have or did have when they were in the hands of said executor."

On June 12, 1905, the district court made an order, on consent of all parties interested, referring it to the referee as special commissioner to hear and determine the claims, including that of Francis Gilman, and to pass upon the validity and legal effect of such claims. The consent to this order was signed by Francis Gilman "without prejudice to the position as defendant taken by him in the proceedings covered by the proposed order." The executors owning the Hilton judgment duly proved their claim in bankruptcy and by petition to the referee asked that the lien of the judgment might be allowed as attaching to the fund transferred from the surrogate's courts. None of the other claimants appears to have filed a formal proof of claim.

The Gilman claim is based upon an assignment and a collateral agreement which are fully described in the report of the referee who says: "This assignment and agreement are alleged to be preferred claims against the funds in the hands of the trustee by said Francis Gilman, to the amount of \$5,000, with interest. This claim is contested by every other creditor alleging preferred claims, particularly by the trustee, who objects to the allowance of the claim in any amount, on the ground that the same is founded upon a corrupt and usurious loan, and is utterly void in law." The referee, after reviewing the testimony, found that the transaction was usurious and therefore void, the bankrupt receiving but \$1,800 and obligating himself to pay \$5,000. The District Court, in effect, confirmed the report in this respect. It is, therefore, unnecessary to discuss the testimony further than to say that the facts fully sustain this conclusion. Having found the claim void for usury the referee disallowed it in toto, but the District Court sustained it for \$1,800, the amount actually received by the bankrupt on the theory that Gilman came into court in invitum in the character of a defendant at the behest of the other claimants who, without any affirmative action on his part, proved his claim for the purpose of showing its invalidity and that trustee and junior claimants must return to him the consideration received by the bankrupt before there can be a decree annulling the assignment.

The confusion which has arisen in ascertaining the legal status of the parties is largely due to the informality of the proceeding and the failure to observe the elementary rules of pleading and practice necessary to the proper presentation of such controversies. It is the opinion of the majority of the court that inasmuch as all parties consented to proceeding in this manner the hardship should be equally distributed. No one should be permitted to profit by the assertion of technical considerations based upon analogies to formal actions where the position of the parties and the burden of proof is established by proper pleadings, when, as here, all have agreed to dispense with such formalities. A majority of the court are unable to agree with the District Court in thinking that Gilman is in the position of a defendant in equity, making no claim to the fund and being forced unwillingly into a litigation in which he has asserted no interest.

The fund in question was transferred to the trustee in bankruptcy to be distributed as the District Court shall direct. Gilman either had an interest in that fund or he had not. If he had no interest and presented no claim it is not easy to see upon what theory the court fixed the amount due him at \$1,800. The proposition is that the other claimants, in order to get rid of a claim, which did not exist, dragged him into court and compelled him to accept \$1,800 for which he had not asked. If, on the contrary, he had a claim he must have presented it and this, we think, is what he did do. It is hardly conceivable that the referee would have received the evidence and entered upon the careful investigation, which the record shows took place, unless he and all other interested parties had understood that Gilman had presented a claim for \$5,000. True, he did not actually prove his debt, but neither did the other creditors with the one exception before noted. Gilman filed a claim for \$6,500 in the Surrogate's Court and a copy of the assignment had been sent by his attorneys to the executor. From the order of the surrogate, in evidence, it seems that Gilman appeared in the Surrogate's Court by his attorneys and took an active interest in the proceedings, and, as we have seen, the fund was paid over to the trustee in bankruptcy with all rights preserved. It was evidently the intention of the court and the understanding of the parties that the controversy between the claimants as it existed in the Surrogate's Court was to be transferred to the court of bankruptcy. Nothing was to be gained or lost by the change of tribunals. The claimants entered the court of bankruptcy on equal footing. Gilman had filed his assignment with the executor and as his counsel say, "He stood on his assignment and did nothing." Naturally, so long as nothing was done the assignment was *prima facie* proof of his claim for \$5,000 and cast the burden of proving its invalidity on those interested in defeating it. We think there can be no doubt that Gilman proved his claim in the Surrogate's Court, was an active party to the proceedings there, consented to the transfer of the controversy to the District Court without formal pleadings, appeared there and litigated the questions in dispute precisely as he would have done had they remained in the state court. In these circumstances we do not think a strained construction should be resorted to in order that a claim, found by both the referee and the judge to be usurious, may take precedence of claims concededly honest.

There is another view, not alluded to by counsel, and yet, perhaps, worthy of consideration. It is difficult to trace the sequence of events from the record, but it would seem that the trustee offered in evidence the Gilman assignment at the hearing of November 13, 1903, which, it will be observed, was five months before the surrogate's order directing the transfer and a year and seven months prior to the order of the District Court referring "the claim of Francis Gilman" and others to the referee as special commissioner. Conceding, however, that this preliminary hearing may be regarded as having taken place under the order of reference and accepting for the moment the theory that Gilman occupies the position of a defendant in a court of equity, it is manifest that the trustee in bankruptcy must occupy the position of a complainant in equity. Following the analogy still

further it is apparent that Miss King, who did not initiate the proceeding, is not a complainant and must be considered as a defendant. The trustee is the only one of these claimants who stands in the shoes of the bankrupt. His interest in the fund is contingent upon defeating the other claims or reducing them below \$6,802. He stands in a position of hostility to all the other claimants. It may be that if he had begun a suit in equity against Gilman to annul the assignment he, as trustee, could not obtain the fund until he had paid Gilman the amount actually received by the bankrupt. But could he thus defeat the prior lien of Miss King, who is in no way responsible for his action, even though she advanced proof in defense of her claim? Still keeping to the fiction of a suit in equity it would seem that the complainant, after having proved the assignment, abandoned the proceedings and a junior claimant, in defense of her own claim, undertook the task of proving the assignment to be usurious. In such circumstances we are inclined to think that she is entitled to defend her rights without losing them. The situation is *sui generis* and we have been unable to find any authority exactly in point, but, upon general principles, equity should not permit an innocent and, indeed, a helpless party to suffer from such a proceeding.

It follows that the order should be affirmed in all respects except as to the claim of Francis Gilman, which is disallowed. The appellant is entitled to costs of this court against Francis Gilman. Horace Russell and others, as executors, etc., are entitled to the costs of this court against appellant.

AMERICAN CAR & FOUNDRY CO. v. BRINKMAN.

(Circuit Court of Appeals, Seventh Circuit. May 18, 1906.)

No. 1,195.

1. MASTER AND SERVANT—INJURY TO SERVANT—FELLOW SERVANTS.

Plaintiff was employed by defendant as a stationary engineer in its car shops, where he was under the orders of a chief engineer, who called him from his regular duties to another part of the works to assist in testing a new electric motor. Plaintiff had no knowledge of such machines, but the chief engineer had and directed the work. The motor became heated, as the evidence tended to show, from the presence of water therein, which was a recognized source of danger; but the chief engineer, although having knowledge of such fact, again turned on the current, when an explosion took place, by which plaintiff was injured. *Held*, that the rule of fellow servants did not apply, nor did plaintiff assume the risk from such danger, which was unknown to him and not in his regular line of employment, but that the duty of seeing that the motor was free from any dangerous defect which was discoverable by reasonable inspection was a positive one of the master, which plaintiff had the right to assume would be performed, that in such respect the chief engineer was defendant's representative, for whose negligence, if proved, it was responsible to plaintiff.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, §§ 422, 616.]

2. APPEAL—RESERVATION OF OBJECTION—OBJECTION EVIDENCE—SUFFICIENCY.

A general objection to a question asked a witness as "improper and immaterial" is insufficient as a basis for an assignment of error, where

the evidence called for is not so clearly incompetent from its essential nature upon any issue in the case that further specification of objection is unnecessary.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, § 1141; vol. 46, Cent. Dig. Trial, §§ 194-196, 199.]

In Error to the Circuit Court of the United States for the Southern District of Illinois.

Geo. F. McNulty, for plaintiff in error.

David E. Keefe, for defendant in error.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

SEAMAN, Circuit Judge. The American Car & Foundry Company, plaintiff in error, was the defendant below in an action of trespass on the case for injuries suffered by the defendant in error while in its service through alleged negligence on the part of the plaintiff in error. The trial resulted in a verdict and judgment against the American Car & Foundry Company, and various errors are assigned for reversal.

The undisputed facts, in substance, are these: The corporation plaintiff in error is engaged in a large manufacturing industry at Madison, Ill., with a plant of several buildings, one portion or department for car shops and another for foundry. Brinkman, the defendant in error, was employed in the car department, as night engineer, had long general experience as a steam stationary engineer, and had charge of three engines and the engine room during his night shift. He was employed by and directly under the orders of Hiscox, the chief engineer. The general foreman of the car shops was one Shipley, while there was a general superintendent of the works and a general manager for the district. Brinkman was injured by the explosion of an electric motor, in a place distant and apart from his engine room, while performing unusual duties, upon call by and under the direction of the chief engineer, as a helper in testing the motor. This motor was obtained for pumping purposes several months prior to the accident, but had not been used. Awaiting its placing and use, it was left in the engine room, and so remained when the works were flooded by an overflow of the Mississippi river, so that the water was in the engine room for about nine days, in depth stated variously at three, four, and six feet; and the motor was lifted from the floor, by means of chain and tackle, but the testimony is inconclusive whether it was free from water. When the water subsided the motor was lowered to the floor, and thus remained for about three months prior to its removal to the pump house; and the testimony indicates that the engine room was warm and dry after the flood. Hiscox had experience in electricity and electric apparatus, including motors; but the testimony at least tends to show that Brinkman had no such experience, beyond the operation of his engine as the generating power for such appliances as were used. Hiscox proceeded to test the motor before putting it into service, called Brinkman from his usual place and duties to assist him, and Brinkman placed himself under the direction of his chief, as his service required. The operation included two tests at intervals, and, while the testimony

is conflicting in some details, it is undisputed, that Hiscox found trouble from heating, when the electricity was applied, but persisted in the application of the current and thus produced the explosion; that Brinkman was then engaged in watching the volt meter, as directed, and at no time took part in the motor operation; and that the latter was unacquainted either with the cause or the danger of the heating of the motor thus operated. The testimony at the least tends to establish that the heating was due to dampness in the motor, a well-recognized source of danger; that it was observed repeatedly by Hiscox during the operation, and that he was careless in thus persisting with the current, in the face of these well-known indications of defect and ensuing danger; that the only course for any operator of reasonable prudence was to cease the use until the defect was ascertained and corrected; and that the presence of water in the motor was the probable cause of the disaster.

With the rulings of the trial court, verdict, and judgment thus supported by testimony, the main assignments of error, relating to instructions given or refused, require no discussion in detail, for the reason that all rest upon these contentions on the part of the plaintiff in error: (1) That Brinkman and the chief engineer, Hiscox, were fellow servants; (2) that in the performance of the service in question the former assumed all risks arising from the negligence of his chief in such performance; or (3) that contributory negligence on the part of Brinkman, defendant in error, conclusively appears. Unless the defendant in error is chargeable with assumption of the risk involved in the service in question, neither of the assignments referred to is tenable.

The doctrine is elementary, at common law, that the servant assumes ordinary risks incurred in the line of his service from negligence of co-employés, when the master is without fault in their employment or retention in service. It is further established by the Supreme Court, in a line of decisions reviewed in *New England Railroad Co. v. Conway*, 175 U. S. 323, 328, 20 Sup. Ct. 85, 44 L. Ed. 181, that such rule includes employés in the "same general undertaking" of the master, irrespective of their grade in the service. So the chief engineer (Hiscox) and his subordinate (Brinkman) were unquestionably fellow servants, within such rule, in the general service of the plaintiff in error. Another rule, however, is equally well settled and applicable to the testimony under review, which is thus stated by Judge Jenkins, speaking for this court, in *Lafayette Bridge Co. v. Olsen*, 47 C. C. A. 367, 369, 108 Fed. 335, 45 L. R. A. 33:

"It is the duty of the master to use ordinary care to furnish appliances reasonably safe for the use of servants, such as with reasonable care on his part can be used without danger save such as is incident to the business in which such instrumentalities are employed. * * * These duties may not be foregone, and, when delegated to be performed by another, that other is a vice principal and quoad hoc represents the principal, so that his act is the act of the principal. That other may have a dual character—vice principal with respect to the duty due from the master to the servant, and co-servant with respect to his acts as a workman."

The injury in that case arose from the weakness of a plank, which was taken by the foreman of the gang from a pile of lumber, assisted by the fellow servant, and used for a support, in the course of bridge construction. The plank broke and the load fell, throwing the helper into the river and causing his death, for which recovery against the master was affirmed. As further remarked in that opinion, the helper was not chargeable with notice of the insufficiency of the plank, as "that was matter of technical knowledge and experience, which would not be left to the judgment of a common laborer," but the inspection was a "positive duty" which "the master owed to the servant," and the acts of the foreman therein were the acts of a vice principal and not of a fellow servant.

The distinction thus pointed out and upheld—in reference to the positive duty owing by the employer, and the right of the employé to assume its performance by the representative of the master, and that he will not be called upon to use defective appliances, when the defects are discoverable upon reasonable inspection—is supported by well-considered authorities, too numerous to require citation, beyond reference to the opinion in *Texas & Pacific Ry. Co. v. Archibald*, 170 U. S. 665, 672, 18 Sup. Ct. 777, 42 L. Ed. 1188. Its applicability to the testimony in the present record is unquestionable. As it was the duty of the plaintiff in error to inspect and test the motor, if needful under the known conditions to ascertain its sufficiency for the required use, Hiscox was in the performance of that duty as vice principal. The defendant in error, called from his work as a helper unskilled in that line, was not in the relation of fellow servant within the first-mentioned rule, and was entitled to assume that the vice principal was qualified for the duty and would warn and protect the helper from danger which was discoverable by the electrician. Exercise of reasonable care in keeping on the electric current, under the circumstances disclosed, was the duty of the principal, and the helper cannot be presumed, without proof, to apprehend danger which may have been apparent to the skilled operator, and is not presumptively chargeable with an assumed risk or contributory negligence in remaining at his station as directed.

The issue of breach of duty on the part of the plaintiff in error was rightly submitted to the jury for determination under all the evidence, although the instructions did not observe the above-mentioned distinction between the relation of vice principal and fellow servant in the transaction, upon that issue, nor upon the question of contributory negligence. In all other respects the instructions were fair and without fault, and, if faulty in reference to risk assumed by the servant, they were in no sense prejudicial to the plaintiff in error and furnish no ground for reversal.

The question remains whether error is well assigned for overruling objections to testimony. Three instances are assigned, but the only objection which is pressed in the argument or is entitled to consideration appears in the course of the testimony of Brinkman, the plaintiff below. The record reads:

"Q. Are you a married man? A. Yes, sir. (Objected to by counsel for the defendant, as improper and immaterial.) Court: It may not be material, but anything pertinent to personal history of a witness is competent within the reasonable discretion of the court. (Objection overruled, to which ruling of the court the defendant then and there excepted.)"

Assuming that the fact of marriage had "no legitimate bearing upon any issue in the case" and that the inquiry was objectionable within the rule of *Pennsylvania Co. v. Roy*, 102 U. S. 451, 460, 26 L. Ed. 141, nevertheless the objection was neither timely nor specific; nor does it appear to have been called to the attention of the court subsequently, by motion, request for instruction, or otherwise. If deemed prejudicial, for any inferences which might arise in the minds of jurors, as now urged, such ground should have been brought to the attention of the trial court, without resting on the general objection, affording no light in that view. *Sigafus v. Porter*, 84 Fed. 430, 435, 28 C. C. A. 443, 449. The salutary rule that such general objections are not available on writ of error is stated and upheld by this court in *North Chicago St. R. Co. v. St. John*, 85 Fed. 806, 807, 29 C. C. A. 634, citing many authorities, and again in *Columbus Safe Deposit Co. v. Burke*, 88 Fed. 630, 634, 32 C. C. A. 67. In *Camden v. Doremus*, 3 How. 515, 530, 11 L. Ed. 705, like objections are well characterized as "vague and nugatory" and "without weight before the appellate court"; and it is unnecessary to multiply citations upon this rule beyond the reference to *Burlington Ins. Co. v. Miller*, 60 Fed. 254, 256, 8 C. C. A. 612; *Ogden City v. Weaver*, 108 Fed. 564, 569, 47 C. C. A. 485; *Baltimore & Ohio R. Co. v. Hellenthal*, 88 Fed. 116, 119, 31 C. C. A. 414; *Ohio & Mississippi R. Co. v. Walker*, 113 Ind. 196, 200, 15 N. E. 234, 3 Am. St. Rep. 638—all pertinent exemplifications. As remarked in the last-mentioned case:

"The particular objection must be fairly stated. It is not enough to state that the evidence is incompetent, or that it is immaterial and irrelevant. This much is implied in the bare fact of objecting. If it be unnecessary to state the particular objection, quite as well say 'We object,' and done with it, since a mere general objection amounts to nothing more, for it is simply tantamount to an expression of the fact that counsel do object. It is no answer to the proposition asserted by the authorities to say that the evidence itself may reveal the objection, for this may be said of all incompetent and irrelevant evidence, when carefully scrutinized, and, if this be true, then there would be no reason for requiring a specific objection in any case. But there is reason for requiring the particular objections to be stated with reasonable certainty; for, in the hurry of a trial, it cannot be expected that particular objections will occur to the judge, although, if stated, he would readily perceive their force. Counsel, who are presumed to have studied the case, ought to be able to state the particular objections, and, if none are stated, it is fair to assume that none exist, since an objection that cannot be particularly stated is not worth the making."

Doubtless the general objection may be treated as sufficient when a question calls for evidence which must "in its essential nature, be incompetent" (*Turner v. City of Newburgh*, 109 N. Y. 301, 308, 16 N. E. 344, 4 Am. St. Rep. 453), or which "could under no circumstances have been competent" (*Pittsburgh & W. Ry. Co. v. Thompson*, 82 Fed. 720, 728, 27 C. C. A. 333), as the departure from elementary rules of evidence may then be obvious without specification or reference

to particular issues. The question and answer under consideration are not within any such exception, and both their connection in the examination and the remarks of the court in overruling the objection indicate that neither the ground nor the tendency to prejudice now urged was in the mind of the court, if contemplated by either party. The objection is insufficient, therefore, and the assignments for error in the admission of testimony are overruled.

No reversible error appearing in the record, the judgment is affirmed.

WEBB et al. v. NATIONAL BANK OF REPUBLIC OF CHICAGO.

(Circuit Court of Appeals, Eighth Circuit. September 5, 1906.)

No. 2,368.

1. TRIAL—TRIAL BY COURT—GENERAL EXCEPTION AFTER JUDGMENT FUTILE.

An exception "to each, all, and every of said finding, conclusion, and judgment," after a judgment has been rendered on a special finding of facts made by the court at the close of a trial before it, is futile, in the absence of any objection, exception, or request for a declaration of law.

2. APPEAL—SUFFICIENCY OF FACTS FOUND TO SUSTAIN JUDGMENT—NECESSITY OF EXCEPTION.

The question whether or not the facts found by the court sustain the judgment upon them arises on the face of the record, and no objection or exception is necessary to present it to an appellate court.

3. TRIAL—FINDING OF SUFFICIENT ULTIMATE FACTS NOT AVOIDED BY FINDING OF OTHER FACTS NOT INCONSISTENT.

Where the finding by the court of the ultimate facts sustains the judgment and clearly shows that it is based on all the evidence and not on evidentiary or other facts it contains alone, and the latter facts are not necessarily inconsistent with the ultimate facts found, they present no ground for a reversal of the judgment.

4. SAME—FINDING NOT AFFECTED BY RECITAL OF FACTS IN OPINION.

Where the court has made a separate special finding of facts upon which the judgment has been rendered, the recital of facts in the opinion of the court constitutes no part of the finding and cannot be invoked to assail it.

(Syllabus by the Court.)

In error to the Circuit Court of the United States for the Western District of Missouri.

Hiram W. Currey, for plaintiffs in error.

Frank Hagerman (Benjamin V. Becker, on the brief), for defendant in error.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

SANBORN, Circuit Judge. This was an action brought by Webb and Wilson against the National Bank of the Republic for the conversion of 780 yearling steers. The issue was whether the defendant or the plaintiffs were the owners and entitled to the possession of the steers on June 4, 1901, when the conversion was alleged. A jury was waived and the cause was tried by the court which made and filed a special finding of facts, an opinion, and a judgment in favor of the defendant.

The plaintiffs assign many errors, but an examination of the record discloses the fact that the only exception they preserved was upon the entry of judgment and in these words: "To each, all, and every of said finding, conclusion, and judgment the plaintiffs and each of them at the time except."

In actions at law this is a court for the correction of errors of law of the court below and for this purpose alone. Exceptions to errors in the progress of the trial of a case are indispensable to their review by an appellate court. The purpose and office of an exception is to sharply call the attention of the trial court and of opposing counsel at the time to the specific ruling or finding challenged to the end that the court may at once correct it, if it is erroneous. An exception which does not give this notice of the specific error claimed utterly fails to perform its function and is futile. The exception here is of this nature. It neither suggests nor indicates which one of the several findings of fact or which of the numerous rulings of the court upon questions of law in the progress of the trial and decision of the case was then claimed to be wrong, or why this claim was made. This exception gave court and counsel no more notice of the alleged errors of which the plaintiffs now seek to avail themselves than their silence would have given. The court and opposing counsel would have been aware that the plaintiffs were of the opinion that the finding and the judgment against them were erroneous if no exception whatever had been taken, and the exception here under discussion gave them no more information. For this reason this exception presents nothing for the consideration of an appellate court, and the questions based upon it that have been discussed in the briefs and argument of counsel are beyond our reach.

No objection was made and no exception was taken to any ruling of the court during the progress of the trial. The bill of exceptions which appears in this record shows no request for any declaration of law or for any declaration that there was no substantial evidence to sustain a finding of facts in favor of the defendant or that there was none to sustain a finding of any of the special facts in issue (*U. S. Fidelity & Guaranty Co. v. Commissioners of Woodson County* [C. C. A.] 145 Fed. 144), and this court may not look beyond the bill of exceptions for such objections, exceptions, or declarations. Thus it appears that there is nothing in the record to indicate that any of the complaints of the rulings or findings founded upon this general exception were either called to the attention of the court below, or that it ever consciously ruled upon any of them. There can, therefore, be no error of the trial court to correct here, because none of the questions based upon this exception were ever consciously ruled by it.

It is conceded that an exception to each refusal to give each of several requests for instructions to a jury or for declarations of law in a trial by the court may be as effective as a separate exception to each refusal, because an exception of this nature calls the attention of the court as pointedly to each one of the requests. But neither the general exception taken after judgment in the case at bar nor any of the proceedings at the trial here called the attention of the

court in any way to the questions now springing out of this general exception, and for that reason they are not reviewable here. A trial court is entitled to a distinct specification of the matter, whether of fact or of law, to which objection is made, and an exception after a judgment at the close of a trial by the court in which a special finding of facts has been made, to each, all, and every finding, conclusion, and judgment therein, specifies no ruling or finding, has no more effect than no exception, and saves no question for review in an appellate court. *Block v. Darling*, 140 U. S. 234, 11 Sup. Ct. 832, 35 L. Ed. 476; *St. Louis, I. M. & S. Ry. Co. v. Spencer*, 71 Fed. 93, 95, 18 C. C. A. 114, 116; *Price v. Parkhurst*, 3 C. C. A. 551, 552, 53 Fed. 312, 313.

No objection or exception is required, however, to present to an appellate court the question whether or not the facts found sustain the judgment, because like the question whether or not a verdict sustains the judgment upon it, this is an issue of law which arises upon the face of the record. *St. Louis v. The Ferry Company*, 78 U. S. 423, 428, 20 L. Ed. 192; *Tyng v. Grinnell*, 92 U. S. 467, 469, 23 L. Ed. 733; *Ætna Ins. Co. v. Boon*, 95 U. S. 117, 125, 24 L. Ed. 395; *Allen v. St. Louis National Bank*, 120 U. S. 20, 30, 7 Sup. Ct. 460, 30 L. Ed. 573; *Seeberger v. Schlesinger*, 152 U. S. 581, 586, 14 Sup. Ct. 729, 38 L. Ed. 560; *Hooven, Owens & Rentschler Co. v. John Featherstone's Sons*, 49 C. C. A. 229, 234, 111 Fed. 81, 86. Counsel for the plaintiffs assail the finding of facts upon the grounds that it is ambiguous, that it contains evidentiary as well as ultimate facts, and that the evidentiary facts do not sustain the finding of the ultimate facts. But the court found that the plaintiffs based their right of recovery on two mortgages, one given by Grimes and the other by Siegel; that the notes secured by the Grimes mortgage had been paid and the mortgage had been abandoned and canceled; that the Siegel mortgage was not intended to cover, and did not include, the cattle in controversy, and that the plaintiffs were not the owners and were not entitled to the possession of the steers. These findings are ample to sustain the judgment. It is true that the court found many evidentiary and other facts. But it also found and declared in its special finding that it found the ultimate facts which have been recited, not from the other facts which it found alone, but from these evidentiary facts "under all the evidence" which consisted of more than 200 printed pages. The other facts which are recited in the court's finding are not necessarily inconsistent with the ultimate facts it found and there is neither ambiguity nor uncertainty in the finding of the latter. Where the court's finding of the ultimate facts sustains the judgment and clearly shows that it is based on all the evidence and not on the evidentiary or other facts it contains alone and that the latter are not necessarily inconsistent with the ultimate facts found, the other facts present no ground for a reversal of the judgment. *Anglo-American Land, &c., Co. v. Lombard*, 132 Fed. 721, 735, 68 C. C. A. 89, 103.

The facts recited in the opinion of the court where it has made a separate special finding of facts constitute no part of the finding and cannot be invoked to avoid it. *North American Loan & Trust Co. v.*

Colonial & U. S. Mortg. Co., 28 C. C. A. 88, 95, 83 Fed. 796, 803; Ogden City v. Weaver, 47 C. C. A. 485, 487, 108 Fed. 564, 566.

The mortgages are not set forth in the pleadings or in the finding. Their construction, their true meaning, the existence of substantial evidence to sustain the special finding or any part of it and every other question conditioned by the evidence in this case has been waived by the absence of all objections, requests for declarations of law and exceptions during the progress of the trial, and there is no escape under the established practice of the Supreme Court and of this court from an affirmance of the judgment below. The judgment is accordingly affirmed.

ADAMS, Circuit Judge, specially concurring. I fully concur in the affirmance of this judgment for the reasons stated in the foregoing opinion; but I am constrained to withhold my approval of any expressions which assert or assume that declarations of law may be required of a trial judge sitting without a jury, or that error may be assigned on the court's action thereon. This court in a carefully prepared opinion well supported by citations from the Supreme Court (Searcy County v. Thompson, 13 C. C. A. 349, 66 Fed. 92), announced a rule inconsistent with those expressions and I am not in favor of overruling or reconsidering the doctrine of that case, until the question of practice shall fairly arise and require a ruling at our hands. It cannot be claimed that it arises in this case. No declarations of law were requested or acted on and no discussion of the question was had at the bar.

PITTSBURGH RY. CO. v. BLOOMER.

(Circuit Court of Appeals, Third Circuit. September 5, 1906.)

No. 28.

1. TRIAL—INSTRUCTIONS—EXPRESSION OF OPINION AS TO FACTS.

The charge of the court in an action against a street railroad company to recover for an injury to a passenger by being thrown to the ground by the sudden starting of the car when she was in the act of stepping off, construed, and *held* not to withdraw the question of defendant's negligence from the jury, but to leave its ultimate determination to them, merely expressing an opinion as to the effect of the evidence.

2. CARRIERS—ACTION FOR INJURY TO PASSENGER—EVIDENCE OF NEGLIGENCE.

Evidence considered and *held* to conclusively establish the negligence of a street railroad company in starting a car suddenly while a passenger was alighting therefrom.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Wm. A. Challener, for plaintiff in error.

E. E. Fulmer, for defendant in error.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

LANNING, District Judge. Two errors are assigned in the record of this case. Both of them relate to the court's charge to the jury. The first is "to the withdrawal from the jury of the question of the alleged negligence of the defendant [the plaintiff in error in this court], and in charging the jury that the defendant was guilty of negligence." The second simply quotes the language of the court in its charge on the subject of the defendant's negligence.

The counsel on both sides have argued the case on the theory that the trial court, in effect, charged the jury that as a matter of law the proofs showed the defendant to be guilty of negligence and that the jury were allowed only to assess the damages. But we think the language of the charge will not bear that construction. The language quoted in the second assigned error, which includes all that the learned judge said on the subject of negligence, is as follows:

"By common experience, getting off of a moving street car is a dangerous operation and results in a great many painful and serious accidents. The law unhesitatingly condemns it, and I should have no hesitation, if a case of that kind was presented to me, in saying that there could be no recovery. At the outstart of the case I had the idea that possibly that was the character of the case with which we had to deal, because Mrs. Bloomer herself testifies that after she had notified the conductor that she wanted to get off and had gone to the rear platform, she stood with one foot on the platform and one foot on the step below, and that when she was in that position the car started, and that she then stepped off. Also, in response to a question which was put to Mrs. Tyler, who was looking at Mrs. Bloomer as she was getting off, after thinking over the matter, Mrs. Tyler said practically the same thing, that she had one foot on the lower step and the other on the platform, and that the car started and then she stepped off. But we are relieved, both you and myself, of having to deal with such a case, for the motorman [it was the conductor and not the motorman] supplied a piece of evidence, for he with evident frankness testified that she was in the act of stepping off of the lower step when the car started. You see how frank the parties are on both sides here. Mrs. Bloomer testifying in a way that apparently was to her disadvantage, and the conductor also testifying in the way that I have just said, which really was favorable to the plaintiff, and evidently, taking it from the testimony and putting it together in this way, evidently she was so in the act of alighting that it may have seemed one way to one, and to another, another way, and if that was the case, if she actually was in the act of alighting, possibly with her foot almost in the air we may say, and then the car started, that would make out negligence and would relieve the plaintiff from any charge of carelessness on her part, which would stand in the way of her recovery. Looking at it in that way, it seems to me, is about the only way you can look at it. The company would be convicted of negligence, and the only question would be as to what the plaintiff was entitled to recover."

In *Vicksburg, etc., Railroad Co. v. Putnam*, 118 U. S. 546, 7 Sup. Ct. 1, 30 L. Ed. 257, Mr. Justice Gray, delivering the opinion of the court, said:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error. *Carver v. Jackson*, 4 Pet. 1, 80, 7 L. Ed. 761; *Magniac v. Thompson*, 7 Pet. 348, 390, 8 L. Ed. 709; *Mitchell v. Harmon*, 13 How. 115, 131, 14 L. Ed. 75; *Transportation Line v. Illoe*,

95 U. S. 297, 302, 24 L. Ed. 477; Taylor on Evidence (8th Ed.) § 25. The powers of the courts of the United States in this respect are not controlled by the statutes of the state forbidding judges to express any opinion upon the facts. Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286; Code Ga. § 3248. The exceptions to so much of the judge's charge as bore upon the liability of the defendant cannot therefore be sustained."

To the same effect see *United States v. Reading Railroad*, 123 U. S. 113, 8 Sup. Ct. 77, 31 L. Ed. 138; *Rucker v. Wheeler*, 127 U. S. 85, 8 Sup. Ct. 1142, 32 L. Ed. 102; *Lovejoy v. United States*, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; *Doyle v. Union Pacific Railway Co.*, 147 U. S. 413, 13 Sup. Ct. 333, 37 L. Ed. 223.

All the learned judge in the present case did, in using the language complained of, was to tell the jury how the proofs in the case on the subject of the defendant's alleged negligence impressed him. He did not declare that there was such conclusive proof of negligence that the jury were relieved from the consideration of that subject. He simply said that if the car was started while the plaintiff was in the act of alighting from it there was negligence on the part of the defendant, and added that "looking at it in that way, it seems to me, is about the only way you can look at it." Then, after discussing the question of damages, the charge was closed with these words:

"Gentlemen, I think this practically covers all that seems to be necessary to say to you upon this subject, and I will therefore now submit the matter into your hands for you to exercise your best judgment and allow such a verdict as seems to you to be warranted and justified by the evidence."

It is clear that the case was ultimately submitted to the jury on all the evidence, both that relating to the question of negligence and that relating to the question of damages, and that the theory on which the case has been argued by counsel is therefore an erroneous one. Nor, if it be assumed that the jury were informed that there was conclusive proof of negligence on the part of the defendant company, do we think there was error. The evidence of negligence by the defendant is much stronger than one would infer from the language of the charge. It is very brief and may be quoted. The plaintiff on direct examination testified as follows:

"Q. What happened to you there in Wilkinsburg on that day? A. The car stopped, and I asked the conductor if they were going to turn around that corner and he said 'Yes'. I said 'I will get off here.' The lady with me and I started to get off. I was part of the way off the car when he started and it threw me head foremost to the ground, on the pavement, on my hands and knees. * * * Q. Was the car stopped when you started to get off? A. Yes, sir, when I raised from the seat in the center of the car. The conductor stood in front of me, and I started for the rear end of the car and got on the platform, with one foot on the platform and the other on the step, and the car started and threw me forward. I landed on my hands and knees, so my hands were pressed all out of shape and my knees were injured. Q. You had one foot on the platform and one foot down on the step? A. Yes. Q. And while in that position the car started? A. Yes. Q. What injuries did you sustain at that time? A. A fracture of the knee cap."

On cross-examination she said:

"Q. Then I understand you, that as you were in the act of stepping down off the platform or off the step, the car moved forward? A. Yes, sir. Q. And you fell on the street beside the car, as I understand you? A. Yes, sir."

Mrs. A. L. Tyler, who saw the accident, on direct examination said:

"Q. Just describe to these men what you saw? A. Mrs. Bloomer [the plaintiff] and Mrs. Burke were on the car, and the car stopped and she attempted to get off. She had one foot on the platform and another on the step, and as she attempted to get off the car started, and, of course, threw her to the pavement."

In answer to questions of the court she said:

"Q. Do I understand that she was still with one foot on the step and one foot on the platform above when the car started? A. Yes. Q. She was standing on the step and about stepping to the ground when it started? A. I don't think so. Q. That is to say, after it started she made a step from the step of the car to the pavement? A. Yes."

On cross-examination she said:

"Q. I don't understand? A. I think Mrs. Bloomer had one foot on the platform and one on the step of the car. Q. When the car started? A. Yes. Q. And she was thrown from there? A. Yes."

For the defendant, James W. Weber, the conductor of the car, on direct examination said:

"The car had stopped at Penn avenue and Wood street. Every person got off the car but Mrs. Bloomer and this other lady that was with her. We were waiting on another car that came across the street. Mrs. Bloomer spoke to the other lady and asked me if the car turned up Penn avenue. I told her it did. Just then she got up to start out, she and the other lady, and I was standing on the platform when they were getting down off the step. She just had one foot on the ground and the other one on the step as the car started to move. I reached up and pulled the bell for the motorman to stop. He stopped right away, and the lady fell down on one knee, forward on one knee. She remained there. I and the lady behind her was getting off, and we stepped off and helped her over to a box on the street."

On cross-examination he said:

"Q. You say that the car was really stopped when she started to get off? A. Yes, sir. Q. And it really did start before she got off? A. She had one foot on the ground and the other one on the last step when the car started. Q. And it was the starting of the car which threw her forward? A. Well, yes, I suppose it was. Q. Had you signaled for the car to start? A. No, sir. Q. Then the motorman started without any signal, did he? A. Yes, sir."

Jacob Sank, the motorman of the car, testified on direct examination for the defendant as follows:

"Q. Where were they [the plaintiff and her companion] at the time? A. In the middle of the car. Another car just passing over, I thought I heard the bell go, my bell, to go ahead. The noise of the car and some wagons passing at the same time sometimes drowns the sound of the bell. This bell I had on that car was a little—didn't sound well, and sometimes I would stop and wait until I would get the second bell. That day I thought I got the bell, but I guess it was a mistake, and I started; but I didn't only move above two feet when I stopped again. The brake was on. Q. If I understand you, it amounts to about this, that there were bells sounded on the other car and you supposed it was your own car, and started your car forward. Is that right? A. Yes, sir."

This is substantially all of the evidence which tends to explain the cause of the accident. It shows conclusively that there was a defective bell on the car, and that the motorman knew of this fact,

and sometimes waited for a second bell in order to make sure that he had a signal to go forward. On this occasion he started forward without any signal from the conductor, and whether the plaintiff had one foot on the platform and one on the lower step, or one foot on the lower step and one on the ground, is an immaterial fact, for it is clear that whether she was in the one position or the other it was the unexpected forward movement of the car that threw her to the ground. The evidence therefore did conclusively show negligence on the part of the motorman of the defendant company. There was no conflict of evidence on this point, and the trial judge would have been justified in charging the jury, as a matter of law, that negligence by the defendant company had been shown. It is not suggested that the plaintiff was guilty of contributory negligence. That defense was not set up at the trial and, of course, is not before us.

The judgment of the Circuit Court is affirmed, with costs.

THE HAMILTON.

THE SAGINAW.

(Circuit Court of Appeals, Second Circuit. June 22, 1906.)

No. 276-2.

1. DEATH—COLLISION—LIABILITY OF SHIPOWNER—WHAT LAW GOVERNS.

Where both vessels which came into collision in a fog belonged in the state of Delaware, those on board, whether passengers or crew, were in contemplation of law within the territory of that state, and hence an action for their wrongful death was governed by the Delaware laws.

[Ed. Note.—For cases in point, see vol. 15, Cent. Dig. Death, § 12.]

2. COLLISION—DEFENSES—JOINT TORT-FEASORS.

Where two vessels came into collision as the result of the joint negligence of both, they were joint tort-feasors, and the negligence of one was no defense to the liability of the other.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, § 237.]

3. MASTER AND SERVANT—INJURIES TO CREW—FELLOW SERVANTS.

Where two vessels came into collision as the result of excessive speed, maintained at the direction of the master, the latter represented the shipowner, so that the personal representatives of the subordinate officers and crew who were drowned in the collision were not precluded from a recovery on the ground that they were fellow servants of the master.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 492.]

4. SAME—FELLOW SERVANTS—PROXIMATE CAUSE.

The negligence of a fellow servant will not defeat an action for injuries, if it is not the sole cause of the accident.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Master and Servant, § 353.]

5. SHIPPING—COLLISION—LIMITATION OF OWNER'S LIABILITY—DEATH OF PASSENGERS AND CREW.

Where two vessels belonging to different owners came into collision as the result of fault on the part of both, and both owners brought proceedings in admiralty to limit their liability, a claim for damages was main-

tainable against both vessels by the personal representatives of the passengers and crew of both vessels who died as the result of the collision.

[Ed. Note.—Limitation of vessel owner's liability, see note to *The Longfellow*, 45 C. C. A. 387.]

6. SAME—CLAIMS.

Where, in a proceeding to limit the liability of the owners of certain vessels for damages resulting from the death of passengers and crew caused by a collision, the statutes of the state to which the vessels belonged created a right of action for death in the widow of the deceased person, a claim filed by M., "widow and executrix" of one of the persons killed in the collision, was sufficient; the allegation that she was executrix being mere descriptio personæ and surplusage.

7. SAME—AMENDMENT.

An amendment of the claim, so as to charge that petitioner claimed as widow, was not erroneous, as permitting the filing of a new cause of action.

Appeals from the District Court of the United States for the Southern District of New York.

On appeal and cross-appeal from a decree of the District Court for the Southern District of New York, granting the petitions of the Old Dominion Steamship Company, owner of the steamship *Hamilton*, and of the Clyde Steamship Company, owner of the steamship *Saginaw*, for a limitation of their liability for damages arising out of a collision between said vessels in a dense fog, as a result of which the *Saginaw* sank, causing loss of life, injury to persons and damage to cargo. The District Court held both vessels in fault for running at excessive speed in a fog. Both vessels were owned by corporations created under the laws of Delaware and, as that state permits a recovery for loss of life, the District Court held that the claimants, representing the passengers and members of the crew who were drowned by the sinking of the *Saginaw*, were entitled to recover in the admiralty. The opinion of the District Judge, stating all the salient facts and citing the leading authorities bearing upon the questions debated, is reported in 134 Fed. 95.

A reference to fix the amount of damages was ordered but before the hearing by the commissioner all claims except those for loss of life were compromised and settled, and since the report one of these claims has been settled and withdrawn. The commissioner, after a careful and painstaking examination of the facts and law, sustained the claims and fixed the amount of damages. Exceptions being filed, the District Court reduced the award of damages in each instance and, as so modified, confirmed the report. The opinion of the District Judge setting out in full the report of Commissioner Goodrich is reported in 139 Fed. 906. The following table shows the names of the deceased persons, the amount of the claims as filed and the amounts allowed respectively by the commissioner and the court:

Name.	Claim.	Commissioner.	Court.
Gilmore, passenger	\$10,200	\$3,500	\$2,000
Goslee, chief officer.....	20,000	7,500	6,000
Morris, chief steward.....	15,000	4,500	3,000
Swanson, passenger	12,000	4,250	2,750
Sarah Elam, stewardess.....	15,000	2,500	1,500
Page, cook	8,100	4,250	3,000

The questions presented by this appeal are:

First. Does the Delaware statute apply to a claim for death on the high seas arising purely from tort?

Second. Can the representatives of the deceased members of the crew of the *Saginaw* recover their claims in full against the *Hamilton*?

Third. Had the court discretion to permit an amendment changing the capacity in which the claimants sued?

Fourth. Shall the awards made by the court be increased or reduced?

Harrington, Putnam and Henry E. Mattison, for appellant Old Dominion Steamship Company.

J. Parker Kirlin, Howard M. Long, and John M. Woolsey, for claimants Goslee, Morris, and Elam.

Arthur L. Fullman, for claimant Gilmore.

George W. Betts, Jr., for claimants Swanson and Lawson.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). The three opinions, which have already been delivered in the course of this litigation, so fully and clearly state the facts and the law that little can be said by this court which is not a repetition of what appears in the Reports.

In *International Nav. Co. v. Lindstrom*, 123 Fed. 475, 60 C. C. A. 649, this court decided that the sovereignty of a state extends to the vessels of the state upon the high seas, and if the law of the state permits a recovery for damages occasioned by a tortious act the law is as applicable to said vessels on the high seas as when actually within the boundaries of the state.

In the recent case of *La Bourgogne* (C. C. A.) 139 Fed. 433, 439, we had occasion to reaffirm this doctrine as to death claims growing out of a collision in a fog on the high seas, the *Bourgogne* being sunk with great loss of life. The law of France permits a recovery in such circumstances and, in a proceeding to limit the liability of the owner, we held that the French law extended to and operated upon the *Bourgogne* in midocean.

We are informed that the Supreme Court has recently granted a certiorari in the *Burgogne* Case and, in view of the similarity of the questions involved, it is not improbable, should a petition for a writ be filed, that a similar course may be taken in the case at bar. We see no impropriety in saying that such a result would be gratifying to us.

The facts in hand, of course, are not identical with those in the cases cited, but we are of the opinion that they cannot be successfully distinguished because of these differences.

The right of action provided by the Delaware statutes is not founded on contract but on tort. "Whenever death shall be occasioned by unlawful violence or negligence" the personal representatives may maintain a suit in every case where the decedent could have maintained it had the injuries not resulted in death. Both vessels belonged to Delaware and those on board, whether passengers or members of the crew, were, in contemplation of law, within the territory of that state.

Assume that the *Hamilton* had negligently run into and sunk the *Saginaw* in the harbor of Wilmington, Del., causing the death of the persons in question, can there be a doubt that the claimants here would have a right of action at common law against the Old Dominion Company under the statute of that state? It would be no defense to such an action to show that the owner of the *Saginaw* was also negligent. One of two joint tort-feasors may not defend

an action against himself by showing that the other wrongdoer was equally responsible. *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

We do not see, either, how the question of negligence of a fellow servant could arise in such an action. The crew of the *Saginaw* were not fellow servants with the crew of the *Hamilton* and the persons who were drowned cannot be considered as fellow servants with the master of the *Saginaw* who, so far as that ship is concerned, was the only person at fault for her excessive speed. No case with which we are familiar has gone to the extent of holding that the captain of a vessel is a fellow servant with the cook, the stewardess and the other inferior members of the crew. A better illustration of the doctrine of alter ego can hardly be imagined. Goslee, the chief officer, was not negligent; what he did was under the direction of the master and it would be a dangerous doctrine to hold a subordinate guilty of fault for obeying the orders of his superior.

But assuming that the rule as to the negligence of a co-servant can be invoked where the action is against another vessel, it would seem that the common-law rule that the negligence of a co-servant does not defeat the action unless such negligence is the sole cause of the disaster is also applicable. No matter how much such negligence may contribute the defendant is not relieved if he himself be at fault. *Grand Trunk Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266.

Were this action against the *Saginaw*, of course, a different rule would apply as to the members of the crew, but it is doubted whether the maritime law based upon the ancient Codes is applicable to the case at bar. *The Osceola*, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760.

There is no pretense that any one of the deceased persons was negligent and the finding that both vessels "were to blame" has been accepted by all. This is enough. We cannot doubt that had suits been brought for these deaths in the courts of Delaware the plaintiffs would have succeeded. By the action of the petitioners they are enjoined from prosecuting their claims in the home forum and are compelled to present them here.

Every consideration based on equity and natural justice impels us to hold that it was not the purpose of the limited liability act to enable vessel owners to force claimants into the admiralty, and thus avoid claims which are valid and enforceable at common law. The intent was to limit the liability, not to destroy it.

It is true that no contractual relation existed between the claimants' intestate and the Old Dominion Company or the *Hamilton*, but we see no reason, based on sound logic, why a passenger of the *Hamilton* should be permitted to recover for her negligence and a similar right be denied to the passengers of the *Saginaw* injured by the identical negligence.

As to members of the crew, although their legal status differs in many respects from that of the passengers, we are unable to perceive how any valid distinction can be drawn as to their contractual

relations to the ship which would permit the passengers to maintain an action against an outside vessel and deny that right to the crew. There is here no conflict of law as the statute invoked applies equally well to both vessels.

The claimants, representing innocent third parties in no way responsible for the collision either directly or by imputation, are entitled to recover the full amount of their damages. The fact that both ships were negligent does not change the rule, as the fault of the Saginaw cannot be imputed to persons who were wholly free from blame. *The Atlas*, 93 U. S. 302, 23 L. Ed. 863; *The Juniata*, 93 U. S. 337, 23 L. Ed. 930.

The claims of Sallie T. Morris and Mary Swanson were proper in the form in which they were originally filed. The objection is that the Delaware statute gives a right of action to the widow and that these claims were filed not by the widow but by the administratrix and that an amendment permitting the claim to be filed in the name of the widow presented a new cause of action which was barred by the Delaware statute of limitations.

In the Morris Case the opening statement of the verified claim is:

"I reside at 2415 East Main Street, Richmond, Virginia, and am the widow and executrix of William Morris."

In the Swanson Case the opening statement is:

"The claimant, Mary Swanson, administratrix of the estate and widow of Peter Swanson, deceased, alleges," etc.

Both claims state all the facts necessary to constitute a good cause of action. Grant that in each case the claimant might have rested with the allegation that she was the widow of the drowned person, the subsequent statement that she was also executrix was absolutely immaterial and might with perfect propriety have been disregarded as surplusage. It was merely descriptio personæ and was as innocuous as the statement "I reside at 2415 East Main Street." Where a pleading alleges two representative capacities, in one of which the claim may be successfully prosecuted, we know of no rule of construction which requires the court to select the other and thus defeat the claim in limine. The court would have been justified in disregarding the unnecessary averments, interpreting the claims as filed by the claimants in their capacity as widows, but for greater caution an amendment was permitted in each instance. That such an amendment was within the discretion of the court there can be no doubt. *The Minnetonka* (decided May 22, 1906), 146 Fed. 509.

As before stated all the facts were before the court showing that the claimants were both widows and administratrices and the amendment allowing them to say that they claimed as widows permitted no new cause of action, created no surprise and required no additional proof. Such amendments are being constantly granted and particularly so in the admiralty where the practice is much more liberal in this regard than in the courts of common law. We have examined the awards made by the court with greater care than would ordinarily be required because both parties are dissatisfied. We are

convinced that the amounts allowed by the District Court are fair and conservative and we see no reason for disturbing them.

We do not deem it necessary to pass upon all the questions presented upon this branch of the case or to express our approval or disapproval of all the reasons advanced by the commissioner and the judge in support of their respective findings; it suffices to say that upon the facts proved we are of the opinion that the amounts allowed by the final decree do substantial justice to the claimants.

The decree is affirmed with interest but without costs in this court.

BACON v. ROBERTS et al.

(Circuit Court of Appeals, Third Circuit. September 10, 1906.)

No. 13.

BANKRUPTCY—PETITION TO REVIEW ORDER OF REFEREE—TIME FOR FILING.

No limit of time having been fixed by the bankruptcy law or the general orders for filing a petition to review an order of a referee, whether a petition was filed within a reasonable time in a given case is to be determined by the District Court in its discretion, in the absence of any rule of court on the subject, and its action will not be reviewed by the appellate court except for an abuse of discretion or manifest error. An order dismissing a petition filed 50 days after the making of the order sought to be reviewed for unreasonable delay *held* not an abuse of discretion where no good reason for delay was shown.

[Ed. Note.—Appeal and review in bankruptcy cases, see note to *In re Eggert*, 43 O. C. A. 9.]

Appeal from the District Court of the United States for the District of New Jersey.

Thomas E. French, for appellant.

Theodore W. Reath, for appellees.

Before DALLAS and GRAY, Circuit Judges, and LANNING, District Judge.

PER CURIAM. The present case was originally brought before this court on appeal by the trustees of the bankrupt, but it was afterwards stipulated by counsel that we should be at liberty to consider the matter as if it were before us upon a petition for review. In either aspect it presents a single question, which may perhaps be best understood by quoting the opinion of the court below, which states clearly the ground upon which the decision of Judge Cross was put. His opinion is as follows:

"The referee in the above cause, on the 2d day of September, 1905, filed an order sustaining and allowing the claim of Thomas Roberts & Co., creditors, against the said bankrupt's estate; on the 23d day of October, 1905, aforesaid, 50 days after such decision and order, a petition for review of said order was filed with the referee. Motion is now made upon notice to dismiss said petition upon facts appearing upon the files and record of the case. There is no time specified in the bankruptcy act within which such petition shall be filed. The authorities, however, all hold that it should be filed within a reasonable time, and that what constitutes reasonable time should be determined by the facts in each case. The act undoubtedly contemplates that in the absence of

any excuse warranting delay, the petition should be filed with a considerable degree of promptness; its manifest policy requires reasonably expeditious administration of the bankrupt's estate. In the matter of appeals from the District Court to the Circuit Court of Appeals, the act provides that such appeal shall be taken within 10 days after the judgment appealed from was rendered (section 25, Act July 1, 1898, c. 541, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432]) and appeals from the Circuit Court of Appeals to the Supreme Court of the United States must be taken within 30 days. Gen. Orders in Bankruptcy, No. 36, par. 2 (89 Fed. xiv; 32 C. C. A. xxxvi). Reasoning by analogy, therefore, it would seem as though 30 days were the outside limit in which to take an appeal from a referee's decision. The labor involved therein is not great, nor is the proceeding either complex or intricate. In the absence of any rule or authority to the contrary, I am unwilling in any ordinary case, where there is no adequate excuse for delay, to say that 30 days is not ample time in which to perfect such an appeal; any longer period than that seems altogether unreasonable and unnecessary, and ought not to be sanctioned.

"In *Re New York Economical Printing Co.*, 106 Fed. 839, 45 C. C. A. 665, a motion to dismiss a petition for review made on the ground that the same had not been taken within ten days was denied, the court said: 'Neither the statute nor the rules limit the time within which a petition for review in bankruptcy should be filed. We do not think there has been any unreasonable delay in this case (the time does not appear), and therefore deny the motion to dismiss. A new rule of this court will control future applications for review.'

"In *Re Milgram & Ost* (D. C.) 133 Fed. 802, a petition was filed for review; there was a doubt as to whether the question for review was upon the allowance of the claim by the referee, in which case more than six months had elapsed before the petition for review was filed, or was upon a refusal to expunge the creditor's claim, in which case the period of delay was three months; in either case the court held the delay unreasonable.

"In *First National Bank of Troy v. Cooper*, 20 Wall. 171, 22 L. Ed. 273, where a bill of review was dismissed because filed too late, Mr. Justice Strong, in delivering the opinion of the court, said:

"It is true their bill was not filed in the Circuit Court until about four months and a half after the order complained of was made. But the act of Congress prescribes no time within which the application for a review must be presented. An appeal is required to be taken within 10 days. Not so with a petition or bill for a review. Undoubtedly, the application should be made within a reasonable time, in order that the proceedings to settle the bankrupt's estate may not be delayed, but neither the act of Congress nor any rule of this court determines what that time is. At present, therefore, it must be left to depend upon the circumstances of each case. Perhaps, generally, it should be fixed in analogy to the period designated within which appeals must be taken.'

"I am also referred by counsel of the creditors to the case *In re Sharick*, 1 Alaska, 398, which I have not been able to examine; the opinion, however, is quoted at some length in the brief of counsel. The purport of the decision is that 10 days is a reasonably sufficient time in which to file a petition to review a question determined by a referee, and a petition filed six months after such determination was dismissed. Upon reading the case of *In re Scherr* (D. C.) 138 Fed. 695, it will appear that there is a rule in the Eastern District of Pennsylvania, fixing a time limit of 10 days for such appeal. The Circuit Court of Appeals, Fourth Circuit, in *Crim et al. v. Woodward*, 136 Fed. 34, 68 C. C. A. 584, said there is no provision of the bankruptcy act, or of the general orders in bankruptcy, fixing the time within which a petition for review of an order of a referee must be filed; and, in the absence of a rule of court on the subject, the time within which such petition may be entertained is discretionary, subject only to the limitation that it must be filed within a reasonable time, in view of the general purpose of the act to expedite the proceedings. In that case the order of the referee adjudging that certain liens claimed by the appellants should be set aside was entered June 5, 1902. One creditor's petition for review was filed June 9, 1902,

another's June 24, 1902, and that of another July 1, 1902. Motion was made to dismiss the two later petitions, because they were not filed within 10 days. Upon this state of facts, after saying that it does not appear from the record that any objection was made in the court below to the hearing of the petitions, on the ground that they were not filed in time, the court says, 'Section 25 requires that, in the cases therein enumerated, appeals to the Circuit Courts of Appeal shall be taken within ten days after the judgment appealed from has been rendered. There is no apparent reason why a longer time than this should be allowed for the filing of a petition for a review of the order of a referee, for in nearly all of the provisions of the bankruptcy act, which require notices, the time limit of 10 days is adopted, and in some jurisdictions there is a rule to that effect; but it does not appear that there is any such rule in the district from which this appeal comes. There being no time limit fixed by the statute or by rule, it seems to be left to the discretion of the judge, and the practice, so far as adjudicated cases which we have examined enlighten us on this point, is that the petition may be filed within a reasonable time.' Subsequently the court adds: 'As these petitions were filed within 20 and 25 days from the date of the filing of the order of the referee, and the record does not show that any objection was made in the court below for the reason that they were not filed within a reasonable time, in the absence of a statutory provision or rule fixing a time limit, this objection is not sustained.'

'An attempt has been made in this case to excuse the delay, but I deem the excuse inadequate and insufficient. The record shows that the trustee has as his counsel a firm composed of two members, and also another counsel practicing independently; the excuse is that one or another of these counsel was at different times, but not continuously, engaged in other matters, and that the trustee was seeking to engage a fourth counsel (the one who argued the case for him, and against whom no charge of delay exists), which he was unable to do until shortly before the petition was prepared and filed. There is absolutely nothing in this allegation by way of valid excuse. Another excuse was that the trustee notified the counsel of the creditors orally that he intended to take an appeal, and also wrote a letter or letters to the referee to that effect; this, too, is clearly unavailing; these notices were not required; and consequently were unnecessary and ineffective; they constituted no part of the appeal. Again, it was suggested on the argument that the creditors delayed filing their claim until within a day or two of the expiration of the time limit therefor; but this afforded no ground of excuse for the petitioner's delay; moreover, it cannot be claimed that the creditors were in laches, so long as they filed their claim within the time fixed by law.

'An order dismissing the petition for review for laches will be entered.'

It is apparent, we think, that we are not called upon to lay down a rule of our own motion, by which to test in all cases the reasonableness of a petitioner's delay in seeking to review the decision of a referee. We agree with the cases cited by counsel—there is no dispute upon this subject—that no limit of time for taking an appeal has been fixed either by the statute or by the general orders; and therefore that, if the particular district court whose action is in question has made no rule upon the subject, the application for review is addressed in the first instance to the sound discretion of that court. It is a familiar principle, that the exercise of such discretion will not be interfered with by an appellate tribunal, except for manifest error, or, as the phrase sometimes goes, for abuse of the court's discretionary power; and it is only necessary to say that we do not find in this record either abuse of discretion, or manifest error, in dismissing the trustee's petition for review. The court below has made no rule fixing the time for taking an appeal from the decision of a referee, and the reasonable-

ness of the delay in a given case is therefore a matter with which that court is, in the ordinary controversy, peculiarly fitted to deal.

The order of the district court is therefore affirmed, with costs to the appellees, both on appeal and in the court below.

THE BARBARA HERNSTER.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,278.

1. SEAMEN—WHALER UNDER LAY CONTRACT—VALIDITY OF RELEASE.

A seaman who shipped on a whaling voyage under a lay contract, but to whom no accounting was made by the owner of the vessel on the completion of the voyage, will not be held bound by a release given by him some time afterward, when greatly intoxicated, on the payment to him of an inadequate sum in settlement for his share of the catch.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, § 129.]

2. SAME—FAILURE OF SHIPOWNER TO DIVIDE PRODUCT OF VOYAGE—LIABILITY FOR VALUE OF SEAMAN'S SHARE.

Where the owner of a whaling vessel, on her return from a voyage on which libellant served as a seaman under a lay contract, shipped away the product taken without making a division, it thereby became liable to libellant for the reasonable value of his share.

[Ed. Note.—For cases in point, see vol. 43, Cent. Dig. Seamen, §§ 157-160.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington.

John P. Hartman, for appellants.

James Kiefer, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The libellant, in the month of April, 1904, shipped from the port of Seattle, state of Washington, on board the schooner Barbara Hernster, on a whaling voyage to the Arctic Ocean, being hired by the master and owner of the schooner as boat-steerer on the one sixty-fifth lay or share of what should be taken, as wages, and performed his duties during the voyage and until the return of the schooner to Seattle. At the time of the commencement of the voyage he received from the appellant \$50 in cash, and while on board received for his own use from the slop chest slops of the value of \$27.20, and on the completion of the voyage he received from the appellant the further sum of \$50. It appears that during the voyage four whales were taken, and that the whalebone removed therefrom was brought to Seattle and amounted to from 7,500 to 8,000 pounds. It was then shipped East by the appellant, where a part of it was sold. The remainder of it had not been sold at the time of the filing of the libel. After the completion of the voyage the libellant demanded of the appellant an accounting, and received from the latter, as has been said, \$50, in addition to the \$50 received

by him at the commencement of the voyage, and the \$27.20 worth of slops during the voyage, but no other or further accounting. He, however, continued to importune the appellant for money.

The answer of the claimant set up, among other things, in defense, that on the 18th day of October, 1904, the libelant came to its office and stated that he would release the vessel and the claimant from all further claims and demands on account of the contract and of the voyage, upon the payment to him of the sum of \$100, which the claimant thereupon paid to the libelant, who thereupon executed the following paper:

"Received of the schooner Barbara Hernster the sum of one hundred and no/100 (\$100.00) dollars, in full payment of all claims and accounts of any kind and every nature and kind against said schooner Barbara Hernster, her charterers, owners and master, from the beginning of the world to this the 18th day of October, 1904, and particularly for all claims and demands on account of whalebone or other products taken during the voyage of said schooner Barbara Hernster, during the season of 1904.

"James Timmons.

"Witness to signature: O. B. Woolley."

On the trial testimony was given on behalf of the libelant tending to show that, at the time he demanded and received the \$100 and executed the foregoing paper, he was too much intoxicated to know what he was doing, and there was testimony on the part of the claimant tending to show that, although the libelant was at the time intoxicated, such was his normal condition, and that the libelant understood his action in the respect under consideration as well as any of his other acts. The court below found, from the evidence, the value of the libelant's share of the whalebone to be \$460, after making due allowance for all expenses and shrinkage, and held that as the claimant did not divide the commodity, but sent it away to market, there existed an implied obligation on its part to pay the libelant his proportionate share of the value. It appears from the testimony of witnesses on the part of the claimant that only a part of the whalebone had been sold at the time of the trial, but exactly how much the claimant did not disclose, although its employes were questioned in respect to that matter. Some of them testified that the bone had been shipped to New Bedford, Mass., and that New Bedford was the general and only market for whalebone. They further testified that the whole of the bone had not been sold, although they had endeavored to dispose of it, but that the market was not satisfactory.

We are of the opinion that the court below was right in not holding the libelant bound by the release executed by him. The law has always looked with extreme care into such settlements made with seamen, and will not sustain them where it appears that advantage was taken of their circumstances and condition. In this case it appears that the libelant was very much intoxicated at the time of offering to take the \$100 in full payment of his interest in the bone, and at the time of executing the release relied upon by the claimant. The claimant, in answer to his demand for an accounting, at no time informed the libelant of the amount of the bone it had sold, or the amount remaining unsold. Nor does it appear that there was any understand-

ing or agreement concerning the shipment and sale of the bone by the claimant. The maritime law contemplates that seamen should be promptly paid and not required to remain on shore indefinitely for their earnings.

We agree with the court below that, the claimant not having divided the commodity, but having, instead, sent it away to market, there is an implied obligation on its part to pay the libelant his proportionate share of the value; and such was the effect of the decisions of Judge Hoffman in the cases of *The Hunter* (D. C.) 47 Fed. 744, and *The Cape Horn Pigeon* (D. C.) 49 Fed. 164.

The judgment is affirmed.

NOTE.—The following is the opinion of Hanford, District Judge, on the merits:

HANFORD, District Judge. There is no basis either in the pleadings or the evidence for the argument made in behalf of the respondent that the contract of employment upon which this suit is founded constituted a partnership. The libelant was hired as a seaman, and it was agreed that for his compensation he should receive a share of the product of the voyage. A reasonable estimate of the value of his share is \$460, after making due allowance for all subtractions on account of expenses and shrinkage. As the respondent did not divide the commodity, and did send it away to market, there is an implied obligation to pay the libelant his proportionate share of the value. An agreement to accept part of a debt as payment in full is not a bar to a suit to recover the balance, because there is no consideration to support such an agreement. An attempt to extinguish a debt in that manner differs materially from an adjustment of differences and payment of the full amount which a debtor and creditor by agreement have made the true amount of the balance due from one to the other. When a sailor at the termination of a voyage or period of service signs clear of a ship upon receiving the amount of wages which at the contract rate is the true amount earned, after deducting set-offs which he has agreed to, the transaction is not subject to be impeached, except on the grounds of mutual mistake, or fraud, or duress, or legal disability of one of the parties to bind himself by a contract. There is no such a settlement between the libelant and the respondent alleged or proved in this case, and it is my opinion that there is no valid defense.

For the above reasons, I direct that a decree be entered in favor of the libelant for the difference between the amount paid him on the contract, and \$460, with interest at 6 per cent. from the date of the commencement of this suit, and costs.

In re GESAS.

In re COMMERCIAL NAT. BANK OF ST. ANTHONY.

(Circuit Court of Appeals. Ninth Circuit. June 27, 1906.)

No. 1,302.

1. BANKS AND BANKING—BANKER'S LIEN—STATUTES—CONSTRUCTION.

The lien given to a banker by Rev. St. Idaho 1887, § 3448, declaring that a banker has a general lien dependent on possession on all property in his hands belonging to a customer for the balance due him from such customer in the ordinary course of business, is limited to property taken by a banker in the usual course of the banking business, such as banks are in the habit of dealing in, or in taking on deposit, or for collection, or otherwise, as notes, bonds, stocks, and other choses in action,

and does not include stocks of merchandise, etc., which cannot conveniently pass into the actual possession of the bank.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, § 673.]

2. BANKRUPTCY—TRANSFERS—PREFERENCES—VALIDITY.

A bankrupt, while insolvent, and while making other like transfers of his property for a like purpose, about 10 days prior to the filing of a petition in bankruptcy by his creditors, asking that he be adjudged a bankrupt, which was done a short time after, transferred certain of his property to certain banks, without any new consideration, which operated to give them a preference over other creditors. *Held*, that the transfers were unenforceable.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, §§ 247-285.]

Petition for Revision of Proceedings of the District Court of the United States for the District of Idaho.

Caleb Jones, for petitioner.

Thomas & Maycock, for trustee.

Before GILBERT and MORROW, Circuit Judges, and DE HAVEN, District Judge.

DE HAVEN, District Judge. This is a petition to revise in matter of law an order made by the United States District Court for the District of Idaho, affirming an order of the referee refusing to allow as a secured claim a certain claim filed by the petitioner herein in the matter of Harry Gesas, bankrupt. The facts, and the grounds of his decision, are fully stated in the following opinion of Beatty, District Judge, affirming the order of the referee:

"The Commercial National Bank of St. Anthony, Idaho, filed with the referee its proof for the sum of \$905 as a preferred claim under the Idaho statute providing a banker's lien. The referee having refused to allow it as a preferred claim, this appeal is taken to review his order. From the record and the stipulation of facts, it appears that on May 16, 1904, the bankrupt executed to the bank his note for \$1,000 for borrowed money which after deductions of payments amounted to the sum of \$905 on the 11th day of March, 1905, when proof thereof was made; that on December 20, 1904, the bankrupt transferred to the bank possession of his stock of goods of over the value of \$10,000, with the understanding that the bank should retain possession thereof and sell the same at retail prices, under said bankrupt's direction, until the proceeds of such sale were sufficient to pay the said indebtedness; that the bank held such possession in conjunction with the First National Bank of St. Anthony; that all the proceeds of sales were turned over to said First National Bank to apply on its claim against said bankrupt; that on the said 20th day of December said bankrupt also executed to said Commercial National Bank his chattel mortgage upon said goods to secure the bank's said claim, but that under this mortgage the bank makes no claim; that on December 31, 1904, a petition in bankruptcy was filed against said bankrupt alleging that on December 19th said bankrupt had given preferences to various parties by executing chattel mortgages on his goods, and that on January 14, 1905, he was adjudicated a bankrupt. In his answer to the petition of his creditors the bankrupt admitted that he had given preferences to some of his creditors and that under the law he was insolvent.

"The matter involved is the construction of section 3448, Rev. St. Idaho 1887, which is: 'A banker has a general lien dependent on possession, upon all property in his hands, belonging to a customer, for the balance due

to him from such customer in the course of the business.' This statute seems chiefly to be but a statement in statutory form of the law upon this subject, as generally recognized: That bankers have liens upon any security or property coming into their possession in the usual course of banking business, for the payment of any indebtedness due them from the owner or depositor of such securities. This rule is subject to modifications, which may be illustrated by quotations from *Reynes v. Dumont*, 130 U. S. 354, 9 Sup. Ct. 486, 32 L. Ed. 934. Quoting from other authorities, it is said (page 390 of 130 U. S., page 495 of 9 Sup. Ct. [32 L. Ed. 934]): 'A general lien does arise in favor of a bank or banker out of contract, expressed or implied, from the usage of the business, in the absence of anything to show a contrary intention. It does not arise upon securities accidentally in the possession of the bank, or not in its possession in the course of its business as such, nor where the securities are in its hands under circumstances, or where there is a particular mode of dealing, inconsistent with such general lien. * * * "A banker's lien * * * ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit" * * * "Here, then, * * * is the true principle upon which this, as well as all other banker's liens, must be sustained, if at all. There must be a credit given upon the credit of the securities, either in possession or in expectancy."'

"From the foregoing, two principles may be deduced: The securities upon which liens may be maintained must be deposited in the regular course of the banking business, in which also is implied, I think, that they must be of the character or class usually dealt in or deposited in banks in the course of their usual banking business, and the debt must have been incurred upon the faith of such securities actually delivered or promised. Those rulings are based upon the general law upon the subject or upon special statutes. It may be doubted that each of these principles is involved in the Idaho statute. It says that the lien is dependent upon possession by the banker of any of his customer's property. The debt or loan may be made without the possession or promise of possession of any of the customer's property and in no way be made upon its credit; but, when such property comes into the possession of the banker, his lien immediately attaches. An exception is when possession is given for some special purpose the property can be applied only to that purpose. *Reynes v. Dumont*, ante, and *Armstrong v. Chemical Nat. Bank (C. C.)* 41 Fed. 234, 6 L. R. A. 226. But I think this statute limits the matters referred to therein to those which occur in the usual course of banking business. While it says all property of the customer, it means all such property as in the usual course of banking business banks are in the habit of dealing in, or in taking on deposit, or for collection, or otherwise, such as notes, bonds, stocks, and other choses in action, the possession of which is consistent with the usual course of banking business and which the bank can conveniently have. I doubt that it applies to the possession of stocks of merchandise or of live stock or of other cumbersome property which cannot conveniently pass into the actual possession of the bank, or such as it does not usually deal in. It is not doubted that, independently of the statute in question, all such property may be transferred to the possession of a bank as security for its claims, when it is not in contravention of some law.

"This brings us to a consideration of the question whether the transfer of the merchandise to the bank is in violation of the statute on bankruptcy. That the chief object of the law is the disposal of the bankrupt's estate to all his creditors in like proportion is too well understood to demand discussion. With such object in view, all transfers of property made to hinder or delay creditors, or preferences made to any, and all judgments, attachments, or other liens obtained through legal proceedings, made within four months of bankruptcy, are set aside. Certain statutory liens, as mechanics' and others, are protected. So, also, is this banker's lien, as provided by said Idaho statute, protected upon whatever property the statute means to include within its terms. So, also, are conveyances and transfers made 'in

good faith and for a present fair consideration.' But does the transfer in question come within the protection of the statute either as a lien or as a transfer? I have already said that I do not think that it is the kind of property which the Idaho statute contemplates in providing a banker's lien. * * * Having held that the bank has no lien upon this property leaves but the question whether the transfer of it was such as can be sustained. It was made when the bankrupt was in fact insolvent under the law and as he subsequently admitted. It was made at the time he was making other like transfers of his property and for a like purpose, and but about 10 days prior to the filing of a petition by his creditors asking that he be adjudicated a bankrupt, which was done in a short time after. Also this transfer was evidently made for the purpose of securing to the bank and the other bank named the payment of their debts, and thus giving these two creditors a preference over the other creditors. All these facts considered were sufficient to put the bank upon its guard and to have at least suggested to it a suspicion of the insolvency of its debtor. But, admitting that the transfer was made in good faith upon the part of the bank, it was without any present consideration whatever, and in that is obnoxious to the law."

We are satisfied with the conclusion reached by the District Court, and for the reasons stated in the foregoing opinion the order is affirmed.

WATERBURY v. McKINNON.

(Circuit Court of Appeals, Ninth Circuit. June 18, 1906.)

No. 1,297.

MORTGAGES—DEFENSE—FRAUD.

That a lender of money, who was a resident of Montana, procured the note and mortgage securing the same to be executed in the name of plaintiff, who was a citizen of Canada, for the purpose of evading taxation to which the mortgage would have been subject if executed in the name of the lender, was no defense to a suit by plaintiff to foreclose the same.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, § 1211.]

Appeal from the Circuit Court of the United States for the District of Montana.

For opinion below, see 136 Fed. 489.

John A. Shelton, for appellant.

W. H. Trippet, John F. Forbis, and L. O. Evans, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This was an action for the foreclosure of a mortgage alleged by the complainant in the court below, appellee here, to have been given to secure the payment of a promissory note alleged to have been executed by the appellant to her. While the answer of the appellant denies that there was any consideration for the note and mortgage passing from the defendant to the complainant, and avers that the real party in interest and the person to whom the note was in fact executed, and who is now the owner there-

of, is one A. C. McKinnon, who was, at the time of the execution of the note, and still is, a resident of the state of Montana—the complainant being a citizen of the Dominion of Canada—yet elsewhere in her answer the defendant to the suit in effect admits that the note and mortgages were executed by her to the complainant, for she expressly “alleges that the said A. C. McKinnon directed the said note and mortgage to be executed in the name of the said Rebecca McKinnon, a nonresident of the state of Montana, for the purpose of defrauding the revenues of the county of Deer Lodge and of the state of Montana; and, being so executed to the said Rebecca McKinnon, the said A. C. McKinnon has from the date of its execution avoided the payment of all taxes to the county of Deer Lodge and to the state of Montana upon said note and mortgage. She alleges that the name of the complainant, Rebecca McKinnon, was used in said note and mortgage solely for the purpose of enabling the said A. C. McKinnon so to defraud the revenues and escape taxation upon the note and mortgage, and that there has been no assessment upon the note and mortgage up to 1903.” The prayer of the answer is that the note and mortgage be declared null and void. Certain exceptions filed by the complainant to the answer were sustained by the court below, which action is assigned for error on this appeal. The only matter so excepted to, which by the record can be identified, is the further and affirmative defense set up in the answer, to the effect that the consideration for the note and mortgage sued on, to wit, \$5,500, was the property of A. C. McKinnon, in which the complainant had no interest, and was loaned to the defendant to the suit by McKinnon for his own benefit, but that he procured the note and mortgage to be executed by the defendant in the name of the complainant, who was a nonresident of the state of Montana, for the purpose of defrauding the revenues of the county of Deer Lodge, and the revenues of the state of Montana, and to escape taxation upon the note and mortgage, and thus defraud the collection of taxes thereon, by reason of which the said A. C. McKinnon has from that day until the present time avoided the payment of all taxes to the county of Deer Lodge and to the state of Montana, upon the note and mortgage in question. The answer itself shows that the appellant got \$5,500 as a consideration for the execution of the note and mortgage to the complainant. There was not, therefore, any lack of consideration, as is argued for the appellant. By her note and mortgage she promised and agreed to repay the complainant the sum of money mentioned therein, with interest, etc., and pledged the property described in the mortgage as security therefor. That was her contract in writing made with the complainant, and the sole contract made between these parties. The fact pleaded by the appellant to the effect that the complainant lent herself to a fraud practiced by A. C. McKinnon upon the state of Montana and Deer Lodge county of that state, to defraud them out of taxes, while a gross fraud, and one properly punishable under the state statute upon the subject, is one collateral to the contract upon which this suit is brought, and cannot properly

be used as a basis upon which to sustain the appellant in the fraudulent retention of money which she borrowed and promised to repay.

Section 5136 of the Revised Statutes [U. S. Comp. St. 1901, p. 3455] impliedly forbids a national bank to loan money on real estate security, but a mortgage upon real estate given to a bank to secure a contemporaneous loan or future advances is valid between the parties, and may be enforced. *Bank v. Matthews*, 98 U. S. 621, 25 L. Ed. 188; *Bank v. Whitney*, 103 U. S. 99, 26 L. Ed. 443. Section 5201 [U. S. Comp. St. 1901, p. 3494] expressly prohibits a loan by a national bank upon a pledge of its own shares, but such pledge was enforced in *Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778, 27 L. Ed. 592. Section 5200 of the Revised Statutes [U. S. Comp. St. 1901, p. 3494] forbids any bank to loan to one person or firm an amount in excess of one-tenth of its actual paid capital stock, but it is no defense to an action for the recovery of money loaned by a bank that the amount of the loan exceeded the limit prescribed by this section. *Gold-Mining Company v. National Bank*, 96 U. S. 640, 24 L. Ed. 648.

An indebtedness which a national bank incurs in the exercise of any of its authorized powers, and for which it has received and retains the consideration, is not void from the fact that the amount of the debt surpasses the limit prescribed by section 5202 of the Revised Statutes [U. S. Comp. St. 1901, p. 3494], or is even incurred in violation of the positive prohibition of the law in that regard. *Weber v. Bank*, 64 Fed. 208, 12 C. C. A. 93. See, also, numerous other cases cited by the court in *Hanover National Bank v. First National Bank*, 109 Fed. 421, 48 C. C. A. 482; *Jones on Mortgages*, §§ 618, 619; *Jefferson v. Burhans*, 85 Fed. 949, 29 C. C. A. 481; *Crowns v. Forest Land Company (Wis.)* 74 N. W. 546; *Callicott v. Allen (Ind. App.)* 67 N. E. 196. It is true that the cases of *Drexler v. Tyrrell*, 15 Nev. 114, and *Sheldon v. Pruessner*, 52 Kan. 579, 35 Pac. 201, 22 L. R. A. 709, are against the view here expressed, but we are of the opinion that those decisions are not sound.

We are unable to see that A. C. McKinnon is a necessary party to the present suit.

The judgment is affirmed.

CASCADEN et al. v. BARTOLIS.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1906.)

No. 1,259.

MINES AND MINERALS—PUBLIC LANDS—MINERAL LOCATION—DISCOVERY—INSTRUCTIONS.

In an action to recover certain land which was a part of the public domain, plaintiff claimed under a placer mining location. The court charged that it was essential to the validity of such location that the discovery of mineral thereon was such that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor in developing the property, but in the same connection declared

that it was essential to a recovery by plaintiffs that they prove with reasonable clearness that for the labor and capital expended in working the ground, it would yield a reasonable profit. *Held*, that the latter instruction was erroneous, and in conflict with the correct rule previously charged.

In Error to the District Court of the United States for the Third Division of the District of Alaska.

Louis K. Pratt and Carl M. Johnason, for plaintiffs in error.

Edward E. Cushman, A R. Heilig, and Leroy Tozier, for defendant in error.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. The plaintiffs in error, who were plaintiffs in the court below, brought this action to recover from the defendant thereto two certain lots of land situated in the town commonly known as "Gates City," in the Fairbanks mining district, territory of Alaska, alleging in their complaint themselves to be the owners, as against all persons except the United States, of the lots of land, and entitled to their possession, and alleging the unlawful entry thereon by the defendant, and his ousting of the plaintiffs, and his withholding of the possession of the property from them.

The answer of the defendant put in issue the allegations of the complaint, and affirmatively alleged that at the time of the defendant's entry upon the lots in question they constituted a part of the vacant and unappropriated public lands of the United States, and that, as such, he entered into the possession of the land and built thereon two log cabins, and has ever since continued in the actual possession thereof. In an amended answer the defendant also put in issue the allegations of the complaint, and repeated the affirmative averments of his original answer, and added the following averments:

"That said cabins are situated in what subsequently became, long prior to the beginning of this action, and is now, the townsite of Gates City; that the inhabitants of said townsite number more than 300, and defendant is an occupant of said town, and a large number of dwellings, for the purpose of carrying on business therein, have been constructed in said townsite, and are used for said purposes; that said townsite embraces about 80 acres of land, and it is the intention of the occupants thereof to enter the same for townsite purposes, for the several use and benefit of the occupants of such townsite, and secure patent therefor in accordance with the provisions of the act of Congress in such case made and provided; that defendant is the owner and entitled to the possession of said cabins and grounds, and claims the same as an inhabitant of said townsite, and as a prior occupant of said premises."

A demurrer of the plaintiffs to the affirmative defense thus set up was overruled by the court below, to which ruling an exception was taken and allowed. Thereafter the plaintiffs filed a reply to the amended answer, denying defendant's affirmative allegations. On the trial, which was had with a jury, the plaintiffs relied upon a certain placer mining location, antedating the entry upon the ground by the defendant, the validity of which location was contested by the defend-

ant, who moved the court below, both upon the conclusion of the evidence on behalf of the plaintiffs, and also upon the conclusion of the entire evidence in the cause, to direct the jury to return a verdict for the defendant upon the ground that the evidence was insufficient to justify a verdict for the plaintiffs. The trial court denied the motion in each instance, thus holding that the case was one to be submitted to the jury under instructions, and proceeded to instruct the jury in respect to the law applicable to and controlling the cause.

The principal controverted question related to the sufficiency of the mineral discovery claimed to have been made by the locators to sustain their placer location, and upon that vital question the court below instructed the jury, among other things, as follows:

"What is 'discovery'? What finding of mineral upon a placer mining claim is sufficient to satisfy that clause of the statute which provides that no location of a mining claim shall be made until the 'discovery' of the mineral within the limits of the claims are located? Sections 2320, 2329, Rev. St. [U. S. Comp. St. 1901, pp. 1424, 1432.] This inquiry is partly answered by the terms of section 2318 of the Revised Statutes of the United States, in the following language: 'Sec. 2318 [U. S. Comp. St. 1901, p. 1423]. In all cases lands valuable for mineral shall be reserved from sale, except as expressly directed below.' It is only lands valuable for mineral which are reserved from sale for disposal under the mineral laws. Lands not valuable for mineral are not so reserved, and may, if otherwise unappropriated and unoccupied, be settled upon, used, and occupied for townsite or business purposes, or taken under the homestead or other laws for the settlement and sale of the public domain. Lands valuable for mineral are lands having value or worth for the mineral contained therein; lands containing mineral in such quantity as to pay a reasonable profit upon the capital and labor necessary to extract the mineral therefrom. Any other lands would have no value for mineral, and are not such as the statute contemplates reserving from sale for disposition under the mineral laws of the United States. * * * In this case the plaintiffs—the mineral claimants—must prove from the evidence, with reasonable clearness, that the land is valuable for mineral purposes, that is, that for the labor and capital expended in working it, the land will yield a reasonable profit, and unless they do so you should find for the defendant. The mere finding of a color or colors of gold, or a cent's worth, or even thirteen cents' worth, is not, of itself, sufficient to constitute a discovery, or to prove that the land is valuable for mineral working. There must be such a discovery of mineral on the claim as to satisfy you that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor thereon in the development of the property; and, unless you are so satisfied in this case, by a fair preponderance of the evidence, you should find a verdict for the defendant."

The reference in these instructions to small quantities of gold was based upon testimony introduced on the part of the plaintiffs, tending to show that certain pannings by and on behalf of the locator, showed colors of gold, and some of them one, two, three, and as high as thirteen cents' worth to the pan. While the court in one part of these instructions did state to the jury the correct rule, that it was essential to the validity of the location under which the plaintiffs claimed that the discovery of mineral thereon was such that "an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor thereon in the development of the property" (Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770), yet it also, at the same time, and in the same connection, expressly and specific-

ally instructed them that it was essential to a recovery by the plaintiffs that they should have proved with reasonable clearness that for the labor and capital expended in working the ground it would yield a reasonable profit, and that, unless the jury so found, their verdict should be for the defendant. This latter specific declaration is not only not a correct statement of the law, but it is also in direct conflict with the correct rule elsewhere given in the instructions above set out.

For this error the judgment of the court below must be, and is, reversed, and the cause remanded for a new trial.

Ex Parte CHICAGO TITLE & TRUST CO.

(Circuit Court of Appeals, Seventh Circuit. April 24, 1906.)

No. 1,273.

MANDAMUS—GROUNDS FOR WRIT—ENFORCEMENT OF COMPLIANCE WITH MANDATE.

Where a decree in bankruptcy entered by a District Court upon a mandate from the Circuit Court of Appeals clearly does not conform to such mandate, and a party is without other remedy to preserve rights which have been sustained by a decision of the Supreme Court to enforce which the mandate was issued, the Circuit Court of Appeals may enforce a compliance with such mandate by mandamus requiring a modification of the decree.

[Ed. Note—For cases in point, see vol. 33, Cent. Dig. Mandamus, § 121.]

On Petition for Writ of Mandamus.

Joseph Paden and Newton Wyeth, for petitioners.

Henry S. Robbins, for respondent.

Before GROSSCUP, BAKER, and SEAMAN, Circuit Judges.

PER CURIAM. This is an application for a writ of mandamus to the judge of the District Court, sitting in bankruptcy, in a proceeding entitled *In re Alexander Rodgers, Bankrupt*, for the modification of a decree therein of November 1, 1905, purporting to be entered "upon the mandate of the United States Circuit Court of Appeals for the Seventh Circuit remanding said cause * * * for further proceedings in conformity with the opinion of the Supreme Court of the United States." The opinion of the Supreme Court referred to is reported under the title of *First National Bank of Chicago v. Chicago Title & Trust Co.*, 198 U. S. 280-288, 25 Sup. Ct. 693, 49 L. Ed. 1051, on certiorari to the Circuit Court of Appeals for the Seventh Circuit. The petition sets out the decree as entered, and alleges that it does not conform to the opinion of the Supreme Court, or the mandate issued by this court thereupon. We have no doubt the decree of the District Court is not in conformity with the opinion and directions of the Supreme court. The question, whether the jurisdiction of this court extends to the enforcement of such directions by mandamus, under the terms of the mandate to this court, is difficult of solution within the authorities. The inquiry in the present case, however, in-

volves the further fact, stated in the return to the alternative writ, that like application for mandamus was presented by the petitioner to the Supreme Court and the motion for leave to file such petition was denied without qualification. The supervisory jurisdiction of this court under the bankruptcy act July 1, 1898, c. 541, § 24b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3432] is not invoked by the petition, nor can it be exercised in this instance, for want of necessary parties and timely application. Moreover, the petition avers that the statute of limitations will soon run against the petitioner's claims in reference to which the Supreme Court directed modification of the decree, to provide against "prejudice to the right of respondents to litigate in a proper court."

With the right to such modification unquestionable under the express terms of that opinion and need of speedy relief to preserve any rights of the petitioner, no remedy appears, unless the writ of mandamus can issue as sought by this application.

Upon the decision of the cause by the Supreme Court, on certiorari to this court, it was "remanded to the said Circuit Court of Appeals with directions to dismiss the appeals and to remand the cause to the District Court * * * for further proceedings in conformity with the opinion of this court." The mandate of this court remanded the cause to the District Court in like terms, without specifying the modifications to be made. Whether the last-mentioned mandate was the command of this court, in the sense of the statute and authorities, may not be clear, but the mandate of the Supreme Court is plainly addressed to this court for remand to the District Court to carry out the directions. In view of the form and terms thus adopted by the Supreme Court, together with its denial of leave to file there an application for the writ under the circumstances stated, it is reasonable to assume that the Supreme Court intended and treated the final direction to the District Court as proceeding from this court, under the decision on certiorari, with jurisdiction to enforce obedience. Thus considered, the petitioner is entitled to the writ, and the alternative writ issued herein is, accordingly, made peremptory.

MACKENZIE v. PEASE, Sheriff.

Ex parte MACKENZIE.

(Circuit Court of Appeals, Seventh Circuit. May 15, 1906.)

No. 1,173.

1. COURTS—UNITED STATES SUPREME COURT—APPEAL FROM CIRCUIT COURT OF APPEALS—HABEAS CORPUS.

A judgment of the Circuit Court of Appeals, affirming one of the Circuit Court in a habeas corpus proceeding on appeal taken by the petitioner, is not appealable to the Supreme Court, even though an appeal might have been taken to that court direct from the Circuit Court, under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549].

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, §§ 1017, 1018.]

2. SAME—ORDER ALLOWING APPEAL—POWER TO SET ASIDE.

A Circuit Court of Appeals has power during the term to vacate an order allowing an appeal inadvertently entered.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

On motion to vacate order allowing appeal.

John M. Duffy, for appellant.

Harris F. Williams and Edwin Bebb, for appellee.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges.

PER CURIAM. 1. On motion to vacate the appeal allowance, see, for want of jurisdiction of habeas corpus as the subject matter, *Woey Ho v. United States*, 191 U. S. 558, 24 Sup. Ct. 844, 48 L. Ed. 301; and the following cases cited: *Lau Ow Bew v. United States*, 144 U. S. 47, 58, 12 Sup. Ct. 517, 36 L. Ed. 340; *Cross v. Burke*, 146 U. S. 82, 88, 13 Sup. Ct. 22, 36 L. Ed. 896; *In re Lennon*, 150 U. S. 393, 14 Sup. Ct. 123, 37 L. Ed. 1120; *Perrine v. Slack*, 164 U. S. 452, 17 Sup. Ct. 79, 41 L. Ed. 510; *The Paquete Habana*, 175 U. S. 677, 683, 20 Sup. Ct. 290, 44 L. Ed. 320.

2. For the right of the court to set aside an allowance improvidently entered, see *Ex parte Roberts*, 15 Wall. 384, 21 L. Ed. 131; *Goddard v. Ordway*, 101 U. S. 745, 25 L. Ed. 1040; *Draper v. Davis*, 102 U. S. 370, 26 L. Ed. 121; *Keyser v. Farr*, 105 U. S. 265, 26 L. Ed. 1025.

3. On the contention that right under the Constitution was involved, and hence appealable under Act March 3, 1891, c. 517, § 5, 26 Stat. 827 [U. S. Comp. St. 1901, p. 549], it is settled that, having elected to go to the Circuit Court of Appeals for a review of the judgment, the appellant must abide by the judgment of that court. *Carey Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, 428, 23 Sup. Ct. 211, 47 L. Ed. 244; *Spreckles Sugar Refining Co. v. McClain*, 192 U. S. 397, 404, 24 Sup. Ct. 376, 48 L. Ed. 496, and cases cited. And he cannot appeal under the provisions of section 6 in reference to cases in which the ruling of that court is not made final for want of the requisite amount involved.

The appeal under section 5 is from the Circuit Court direct, and the only appeal provided for from the Circuit Court of Appeals is under section 6, under the above limitation.

BAKER v. F. A. DUNCOMBE MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. May 9, 1906.)

No. 2,328.

1. EVIDENCE — JUDICIAL NOTICE — PATENTS — INVENTION — MATTERS GENERALLY KNOWN.

On the question of invention, in a suit for infringement of a patent, the court will take judicial cognizance of facts of general knowledge or devices in common use which may be similar to or identical in principle with that of the patent.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, §§ 4, 23.]

2. SAME—INVENTION.

Applying an old process to a new use is not invention.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 31.]

3. SAME—PROCESS OF TREATING COFFEE.

The Baker patents, No. 726,812 and No. 736,346, each for a process of treating coffee and the product of such process, which consists of cutting or crushing the roasted coffee bean and winnowing the dust, chaff, and disengaged silver skin of the bean from the granulated product by means of an apparatus designed for the purpose and consisting of a hopper, crushing or cutting rolls, and a screen or sieve through and over which a blast of air is forced, are void for lack of invention, in view of the old and familiar use of the same process in the cleaning of grain, so long known and practiced that a court may take judicial cognizance of it.

[Ed. Note.—For cases in point, see vol. 20, Cent. Dig. Evidence, § 23.]

4. SAME—PATENTS—INVENTION—IMPROVED PRODUCT—PATENTABILITY.

Granulated coffee is not patentable as an article of manufacture merely because the process used may produce granules which are more uniform and attractive in appearance than those otherwise produced.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 15, 42, 44, 46.]

Appeal from the Circuit Court of the United States for Western District of Missouri.

John E. Stryker, for appellant.

George W. Groves and Vinton Pike, for appellee.

Before SANBORN, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge. This was a bill in equity to restrain the infringement of two United States patents, No. 726,812, dated April 28, 1903, and No. 736,346, dated August 18, 1903. They are each for a process of treating coffee, and also for the product of the process. The second or process claim of each patent is as follows:

"The process of treating coffee, which consists essentially in first roasting the coffee bean, whereby the body of the bean is rendered brittle, while the embedded silver skin remains relatively flexible; then breaking" (in one patent) and "cutting" (in the other patent) "the roasted bean and freeing the silver skin, and finally separating said skin from the broken" (or cut) "body of the bean."

The third or product claim of each patent is as follows:

"As a new article of manufacture, the roasted body of the coffee bean, granulated" (in one patent) and "cut into granules" (in the other patent) "and freed from the embedded silver skin."

The process, as described in the specification, consists of roasting and grinding the coffee bean, thereby rendering it brittle so as to disengage the silver skin which extends into the interior of the bean, and subjecting the product, consisting of granules of coffee dust and chaff, to a current or blast of air for the purpose of separating the dust and chaff from the coffee granules. The patentee specifies a form of apparatus to illustrate his invention in substance as follows: An upright structure having a chute or hopper at its upper end into which roasted coffee beans are poured. Immediately below this chute

or hopper are two crushing or cutting rolls, designed to crush or cut into granules the coffee beans as they fall by gravity out of the chute or hopper between the revolving rolls. Beneath these crushing or cutting rolls is a reciprocating or shaking screen or sieve, upon which the product of the crushing or cutting falls. While passing over this screen or sieve the product is subjected to a blast of air which carries off the dust and chaff, including the disengaged silver skin, leaving the granules of well-winnowed coffee to be discharged from the structure through the chute near the bottom.

Defendant claims that this process involves no patentable novelty, and introduced certain patents which it claims anticipated the patents in suit, or at any rate disclosed that the process was old. Serious objection was made at the trial below, and again urged before us, to any consideration of the prior patents on the ground that defendant's answer consists only of a general denial of patentable novelty and gives no notice of the patentees, the dates of their patents, and when granted, or other information as required by section 4920 of the Revised Statutes [U. S. Comp. St. 1901, p. 3394]. But, in the view we take of other questions, we have not found it necessary to consider or determine this question of practice. We have concluded that the process disclosed by the patents in suit, in the light of what we may take judicial cognizance, was old at the time plaintiff applied for his patents, and involved no original idea or inventive faculty within the meaning of the patent law. In *Brown v. Piper*, 91 U. S. 37, 42, 23 L. Ed. 200, a patent was involved for a process of freezing fish in a closed chamber by means of a freezing mixture. In disposing of the case the court says:

"Courts will take judicial notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and reliable."

It held that a common ice cream freezer, of which, together with its process of operation, it would take judicial cognizance without pleading or notice under the statute, contained the principle of the patentee's invention and deprived it of patentable novelty.

In *Black Diamond Co. v. Excelsior Co.*, 156 U. S. 611, 616, 15 Sup. Ct. 482, 36 L. Ed. 553, which involved a patent for an improvement in coal screens and chutes, the Supreme Court observes:

"Hoppers with chutes beneath them have been used for a dozen different purposes, but principally for grain elevators. * * * Indeed, these devices are so common that we think judicial cognizance may be taken of them"—citing *Brown v. Piper*; *Terbune v. Phillips*, 99 U. S. 592, 25 L. Ed. 293; *King v. Gallun*, 109 U. S. 99, 3 Sup. Ct. 85, 27 L. Ed. 870; *Phillips v. Detroit*, 111 U. S. 604, 4 Sup. Ct. 580, 28 L. Ed. 532.

In *Richards v. Chase Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, the Supreme Court held that two patents for grain-transferring apparatuses were wholly void on their face for want of patentable novelty. The case involved a stationary building, railway tracks, lifting apparatus, hopper, scales, and discharge spouts. The court, in holding the patents void, says: "We do not feel com-

pelled to shut our eyes" to facts so well known as those just enumerated, and the case was disposed of on a demurrer to the bill.

In *Specialty Mfg. Co. v. Fenton Mfg. Co.*, 174 U. S. 492, 497, 19 Sup. Ct. 641, 643, 43 L. Ed. 1058, involving a patent for improvements in storage cases for books, the court observes:

"The employment of semicircular handholds or recesses, for more readily grasping the books, is such a familiar device in upright partitions for holding books that scarcely any banking or record office is without them, and the court may properly take judicial notice of their use long prior to this patent."

See, to the same effect, *Fond Du Lac County v. May*, 137 U. S. 406, 11 Sup. Ct. 98, 34 L. Ed. 714; *Mahler v. Animarium Co.*, 49 C. C. A. 431, 111 Fed. 530; *Westinghouse Electric & Mfg. Co. v. Union Carbide Co.*, 55 C. C. A. 230, 117 Fed. 495, 501.

In *Appleton Mfg. Co. v. Star Mfg. Co.*, 9 C. C. A. 42, 60 Fed. 411, the Circuit Court of Appeals for the Seventh Circuit held that a patent for an improvement in the method of reducing corn in the stalk and separating the kernels, consisting of a cutter with feed rollers in front, a beater or thresher, a revolving screen or separator, and a shaking screen under it, all mounted in one frame, are void for want of invention, the device amounting merely to a new use of the old and well known devices.

In *Brown v. Piper*, *supra*, the Supreme Court, after quoting from the American Encyclopædia on the subject of "Freezing," says:

"Here the principle and substance of the appellee's claim are set forth as belonging to the general domain of knowledge and science."

In *Beer v. Walbridge*, 40 C. C. A. 496, 100 Fed. 465, the Circuit Court of Appeals for the Second Circuit says:

"The courts will take judicial notice of facts which are within common knowledge, including those relating to the arts and industries, and matters of science, and may refer to the dictionaries and encyclopædias for information, when necessary to go outside the record."

The process of these patents, so far as the separation of dust and chaff from the subject upon which the process operates is concerned, is and has been for a long time a familiar one in practice. The common winnowing or fanning mill discloses it. No different principle is involved in separating chaff from granules of coffee by a blast of wind than that involved in the old familiar process of separating chaff from wheat or oats by subjecting the grain to a gust or puff of wind, either by hand or by using the old fashioned winnowing mill. This is not only within our experience and observation, but is taught circumstantially in biblical and classical literature, in encyclopædias and lexicons:

"The oxen likewise and the young asses that ear the ground shall eat clear provender, which hath been winnowed with the shovel and with the fan." *Isaiah xxx, 24.*

"And as in sacred floors of barns upon corn-winnowers flies the chaff, driven with an opposite wind." *Homer's Iliad, Book V, p. 73, Chapman's Translation.*

Knight, in his *American Mechanical Dictionary* (volume 3, p. 2786), defines "winnowing machine" as follows:

"A machine in which grain, accompanied by chaff, dirt, cheat, cockle, grass seeds, dust, straw, and other foul [matter] either or all is subjected to a shaking action on riddles and sieves in succession, the while an artificial blast of wind is driven against it on and through the sieves, and as it falls from one to another."

The *Century Dictionary* defines it as follows:

"A machine for cleaning grain by the action of riddles and sieves and air blast; a fanning machine or fanning mill."

We are thus informed by sacred and profane history as well as by modern mechanical engineers and lexicographers, to all of which we may resort in the determination of what we may take judicial cognizance (*Beer v. Walbridge*, *supra*), that all of complainant's process, excepting his preliminary roasting of the bean, had been for a long time a well known and generally practiced method of separating wheat from its accompanying chaff. The new and analogous use to which the old and familiar process was put does not amount to invention. *Slawson v. Grand Street Railroad Co.*, 107 U. S. 649, 654, 2 Sup. Ct. 663, 27 L. Ed. 576; *Grant v. Walter*, 148 U. S. 547, 556, 13 Sup. Ct. 699, 37 L. Ed. 552; *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81, 37 L. Ed. 1059. But it is said that the patentee combined with the old process the new feature of roasting the coffee bean to make it brittle so as to permit the effective operation of the grinding rollers and the separation of the silver skin from the granules. We do not regard this as an exercise of the inventive faculty. It amounts only to using the process on another subject. As the coffee bean could not be ground in its green state it was a most obvious conception to roast or otherwise dry it before attempting to grind it. The process as patented, including the preliminary roasting, was at best the application of the well known ancient and modern practice to new and strictly analogous uses; and, appropriating the language of Mr. Justice Blatchford in *Aron v. Manhattan Railway Co.*, 132 U. S. 84, 89, 10 Sup. Ct. 24, 33 L. Ed. 272, its purpose "was to adapt well known devices [process] to the special purpose to which he contemplated their application. * * * Any competent mechanic * * * could have done this readily and successfully, upon the mere suggestion of the purpose which it was desirable to effect."

The claim of invention in the new article of manufacture, or the product of the process of the patents is likewise without merit. It may be that the particular machine employed to illustrate complainant's process, or the process itself, produces more evenly crushed or cut granules of coffee than other machines or processes. The coffee may look better or more attractive in the package, but this does not involve invention. It is only a change in the form or appearance of a well-known article of merchandise and is not patentable. *Glue Co. v. Upton*, 97 U. S. 3, 7, 24 L. Ed. 985; *King v. Gallun*, *supra*;

Cerealine Mfg. Co. v. Bates, 41 C. C. A. 341, 101 Fed. 272, 280;
Sanitas Nut Food Co. v. Voigt (C. C. A.) 139 Fed. 551, 553.

The decree below dismissing the bill for want of equity was right,
and is accordingly affirmed.

CONROY et al. v. PENN ELECTRICAL & MFG. CO.

(Circuit Court of Appeals, Third Circuit. September 5, 1906.)

No. 29.

PATENTS—INFRINGEMENT—MIRRORS.

The Wright & Curry patent No. 631,033, for a mirror is not so limited
by the prior art as to require it to be given a narrow construction and is
entitled to a fair range of equivalents. Also, *held* infringed.

Appeal from the Circuit Court of the United States for the
Western District of Pennsylvania.

For opinion below see 140 Fed. 872.

Bayard H. Christy and George H. Christy, for appellants.
Edward Rector and Joseph M. Nesbit, for appellee.

Before DALLAS and GRAY, Circuit Judges, and LANNING,
District Judge

LANNING, District Judge. This appeal brings before us the
final decree of the United States Circuit Court for the Western Dis-
trict of Pennsylvania awarding to the appellee (the complainant
in that court) an injunction against the appellants (the defendants
there) to restrain the latter from an alleged infringement of the
Wright & Curry patent No. 631,033, dated August 15, 1899, for
improvements in mirrors. The Circuit Court held that the defendant
had infringed claims 3, 4, 5, and 6 of the patent by the manufacture
and sale of the six kinds of mirrors, samples of which were offered
in evidence and distinguished in the record as Exhibits Nos. 1, 2,
3, 4, 5, and 6. The patent was sustained by the Circuit Court of Ap-
peals of the Seventh Circuit in *Regent Manufacturing Company v.
Penn Electrical & Mfg. Co.*, 121 Fed. 80, 57 C. C. A. 334. In the
present case, the assignments of error relate only to the question
of infringement. In discussing this question, counsel have directed
our attention to the prior art, in its bearing upon the construction
that should be given to the patent in suit, and also to the character
of the mirrors manufactured and sold by the defendants.

The application for the patent was filed February 4, 1899. In
the specification the patentee declares that the invention described
therein relates to mirror mountings, and that its objects are "to pro-
vide a mounting in the form of a folding frame which may be utilized
either as a stand or easel for supporting the mirror on a dresser,
or, when compactly folded, as a handle for constituting the mirror
a hand-glass," and "to provide improved means for securing the
mirror in its mounting." The claims alleged to be infringed are as
follows:

"(3) In a mirror, the combination of a glass, a spring-metal frame normally narrower than the glass, clips grooved on their inner edges and having fixed rotatable mounting in the frame sides, the grooved clips being adapted upon expansion of the frame, to embrace and frictionally hold opposite edges of the glass at any desired point in the length of the latter, substantially as shown and described.

(4) In a mirror, the combination of a glass, an expansible spring-metal frame normally narrower than the glass, and clips on opposite sides of the frame adapted, upon expansion of the frame, to embrace and frictionally engage opposite edges of the glass at any desired point in the length thereof, whereby the relative position of the glass and frame may be varied, substantially as shown and described.

(5) In a mirror, the combination of a glass having its edges continuous and uninterrupted by apertures or other bearing-points, an expansible spring-metal frame normally narrower than the glass, and clips grooved in the direction of the glass edges, said clips secured to opposite sides of the expansible frame and adapted to embrace the glass edges at any desired point in the length thereof, the clips holding the glass by frictional engagement, substantially as shown and described.

(6) In a mirror, the combination of a glass having beveled or tapering edges, a frame, clips for securing the glass to the frame, the clips having V-shaped sockets for embracing the back and bevel of the glass without encroaching on the reflecting-surface thereof, and means for frictionally holding the clips at any desired point on the glass edges, the latter having wedging action in the clip-sockets, substantially as shown and described."

The figures illustrating the patent may be found in the opinion of the Circuit Court rendered in this case and reported in 140 Fed. at page 873. It will be observed that claim 3 of the patent is for a combination of three elements, viz.: (1) a glass; (2) a spring-metal frame normally narrower than the glass; and (3) clips grooved on their inner edges and having fixed rotatable mounting in the frame sides, the grooved clips being adapted, upon expansion of the frame, to embrace and frictionally hold opposite edges of the glass at any desired point in the length of the latter.

The record of the case shows that the Curry mirrors, samples of which were offered in evidence, were made and sold in 1892 and 1893, six years, or more, before the patent in suit was applied for. With each of these mirrors there is, extending across the back of the mirror, a wire bent into a V shape, or such other shape as to permit of lateral expansion and being also, at the opposite edges of the glass, so bent as to form two clips into which the glass on expansion of the wire may be inserted and held. The ends of the wire, also, protrude laterally beyond the clips and the outer edges of the glass and fit into sockets drilled in the frame that surrounds the mirror. When the bent wire is expanded so that its clips may receive the glass, the resiliency of the wire causes its clips to grip and hold the glass. When the frame is expanded so that the sockets in its sides may receive the ends of the wire, the resiliency of the frame keeps the ends of the wire imbedded in the sockets. When the several parts—the glass, the wire and the frame—are thus adjusted, the wire may be turned about in the sockets so as to put its embraced glass in a vertical or in any desired inclined position. When the frame is expanded, both the glass and its embracing wire are released. When the embracing wire is expanded the glass only is released. We think this description of the Curry mirror

shows, notwithstanding the contention of the learned counsel for the defendants, that it is not provided with clips "having fixed rotatable mounting in the frame sides," and that the clips are not "adapted, upon expansion of the frame, to embrace and frictionally hold opposite edges of the glass." Giving to the word "frame" the meaning which a reasonable construction of the patent in suit requires, it seems to us that the embracing wire of the Curry mirror, which alone is provided with the clips, is no part of the frame, that the clips are adapted, upon expansion of the embracing wire, and not upon expansion of the frame, to receive and frictionally hold opposite edges of the glass, that the embracing wire as a whole, and not the clips, is rotatable in the frame sockets, and that the expansion of the frame serves the purpose, not of enabling the clips to embrace the glass, but of enabling the frame to receive into its sockets the ends of the wire which embraces the glass.

The invention described in the Scheurich patent, No. 236,845, dated January 18, 1881, is one in which the glass is held in position by a mechanism on the back of the glass consisting of a center-piece, the clips at the edges of the glass, and spring-cushioned rods connecting the center-piece with the clips. Neither is the device described in this patent provided with clips which have fixed rotatable mounting in the frame sides.

In our judgment, neither the Curry mirror nor the Scheurich patent discloses such a state of the prior art as requires the narrow construction of the language of the patent in suit for which the defendants have contended.

The record of the case further shows that after the patent in suit had been granted, and in the year 1900, the defendants began to manufacture and sell a mirror known in the market as the "Conroy Mirror." This mirror was clearly a combination of (1) a glass; (2) a spring-metal frame normally narrower than the glass; and (3) clips grooved on their inner edges and having fixed rotatable mounting in the frame sides, the grooved clips being adapted, upon expansion of the frame, to embrace and frictionally hold opposite edges of the glass at any desired point in the length of the latter. The complainant complained of the sale of this mirror by the defendants and about January, 1901, they discontinued its manufacture and sale as theretofore constructed and later settled with the complainant for the infringement. Almost immediately, however, the defendants began to make and put upon the market another mirror which the complainant insists was identical in all respects with the Conroy mirror save that the inner edges of the two clips were so turned on the back of the glass as to form hollow cylinders into which the legs of an M spring could be inserted or removed as desired. This latter mirror is designated in the record as Exhibit No. 1, and is one of the six mirrors the manufacture and sale of which were enjoined by the decree of the court below. Mr. Conroy, one of the defendants, insists that the Conroy mirrors proved to be unsatisfactory because the resiliency of the frame was not sufficient to hold the glass securely in place, and that the addition of the M

spring in Exhibit No. 1 cured this defect by causing the glass to be held firmly in position, not by the resiliency of the frame, but by the resiliency of the M spring. The contention of the defendants is that by the introduction of the M spring they have brought into their combination an element not mentioned in the patent in suit, that they have no need of and do not employ in their combination a resilient frame such as is described in the patent in suit, and that the M spring used by them is in substance the old device of the Curry mirror or of the Scheurich patent.

We have given to this contention careful consideration, but we are forced to the conclusion that the proofs do not support it. The frame of Exhibit No. 1, as demonstrated on the hearing by actual inspection and trial of that exhibit, possesses sufficient resiliency to hold the glass in position, even when the M spring is removed or when it is cut in two so as to destroy its function as a spring. Nor is noninfringement established by the mere fact that the arms of the frame may be put so wide apart in their manufacture that they cannot grip the glass and that, in such case, the M spring gives to the frame as a whole the resiliency necessary to hold the glass in its place. In such a case the M spring becomes merely a mechanical equivalent, performing the same office and producing the same result performed and produced by the arms of the frame when so manufactured as to be in the normal position described in the patent. In *Water Meter Company v. Desper*, 101 U. S. 332, 25 L. Ed. 1024, it is said:

"It is a well-known doctrine of patent law that the claim of a combination is not infringed if any of the material parts of the combination are omitted. It is equally well known that if any one of the parts is only formally omitted and is supplied by a mechanical equivalent performing the same office and producing the same result the patent is infringed."

Besides, the insufficiency of such a contention is well pointed out in the *Regent Manufacturing Company's Case*, where the court said:

"But if the construction of the claims be adopted that the naked spring-arms, when free from pressure, must stand nearer each other than the width of the glass, then an infringing mirror may be made noninfringing by bending the spring-arms a hundredth of an inch, and vice versa, and the same mirror may at one moment infringe and not at the next. Verily, this would be an instance in which the letter killeth."

We think Exhibit No. 1 possesses all the elements of the combination described in claim 3 of the patent in suit, and that the addition of the M spring does not result in a combination different from the one described in that claim.

Exhibits 2 and 4 are not distinguishable from Exhibit No. 1. Exhibits 3 and 5 are distinguishable only by having the legs of the M spring soldered fast to the cylindrical holes in the ends of the clips. No material change in the combination is thereby made. Our opinion, therefore, is that the Circuit Court was right in awarding an injunction against the manufacture and sale of Exhibits Nos. 1, 2, 3, 4, and 5.

But the injunction should not apply to the mirror designated as Exhibit No. 6. In that mirror there are a glass and two clips, into the ends of which clips back of the glass, the two ends of a bent wire.

are inserted. This wire, which by its resiliency causes the clips to grip and hold the glass and serves also as an easel for the glass, is wholly concealed back of the glass. There is no wire or any other material surrounding or partially surrounding the glass. Aside from the glass, the upper edges of the clips only are seen as one looks into the mirror. For these reasons we think this mirror has no "frame" in the sense in which that word is used in claim 3.

Claims 4, 5 and 6 do not differ in their essential features, so far as the decision of this case is concerned, from claim 3, and no discussion of them is necessary.

Our conclusion, therefore, is that the decree of the Circuit Court should be affirmed in all respects save that in the last two lines of its first paragraph the words "defendant's mirrors Nos. 1, 2, 3, 4, and 5, and each of them" should be substituted for the words "defendant's mirrors Nos. 1, 2, 3, 4, 5, and 6, and each of them."

AMERICAN SEWAGE DISPOSAL CO. OF BOSTON v. CITY OF PAWTUCKET.

(Circuit Court of Appeals, First Circuit. August 15, 1906.)

No. 564.

PATENTS—INFRINGEMENT—SEWAGE APPARATUS.

The Glover patent No. 559,522 for a sewage apparatus reconsidered and held not to cover the principle of septic treatment of sewage, and not infringed by an apparatus using a septic tank.

Petition of appellant for permission to apply to the Circuit Court for leave to reopen the case.

For former opinion, see 138 Fed. 811.

Before COLT and PUTNAM, Circuit Judges, and ALDRICH, District Judge.

COLT, Circuit Judge. Upon full consideration of this case we held that the first Glover patent does not disclose the septic tank, and that the second Glover patent is for a system of rapid filtration, comprising two series of filter beds, one inside the ventilated structure and the other outside; and that it followed that the defendant's apparatus did not infringe the second Glover patent, upon which the present suit was brought.

Upon further consideration of the evidence in the affidavits accompanying this petition to reopen the case, we are clearly of the opinion that if this evidence had been before the court at the hearing, it would not have changed or modified our conclusions respecting the Glover patents. The point of this new evidence, so far as it is not cumulative, resolves itself into the proposition that the court, in defining the essential conditions which characterize the septic tank, adopted the scientific views presented in the record, instead of the present scientific views founded upon experience in the practical operation of this form of tank. This change of views, however, in

what were once regarded as essential characteristics of the septic tank, does not extend, and could not by any possibility extend, to the primary and fundamental distinction, pointed out in the opinion, between a septic tank and a settling tank, namely, the difference in the method of sewage treatment in the two tanks. The change simply amounts to this, that it has been found by experience that a septic tank may be exposed to the atmosphere; in other words, that neither the total exclusion of air and light by means of an air-tight tank, nor the formation of a thick scum on the top surface of the tank, which produces substantially the same effect, is essential to a practically operative tank. The reason of this is not because air and light are not destructive to putrefactive action, but because the character of ordinary sewage is such that air and light will not penetrate to any distance beneath its surface. From this statement it is manifest that if the evidence upon this point contained in these affidavits had been in the record at the hearing, it would not have affected the conclusions we reached respecting the Glover patents. Those conclusions were not dependent upon the necessity of either making the septic tank air-tight, or permitting the formation of a scum upon the top surface of the tank, but they were based upon the many grounds set forth in the opinion, which it is unnecessary at this time to restate.

The further evidence contained in these affidavits concerns two points upon which a great deal of evidence appears in the record, and which were fully presented at the hearing, namely, what Glover told other people about his discovery of the disappearance of the sewage in his Brockton cesspools, and the proper construction of the Glover patents.

As to the first point, it may be said that this whole class of evidence has little or no bearing upon the real question in this case, which is, not what did Glover discover in his Brockton cesspools, but what do the Glover patents disclose and claim as Glover's inventions or discoveries.

With respect to the second point, it may be said that it is for the court to construe the Glover patents; and, further, that we find nothing in these affidavits which would lead us to modify the conclusions we have already reached respecting the actual inventions covered by those patents.

The sewage art relates to the disposal of sewage by treatment. The particular problem with which we are dealing is the treatment of sewage in tanks. Sewage is treated in tanks in two ways, or by two distinct methods, known as "sedimentation and septic." The fundamental distinction between these two methods is the length of time in which the solid matter of the sewage remains in the tank. By the first method the solid matter only remains in the tank a short time, or long enough to settle, and is then removed from the tank. By the second method the solid matter must remain in the tank a considerable period of time, or long enough to insure its destruction by putrefactive action, and the metallic deposit which remains is not removed from the tank for months. The tank in which the sewage

is treated by the first method is called a settling tank. The tank in which the sewage is treated by the second method is called a septic tank. When Glover discovered the disappearance of the solid matter in his Brockton cesspools, or tanks, he had not discovered the septic tank, because he had not discovered the septic method of the treatment of sewage in a tank. In other words, he had not discovered that this phenomenon which he saw was caused by the long retention of the solid matter in the tanks; or, to vary the form of expression, he had not discovered that it was by reason of this peculiar treatment of the sewage in the tanks that the solid matter had been destroyed. Nor did Glover, so far as appears by this record, including the present affidavits, ever have any conception of the principle, mode of operation, or process, involved in the treatment of sewage in a septic tank. Neither in the tanks of his first patent, nor in the primary filter beds of his second patent, do we find any description or suggestion that the solid matter must be retained in the tanks for a considerable period of time in order to cause its disappearance. Upon this vital point both patents are equally silent. Further than this, if Glover had had any proper conception of a septic tank, and still more, if he had intended to embody that conception in his first patent, it is simply inconceivable that he should have described those tanks as "depositing in each tank a portion of the matter held in suspension," and then followed this with the statement: "I am aware that sewage has been caused to flow through a series of tanks, depositing in each a portion of the matter held in suspension, but I am not aware that such tanks have ever been covered by a structure," etc. In corroboration of this language, it appears that 13 years later, in the file wrapper of his second patent, he makes the following statement respecting these tanks:

"Applicant's former patent, 258,744, does not show filter-beds. It contains simply a series of tanks in which the sewage is acted on only by sedimentation."

With respect to the second patent, it is also equally inconceivable that if Glover had had any proper conception of a septic tank, and had intended to embody that conception in his patent, he should have begun his patent as follows:

"This invention has for its object to permit the filtration of sewage on a large scale without making the same offensive; and it consists of an apparatus comprising a series of primary filter-beds and means for charging the same with sewage," etc.; and should further have described these beds in the terms which follow in the specification.

The whole structure of the complainant's argument appears to be based upon the following propositions: First, Glover discovered the septic tank; second, it follows that Glover must have intended to incorporate this tank in his first patent in the form of his series of tanks, and in his second patent in the form of his series of primary filter-beds; and, third, it has been shown, in the light of what is now known about septic tanks and septic action, that both the tanks of the first patent and the primary filter-beds of the second patent are capable of the treatment of sewage by the septic process. The first two prop-

ositions, in our opinion, are clearly unsupported by the evidence. As to the last proposition, it may be observed that the fact that the Glover apparatus described in his patents can be made to operate, in the present state of the art, by a process which he did not discover and does not disclose in his patents, does not entitle him to a monopoly of that process under the patent laws of the United States.

The petition of the appellant for permission to apply to the Circuit Court for leave to reopen the case is denied, and mandate may issue forthwith.

SHEPHERD v. DEITSCH et al.

(Circuit Court of Appeals, Second Circuit. April 2, 1906.)

No. 113.

PATENTS—INFRINGEMENT—BRUSH.

The Shepherd patent, No. 601,405, for a brush having a reticulated back, the openings in which extend between the bristles having the greatest diameter at the rear of the brush "and decreasing in diameter to the face thereof" is limited by the prior art and by the proceedings in the Patent Office to a construction in which the openings so decrease in diameter from the rear to the front of the brush back, and is not infringed by a brush in which the openings are of uniform diameter, except for a bevel at the back extending but a short distance.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon appeal from an interlocutory decree adjudging the validity, and infringement by defendants, of complainant's patent, No. 601,405, granted to him March 29, 1898, for a brush, and ordering an injunction and accounting.

For opinion below, see 138 Fed. 83.

J. L. Levy, for appellants.

Arthur v. Briesen, for appellee.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The object of the patentee was "to overcome the difficulties heretofore found in open-back brushes," and "to produce a strong and efficient" one "at little cost." These difficulties were due to the fact that the openings in the backs of such brushes were customarily so made that "the least material is provided where the bristles are mounted, and where the most strength and material are required," and, therefore, it has been found "impracticable to mount the bristles near the edge of the brush, so that they will project outwardly from a longitudinal median line, as is illustrated in the drawings."

The manner in which the patentee proposed to overcome these difficulties is set forth in a single claim, which is as follows:

"A brush having a reticulated back, the openings in which extend between the bristles, said openings being of the greatest diameter at the rear of the brush and decreasing in diameter to the face thereof whereby the most material is provided at the face or bristle-receiving side of the brush back."

The limited scope of the claimed invention is sufficiently shown by the file wrapper. The application was rejected on references to Maloney patent, No. 557,844, and Ashburner patent, No. 381,749. Thereupon, the applicant made sketches distinguishing his construction from these references, the sketch of the Ashburner brush being practically identical with the construction of the defendants' brush. The claim was again rejected on Maloney, the examiner adding that:

"Whether the openings are of the greatest diameter at the rear of the brush or not is regarded as immaterial but such openings are old as shown by the patent to Osborn, No. 457,007, August 4, 1891, in tooth brushes."

Thereupon, the applicant inserted for the first time the words found in the claim, "whereby the most material is provided at the face or bristle receiving side of the brush back," and said as follows:

"It is not merely a question whether or not openings in the brush back are of the greatest diameter at the rear of the brush back as assumed by the examiner, but the claim likewise defines that the said openings are 'decreasing in diameter to the face thereof' (of the brush back) whereby the most material is provided at the face or bristles receiving side of the brush back where the greatest amount of material is needed in which to support the bristles and where greatest strength is required."

The defendants' brush is provided with longitudinal openings, widened by a bevel at the rear of the brush, which are rectangular from a point commencing above the line of the top of the holes for receiving the bristles, with the result that said openings are not "decreasing in diameter to the face thereof," and the most material is not "provided at the face or bristle receiving side of the brush back," because, barring the bevel at the extreme back, the openings are of the same size, and the same amount of material is provided during their entire length, thus having the same construction as was shown in said Ashburner sketch, filed by the patentee during the pendency of his application. The single technical ground on which infringement is claimed is that the claim may be read to cover any decrease in diameter toward the face of the brush, and, therefore, to cover the bevel at the extreme back of the brush.

But this interpretation ignores the express language of the claim, and the claimed structural results of the diameter of the openings decreasing "to the face," and of the consequently increased material "at the face," whereby the brush is strengthened and the bristles may be projected outwardly. No such result is accomplished by the defendants' brush, wherein there is no departure from the prior art in the direction of the patent, because it is in effect the Ashburner brush, with a negligible or merely ornamental bevel at the rear of the brush back, such as is shown or suggested in various brushes of the prior art, and such as Shepherd had himself shown in his earlier application. Even if it had not been so shown, that fact would be immaterial upon the question of infringement because, as already pointed out, the whole of the bristles are below the bevel and, therefore, the bevel does not extend to a point where it can affect the construction or operation of the brush in any way.

The decree of the court below is reversed, with costs.

GILLETTE v. SENDELBACH et al.

(Circuit Court of Appeals, Seventh Circuit. April 10, 1906.)

No. 1,216.

1. PATENTS—SUIT TO COMPEL ISSUANCE—SUFFICIENCY OF EVIDENCE.

Where the question which of two applicants for a patent for the same invention was the true inventor depends on questions of fact, the court, in an action brought under Rev. St. § 4915 [U. S. Comp. St. 1901, p. 3392], by the unsuccessful applicant to compel an issuance of the patent to him, must be very clearly satisfied that the decision of the Patent Office tribunals between the two was erroneous before it will be justified in reversing the same.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 162-166.]

2. SAME—HUB CENTERS.

Complainant *held*, under the evidence, not entitled to the issuance to him as the true inventor of a patent for the subject-matter of claims 1 and 2 of the Sendelbach patent, No. 651,276, for a wooden center for a hub.

Appeal from the Circuit Court of the United States for the District of Indiana.

Fred L. Chappell and Thos. A. Banning, for appellant.

Melville E. Church, for appellees.

Before GROSSCUP, BAKER, and KOHLSAAT, Circuit Judges.

BAKER, Circuit Judge. Sendelbach, on an application filed March 9, 1900, received patent No. 651,276, June 5, 1900, containing these claims:

"1. As a new article of manufacture, a wooden center for a hub, consisting of a short cylindrical block having ends lying in planes at right angles with its axis, radial mortises for the spoke tenons, a central longitudinal bore, and metallic bands encircling it at its ends, said bands lying entirely outside the line of the spoke mortises.

"2. The combination with a wooden center having radial mortises and flat ends lying in planes at right angles with the axis of the hub, of a metallic box provided with a collar fitting against one end of said center, a metallic sleeve surrounding said box and having a flange fitting against the other end of said center, means for clamping the said parts together, lengthwise, and spokes inserted into the mortises in said center and sustained against lateral pressure by the wooden center only."

Gillette, on January 3, 1901, filed an application which contained, among others, the two claims above recited. The examiner of interferences decided that Sendelbach was the inventor of the subject-matters in issue. That decision was affirmed by the examiners in chief, reversed by the Commissioner, and finally affirmed by the Court of Appeals for the District of Columbia on June 2, 1903.

Afterwards Gillette began this suit, under section 4915 Rev. St. [U. S. Comp. St. 1901, p. 3392], to obtain a decree adjudging that he was the inventor of the subject-matters in controversy and directing that a patent be issued to him; and he prosecutes this appeal from a decree dismissing his bill for want of equity.

Whether the original conception was Gillette's, whether he disclosed it adequately to Sendelbach, whether Sendelbach was charge-

able as Gillette's agent in embodying the conception in the forms of the two claims, were questions of fact presented to the Patent Office tribunals on virtually the same evidence that is now adduced. To justify us in directing the issuance of a patent to Gillette, we should be shown very clearly that the adverse findings are erroneous. Our study of the record has not convinced us that such is the fact; and we deem it unprofitable to review the ground covered by the decision of the Court of Appeals for the District of Columbia, because we are far from being persuaded that invention was involved in what Gillette actually did. He had devised a roller bearing for use in lumber carts. The wheels shown (patent No. 644,550, February 27, 1900) were made of three thicknesses of plank. The flanged metal boxing of the bearing was bolted snugly to the planks. Then he took a cart wheel of the usual spoke and hub pattern, sawed off the ends of the hub that protruded beyond the thickness of the planks, and attached his roller bearing. Passing the question whether this involved the subject-matters of the two claims, we think that Gillette, in shortening the hub to receive the bearing, did only the obvious.

The decree is affirmed.

UNITED SHOE MACHINERY CO. v. GREENMAN.

(Circuit Court of Appeals, First Circuit. July 6, 1906.)

No. 627.

PATENTS—INFRINGEMENT—SHOE SEWING MACHINES.

The French patent, No. 561,386, for a device for heating the looper of a wax-thread shoe sewing machine makes an intermittent contact between the looper carrier and the heated block or plate an essential feature of the invention, by which it is distinguished from the prior art, and is not infringed by a device in which a constant contact is maintained between the two.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

Elmer P. Howe and Benjamin Phillips, for appellant.

T. Hart Anderson, for appellee.

Before COLT and PUTNAM, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This suit is for infringement of letters patent No. 561,386, to Zachary T. French, dated June 2, 1896. The claim relates to means for heating the looper of a wax-thread shoe sewing machine:

"In a sewing machine, a block or plate heated by a fluid, and a looper and looper carrier, combined with means to move the said carrier to put it in contact intermittingly with the said heated block or plate, to thereby, in the operation of the machine, keep the looper heated to the proper degree, substantially as described."

The defendant's device is similar in the use of a heated block or plate to heat the looper carrier, but different in that there is no in-

intermittent contact between the heated block and carrier. The defendant's heated block, instead of being held stationary in the path of the looper carrier, as in the complainant's device, follows the movements of the looper carrier, a spring support keeping the heated block constantly in contact with the looper carrier throughout the movement of the looper carrier. So far as practical results are concerned, the difference between the heating by an intermittent contact and by a constant contact does not seem important.

The complainant contends that the continuous contact in the defendant's machine is simply the intermittent contact of the patented device plus a useless continuation, which produces no new result, and that it is a mere colorable evasion of the terms of the claim.

While we recognize the force of this contention, when comparing the complainant's device and that of the defendant, we are nevertheless of the opinion that, in view of the specific character of the claim, it is impossible to hold the defendant's device an infringement without disregarding the following part of the claim: "combined with means to move the said carrier to put it in contact intermittently with the said heated block or plate."

The complainant urges that the word "intermittently" has no effect to distinguish the invention from the prior art. Even if this were so, we could not disregard a specific limitation, which is binding upon the patentee, even if not required by the state of the art. It seems clear, however, that in the Patent Office the feature of an intermittent contact as distinguished from a constant contact was insisted upon by the patentee as a main feature of distinction from the prior art. The claim was rejected by the examiner for insufficiency of invention, in view of the state of the art. Upon appeal to the examiners in chief, it was urged by the complainant:

"The prime requisite definitely made vital in the above issue is: There must be a heated block or plate and a looper-carrier, and the looper-carrier must move into, and out of, direct contact [i. e., touching engagement] with the block or plate, and the looper-carrier must be properly and continuously heated by this intermittent contact with said heated block or plate. * * *

"The examiner does not base his rejection on any anticipatory device, but rejects it on the general state of the art, the said art being shown in nine patents, five of which are discussed in the examiner's statement. * * *

"A review of these nine patents of record shows that there is no suggestion of heating any part by 'intermittent contact' thereof with a heated block. * * *

"Again, each reference either has the heating means in constant contact with the part to be heated [as in Aldrich (2), Ashe, Garton], or it never at any time has the heating means in contact with the part to be heated [as in Wardwell (W¹⁴), 262, 160, and Brown (D), 498, 505.] * * *

"What is claimed is 'intermittent contact,' and this only, and this is precisely what is not shown, and what is novel."

The interpretation of the claim by the Circuit Court was substantially the interpretation for which the patentee contended in the Patent Office. We are of the opinion that this interpretation is correct, and that the defendant does not infringe.

The decree of the Circuit Court is affirmed, and the appellee recovers his costs of appeal.

EASTERN MILLING & EXPORT CO. v. EASTERN MILLING & EXPORT CO. OF PENNSYLVANIA.

(Circuit Court, E. D. Pennsylvania. July 14, 1906.)

No. 37.

1. ASSIGNMENTS—CHECK AS EQUITABLE ASSIGNMENT—PRIORITY—RECEIVERS.

The giving of a check on a bank in the ordinary form does not constitute an equitable assignment pro tanto of an indebtedness owing by the bank to the drawer, nor does the fact that the check was presented, where it was not paid nor accepted, entitle the holder to priority of payment, on the drawer's subsequent insolvency, from a fund due from the bank or collected by a receiver.

[Ed. Note.—For cases in point, see vol. 4, Cent. Dig. Assignments, §§ 85-98.]

2. BANKS AND BANKING—RIGHT OF BANK TO APPROPRIATE DEPOSIT—EFFECT OF RECEIVERSHIP.

The right given to a bank by a contract with a depositing and borrowing corporation to declare any notes of the corporation held by the bank due in case the corporation became insolvent, and to apply thereon any sum then on deposit to the corporation's credit, cannot be exercised after a receiver has been appointed for the corporation, since title to the deposit passed to him at once on his appointment.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Banks and Banking, §§ 353-374.]

Rule on Receiver to Pay over Money.

See 125 Fed. 143.

H. Gordon McCouch, for Corn Exchange Nat. Bank.

Stacy B. Lloyd, for receiver.

HOLLAND, District Judge. This matter is brought before the court on a petition presented on behalf of the Corn Exchange Bank, to which an answer was filed by the receiver of the Eastern Milling & Export Company of Pennsylvania, and a stipulation of counsel as to certain facts, which are admitted by the parties, and which do not appear in the petition and answer. They are as follows: The milling company became a debtor to the bank on a promissory note of \$4,500, dated May 11, 1903, payable at the expiration of 60 days, and it came due July 11th, the same year. Nine of the first mortgage bonds, for \$1,000 each, of the company, were deposited with the bank as collateral security for the note. The milling company was also a depositor with the bank, and had filed a statement of its assets and liabilities in which the milling company agreed that:

"In consideration of granting any credit by the said bank, the undersigned [the milling company] agrees that, in case of failure or insolvency on the part of the undersigned, * * * all or any of the claims or demands against the undersigned held by said bank shall at the option thereof immediately become due and payable, and it is hereby understood and agreed that all moneys, funds, stocks, bonds, notes, and other property in the hands of the said bank belonging to the undersigned may at all times at the option of the bank be held and appropriated by the said bank to the payment of all notes, indorsements, obligations, or indebtedness in any form, matured or unmatured, made by the undersigned, which the said bank may hold.

Further that the exercise of or omission to exercise such option or options in any instance shall not waive or affect any other or subsequent right to exercise the same."

On July 3, 1903, the milling company had credit with the bank as a depositor for the sum of \$554.54, some of which was for collection on out of town checks. A receiver was appointed for the milling company on July 6, 1903, because of its insolvency, and on May 11th the \$4,500 note made by the milling company to the bank fell due, and on February 9, 1904, the bank appropriated the deposit on account of the note. Prior to the appointment of the receiver and on the 3d day of July, 1903, the milling company drew a check to Charles H. Burr for \$500, which was presented the same day, but payment refused on the ground that while the milling company's bank book showed a credit of more than enough to meet the check, the credit was made up of certain checks that day deposited by the milling company with the bank, some of which were out of town checks and had not then been collected, and the agreement with the bank and all depositors made the bank simply a collateral in all out of town checks until they received the money in their possession. Mr. Burr did not present his check again for payment before the receiver had been appointed. Subsequently a distribution of the assets of the milling company was made, and there was awarded to the bank the sum of \$2,935.35 on the nine bonds held by the bank as collateral to the note; this being a dividend of 32.615 per cent. The receiver offered to pay this amount to the bank, less the deposit which he claims belongs to him as receiver for the milling company. The bank claims the right, under the provisions of its agreement above stated, to appropriate the deposit on account of the note which matured subsequent to the appointment of the receiver, and Mr. Burr, the holder of the check, insists that \$500 of the deposit should be paid to him.

The latter's claim, we think, is clearly ruled out by the decisions of the Supreme Court in *Bank of Republic v. Millard*, 77 U. S., 152, 19 L. Ed. 897, and *Fourth Street Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855. In the first case, it is held that as between a check holder and a bank upon which the check is drawn, unless it be accepted by the bank, an action cannot be maintained by the holder against the bank; and, in the latter, the court held that a check, drawn in the ordinary form, does not, as between the maker and payee, constitute an equitable assignment pro tanto of an indebtedness owing by the bank upon which the check has been drawn, and that the mere giving and receipt of the check does not entitle the holder to priority over general creditors in a fund received from such bank by an assignee under a general assignment made by the debtor for the benefit of creditors, and the contention that the check was presented for payment to the bank prior to the assignment does not change the rights of the holder thereof is fully borne out by the opinion of Justice White in *Bank v. Yardley*, supra.

As between the milling company and the bank, the bank's note having matured after the insolvency of the milling company and the ap-

pointment of a receiver, the latter would be entitled to recover the deposit, because at the time the receiver was appointed all property, including the deposit, passed to him as trustee for the creditors, and the bank could not credit the deposit on account of the note it held against the milling company, which matured on the 11th of July, five days after the deposit had passed to the receiver, for the reason that at the time the receiver was appointed the bank had no lien on the deposit that would have interfered with the rights of the milling company to draw the same and that by virtue of the appointment of a receiver the right to do so passed to him in trust for the creditors. *Chipman & Holt v. Ninth National Bank*, 120 Pa. 86, 13 Atl. 707, and cases therein cited. But it is contended that by virtue of the agreement the milling company was authorized to appropriate the deposit on account of the note as above stated. It is true, under the agreement, the bank was authorized as between the depositor and itself to apply the deposit on account of any note it might hold against the milling company in case of insolvency of the latter. The bank, under the agreement, for the reasons stated, held an option or privilege to declare any note due held by it against the milling company and to appropriate any deposit it might hold in payment thereof; but, in this case, the bank did not exercise this option before the appointment of the receiver, and the deposit passed to him as trustee for the creditors upon his appointment.

The relations between the milling company and the bank up to the time of the appointment of the receiver were identical with those existing in the case of *Chipman & Holt v. Ninth National Bank*, *supra*, with the exception that the bank held a power of attorney authorizing it, at its option, to declare the note due and payable and to appropriate the deposit as part payment. Having failed to exercise this power prior to the appointment of a receiver, its right to do so no longer exists, and the receiver is entitled to the fund.

The prayer of the petitioner for an order upon the receiver, directing him to pay over the said dividend of \$2,935.35, without deduction or abatement, is therefore refused.

UNITED STATES v. NEELEY.

(Circuit Court, S. D. New York. March 3, 1906.)

ATTACHMENT—VACATION—ACTION BY ADVERSE CLAIMANT AGAINST GARNISHEE.

Where a fund on deposit in a bank and attached in an action in a federal court as property of the defendant therein is claimed by others, not parties, and an action against the bank for its recovery has been instituted in a state court, the plaintiff in the federal court should appear in such action and submit his rights to adjudication therein for the protection of the bank, and unless he does so the attachment will be vacated.

On Motion to Vacate Attachment.

Sullivan & Cormwell, for the motion.

Henry L. Stimson and Edward K. Jones, opposed.

LACOMBE, Circuit Judge. This is a motion to vacate an attachment and discharge a levy thereof upon a fund in the hands of the Mercantile National Bank, unless the plaintiff herein consents to appear and to yield to the jurisdiction of the New York Supreme Court and to allow the question as to its right, if any, under and by virtue of said warrant of attachment, to be determined in said court on the merits. The fund is claimed by two other persons besides Neeley, and suit has been brought against the bank in the state court. Apparently in no other way can the rights of the bank, who is a mere stakeholder, be protected.

The determination of the question whether or not the United States shall voluntarily appear in an action in a state court is one to be determined by the executive branch of the government; i. e., by the Attorney General. The proposition that a federal court shall compel that officer by threat of an adverse decision to make such "voluntary (?)" appearance is an interesting one, which has apparently once before been considered in this court (*Johnston v. Stimmel*, 89 N. Y. 117), but which need not be discussed here. The Attorney General states that the United States disclaims any interest in the litigation, which it appears is being prosecuted in the name of the United States solely for the benefit and at the expense of the Cuban government. There is no reason why the Cuban government should not appear in the state court case, and, indeed, every obligation of fair dealing requires it to do so.

The motion is therefore granted.

UNITED STATES v. NEELY.

(Circuit Court, S. D. New York. March 19, 1906.)

ATTACHMENT—VACATION—MOTION BY CLAIMANT OF PROPERTY.

A third person, claiming ownership of a fund in a bank attached as the property of a defendant, through a transfer to him of the certificate of deposit issued for the same, may properly intervene in the action, and assert his claim by a motion to vacate the attachment as to such property; but the attachment will not be vacated on such ground on ex parte affidavits.

On Motion to Vacate Attachment.

H. Melville Walker, for the motion.

Arthur M. King, opposed.

LACOMBE, Circuit Judge. Kaulbach, who claims the money represented by the certificate of deposit, apparently acquired whatever interest he has subsequent to the levy. He should not, however, for that reason be denied opportunity to establish a claim, if he can do so, either personally or through Russey, under the principles governing negotiable paper. He has quite properly, although not a party, moved in this action, because in that way a decision can be reached much more quickly and economically than in any other. Judging from a communication received from his counsel, he does not understand

the practice usual here when there is a conflict of affidavits upon a motion, and confounds it with the state reference of all the issues. As was stated on the argument, it would be grossly improper to vacate attachment on either Kaulbach's or Russey's *ex parte* affidavit untested by cross-examination. The case is therefore sent to the clerk of the court to take such testimony as may be offered, and report the same to the court promptly. Notice of the hearing should be given to the bank and to Russey, and they should be allowed to intervene. To save expense, the testimony of Russey or of any one else living more than 100 miles from the courthouse, may be taken by commission upon direct and cross interrogatories. Whether there shall be any delay, or not rests wholly with the moving party. If he is reasonably expeditious, there is no reason why the testimony may not be completed and the matter disposed of within two weeks. The suggestion of calling witnesses from the Attorney General's office and producing books and documents from the banks is preposterous. No questions calling for any such proof are to be decided. A single witness from the bank will prove the genuineness of the certificate of deposit, and, if petitioner can show that he is a bona fide holder for value with a title superior to the levy, the attachment will be vacated. If he cannot show this, no other alleged defect in the levy will be considered, because, if he is not such a bona fide holder, he is a mere stranger, who has no concern in the question whether the levy was properly made or not.

This summary proceeding is much less expensive than the litigation proposed in the state courts. There are no costs on motions in the federal courts. The affidavit of Kaulbach, on which he relies as entitling him to relief, does not make out a *prima facie* case, because its averments are rather of conclusions than of facts.

BROWN v. MAGEE et al.

(Circuit Court, E. D. Pennsylvania. July 14, 1906.)

No. 15.

DISCOVERY—OWNERSHIP OF STOCK IN CORPORATION—BILL BY RECEIVER.

A receiver for an insolvent corporation who has been ordered by the court to collect an installment due from stockholders for the benefit of the creditors is entitled to maintain a bill of discovery against a broker, who as agent purchased certain of the stock for an undisclosed principal, to compel a disclosure of the real ownership of such stock to enable him to bring a suit for the collection of the assessment.

In Equity. On bill of discovery.

Burr, Brown & Lloyd, for complainant.

Rudolph M. Schick, for respondents.

HOLLAND, District Judge. The question in the former suit was whether the defendant Kurtz was liable as agent for an assessment on this stock, and the court held he was not liable. The question now raised by the bill is the plaintiff's right to compel the defendants to disclose the real ownership of the stock. It is an entirely different

question and was not raised in the former suit. In the case of *Brown v. McDonald*, 133 Fed. 897, 67 C. C. A. 59, 68 L. R. A. 462, the Circuit Court of Appeals of this district decided, upon a similar state of facts, that this plaintiff was entitled to a discovery.

A decree will be entered in favor of the plaintiff.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. January 12, 1906.)

No. 371.

1. EXTRADITION—CONSTRUCTION OF TREATY.

In the construction and carrying out of extradition treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent, since an exact correspondence between the laws of the two countries cannot be expected, and the only purpose of extradition is to put the accused on trial under the laws of his own country.

[Ed. Note.—For cases in point, see vol. 23, Cent. Dig. Extradition, § 9.]

2. SAME—SUFFICIENCY OF INDICTMENT—DESCRIPTION OF OFFENSE.

An indictment charging a conspiracy to defraud the United States between an officer and agent of the government and his codefendants, which sets out facts showing a corrupt agreement between the defendants and overt acts by means of which the purpose of such agreement was effected and the government defrauded, charges fraud by an agent and participation therein by the other defendants, within the meaning of clauses 4 and 10 of article 1 of the extradition treaty of 1890 (Act March 25, 1890, 26 Stat. 1509) between Great Britain and the United States, and is sufficient to warrant their extradition for trial thereunder.

3. SAME—CONSTRUCTION OF TREATY.

Distinction between relating clause of the Ashburton treaty of 1842 and the supplemental treaty of March 25, 1890, now of force, discussed.

4. SAME—INDICTMENT.

For the purposes of determining a question like this, the indictment must be construed, not by one generic description alone, but after full consideration of all its clear and substantial averments.

Indictment for Conspiracy to Defraud the United States by Presenting False Claims, etc. On pleas of Benjamin D. Greene and John F. Gaynor.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., and Alexander Akerman, Asst. U. S. Atty.

William Garrard, Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants.

SPEER, District Judge. The court has heard the questions presented on the plea of the defendants Benjamin D. Greene and John F. Gaynor to indictment No. 371, and the answer filed by the government's counsel thereto. The argument of counsel has been exhaustive.

The plea alleges that the court is without jurisdiction for the reasons therein stated. They are that the defendants were lately under

the sovereignty of the United Kingdom of Great Britain and Ireland, and that, under the treaty and under extradition proceedings between this government and that of Great Britain, the defendants were extradited to be tried upon the charges: First, participation in fraud by an agent and trustee; second, participation in embezzlement; and, third, for receiving money and property, knowing the same to have been fraudulently obtained. It is alleged that none of the aforesaid crimes or offenses are charged in the bill of indictment in any of its counts, and that no crime is charged in said indictment for which extradition can be asked. Elaborating this ground of defense it is alleged that the court has no authority to try the defendants for any crime or offense other than those named and defined in the extradition treaty, and, further, that the court has no authority to try the defendants for any crime or offense other than those for which they have been extradited. Whereupon, defendants object to being called upon to plead to said indictment, and pray that they be not tried thereon, and that they may be discharged from custody.

The answer of the government admitting the grounds of extradition to be as alleged by the plea, denies that there is a failure to charge the appropriate crimes or offenses for which such extradition was had. On the contrary, it answers that each count of the indictment charges both defendants with participation in the fraud alleged to have been practiced upon the government by one of its agents and trustees. It alleges also that the judgment of the extradition judge in the Dominion of Canada specifically sets forth that the particular acts which are charged in the indictment No. 371 were committed by the defendants and constitute participation on their part in the fraud alleged. The answer also denies the averment of the plea that the crimes and offenses set out in the indictment are not named in the extradition treaty and are therefore not extraditable. The answer of the government further alleges that the defendants were extradited and surrendered for the crimes and offenses set out described and charged in the first, second, third, fourth, fifth, and sixth counts of the indictment, and that the court has full jurisdiction to proceed with the trial.

From a certified copy of the judgment of Ulric Lafontaine, extradition commissioner of the Dominion of Canada, the grounds upon which the prisoners were returned for trial are clearly discoverable. They are: First. By entering into a corrupt agreement (conspiracy) with Oberlin M. Carter, an officer and agent of the United States, to defraud the United States in the discharge of the duties of his office and employment, and for payment by him as such officer and agent, of the public moneys intrusted to him, fraudulent claims made and to be made against the United States for the benefit of Carter and the defendants here; that such fraudulent claims were presented to Carter as a disbursing officer for approval and payment; that this constituted a corrupt agreement and deceitful device by which Carter transferred the exercise of the discretions of his office and the service of his employment from the United States, his principal and employer, to the prisoners, so that the United States thereby lost what it was entitled

to have, the honest and faithful services of its officer and agent. Second. By jointly with said Carter, agent and trustee as aforesaid, causing to be made and presented to him fraudulent claims against the government for his approval and payment to the amount of \$575,-749.90 knowing the same to be fraudulent. The third and fourth grounds charging embezzlement and receiving money embezzled are not important for consideration on this issue.

The treaty itself was designed to enlarge the Ashburton treaty of 1842, which, if I am accurate in my recollection, was negotiated by Mr. Webster, then Secretary of State, and Lord Ashburton. At the time that treaty was under consideration there was great tension between Great Britain and our own government, with several threatening causes of dispute—among these the dispute as to the boundaries between the United States and Canada and the final suppression of the African slave trade. An interesting résumé of these historical facts may be found in the *Life of Daniel Webster* written by Mr. Curtis, one of his literary executors. In later years the entente cordiale between these two great branches of the Anglo-Saxon race has steadily strengthened, and is in this day second to no other as a guaranty for the preservation of civil and religious liberty in all that vast domain where the sun, in each diurnal progress around the world, is simultaneously greeted by the meteor flag of the mother country and the stars and stripes. The influence of this feeling doubtless contributed to the supplemental convention for extradition which controls the question now before the court. The purpose of the treaty is indicated by the following provision of the preamble:

"And whereas it is now desired by the high contracting parties that the provisions of said article should embrace certain crimes not therein specified and should extend to fugitives convicted of the crimes specified in said article and in this convention."

We find that the original treaty was supplemented by three additional clauses which are strongly illustrative of the subject now under consideration. The third and fourth clauses of article 1 comprehend:

"(3) Embezzlement; larceny; receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained.

"(4) Fraud by a bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries." 26 Stat. 1509.

The second clause of paragraph 10 of the same article provides as follows:

"Extradition is also to take place for participation in any of the crimes mentioned in this convention or in the aforesaid tenth article provided such participation be punishable by the laws of both countries."

26 Stat. 1509.

Construing the Ashburton treaty in *Rauscher's Case*, 119 U. S. 420, 7 Sup. Ct. 234, 30 L. Ed. 425, the Supreme Court comments upon the enumeration of offenses and declares that they are so specific and marked by such a clear line in regard to magnitude and importance that it is impossible to give any other interpretation to it than that of

the exclusion of the right of extradition for any others. In the older treaty the pertinent language of the caption of the treaty was for the giving up of criminal fugitives from justice in certain cases. There were only seven crimes enumerated. In the later treaty extradition, as we have seen, is to take place, not only for the crimes which are largely multiplied, but also for participation in any of the crimes therein mentioned. It is not surprising that, construing the earlier treaty, Mr. Justice Miller in *Rauscher's Case*, after reviewing the authorities declared that a person who has been brought within the jurisdiction of the court by virtue of the proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty. It is obligatory upon the court in the application of this language to look carefully to the phraseology and purpose of the treaty the Supreme Court is construing. When, however, a subsequent treaty, equally binding upon the judicial officers of both countries, authorizes extradition not only for the specific crime mentioned but for participation in it, and when such facts constitute a penal offense under the laws of both sovereignties and the determination of whether the facts set out in the proceedings for extradition and in the indictment found in the trial court on the same facts constitute such a participation is a matter to be determined according to the jurisprudence and practice of the country where the prisoners are indicted and to which they have been returned.

The treaty now effective was adopted in 1890, and the view we state above may, we think, be regarded as confirmed by the language of the court in *Bryant v. U. S.* (decided in 1896) 167 U. S. 104, 17 Sup. Ct. 744, 42 L. Ed. 94. This was a case of extradition by the British government from American Territory. The prisoner was charged with the crimes of forgery, larceny, embezzlement, and false entries committed in the city of London. The extradition was attempted under article 10 of the treaty of November 10, 1842 (8 Stat. 576), and article 1, of the treaty supplemental thereto of March 25, 1890 (26 Stat. 1508). These are the precise principles of the treaty which are now under consideration. It will be observed that there was a charge of forgery of three checks, and it was insisted that, because the prisoner made false entries upon the books of Morrison and Marshall, this would not constitute an offense for which he could be extradited because, when the treaty of 1842 was executed, the making of false entries was not forgery, and that further as to the charge of embezzlement there was no evidence of criminality, and that if there was evidence sufficient to hold appellant upon the charge of forgery, he could not be held as for larceny or embezzlement, and that if he were held for embezzlement he could not also be held for obtaining the money upon forged checks, that as he could only be tried for the particular offense for which he is surrendered, the demanding government and the commissioner should have elected, and if the latter deemed the evidence sufficient to commit upon the one charge he should not have been committed upon the other. The court, through Mr. Justice Brown, made this significant remark:

"So long as the prisoner is tried upon the facts which appeared in evidence before the commissioner, and upon the charges or one of the charges for which he is surrendered, it is immaterial whether the indictment against him shall contain counts for forgery, larceny, or embezzlement. While the treaty of 1842 authorized surrender only for the crime of forgery, or utterance of forged paper, the supplemental treaty of March 25, 1890, included both embezzlement and larceny."

It is, perhaps, not quite safe, therefore, in the practical administration of justice to be guided exclusively by precedents established when the treaty making nations were ever en garde the one toward the other. This is happily expressed in the brief of Mr. Solicitor General Hoyt and Mr. Assistant Attorney General Purdy in *Wright v. Henkle*, 190 U. S., at page 55:

"As confidence between nations has grown, the liberal view of extradition treaties as effectuating common and proper purposes emphasizes the broad, essential correspondencies, and minor technical distinctions and mere designations have less weight. *Bryant's Case*, supra; *Grin v. Shine*, 187 U. S. 181, 23 Sup. Ct. 98, 47 L. Ed. 130.

They add on page 56 that:

"Provided the particular variety is criminal in both jurisdictions, exact correspondence is not necessary. The essence and substance are to be regarded, and highly technical considerations fall away."

And reciting, on page 60 of 190 U. S., page 785 of 23 Sup. Ct. (47 L. Ed. 948), the interesting fact that the treaty we have under consideration was made by Mr. Secretary Blaine and that accomplished lawyer and publicist, then Sir Julian Pauncefote, the Chief Justice declares:

"Where there was reason to doubt whether the generic term embraced a particular variety, specific language was used. As for instance, as to the slave trade, though criminal, yet, apparently because there had been peculiar local aspects, the crime was required to be 'against the laws of both countries'; and so as to fraud and breach of trust, which had been brought within the grasp of criminal law in comparatively recent times."

"It is enough," continues the Chief Justice, "if the particular variety was criminal in both jurisdictions and the laws of both countries included the laws of their component parts." This view seems to have impressed the Chief Justice who rendered the opinion for the unanimous court in *Wright v. Henkel*, supra. "Treaties," said he, "must receive a fair interpretation, according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent." Chief Justice Fuller continued:

"The general principle of international law is that in all cases of extradition the act done on account of which extradition is demanded must be considered as a crime by both parties, and as to the offense charged in this case, the treaty of 1889 embodies that principle in terms. The offense must be 'made criminal by the laws of both countries.'"

It must be remembered that the treaty under consideration is sometimes called the treaty of 1889 and sometimes the treaty of 1890. This is due to the fact that it was negotiated in one year and put in

operation by the proclamation of the President the next year. The thought is further amplified in the observations of Mr. Justice Brown, in *Grin v. Shine*, 187 U. S. 184, 23 Sup. Ct. 98, 47 L. Ed. 130. Said that learned justice:

"There is such a general acknowledgement of the necessity of such treaties, that of late, and since the facilities for the escape of criminals have so greatly increased, most of the civilized powers have entered into conventions for the mutual surrender of persons charged with the most serious nonpolitical crimes. * * * In the construction and carrying out of such treaties the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal law, and proceedings for surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all citizens are required and ought to be willing to do, viz., submit themselves to the laws of their country."

It is insisted, however, that, notwithstanding the essential facts constituting an offense criminal in both countries are fully recited in the indictment and as fully placed before the commissioner of extradition as appears from his judgment, we have no jurisdiction to try these prisoners because in some of the counts the aggregated facts thus denounced by law are by the pleader termed a conspiracy. It is further urged that conspiracy is not specifically extraditable under the supplemental treaty or under any treaty with Great Britain, and therefore the prisoners must be discharged and permitted to go hence without a day.

In view of the grave consequence of the offenses charged, this proposition is startling to all who consider the right of the people to have issues like this tried upon the merits and the guilt or innocence of the parties determined by the evidence. The court will not lightly or without anxious inquiry dispose of an issue of such magnitude. For years the government has been attempting to bring to the bar of public justice the men whom successive grand juries have indicted for alleged violation of its laws, and alleged misappropriation of enormous sums appropriated by the liberality of Congress for the benefit of this city, of the Georgia sea coast, and the mighty values involved in the transportation by water of the interstate and foreign commerce of our country. On the other hand the rights of an individual in the orderly administration of justice are not less sacred, not less to be carefully conserved by the courts than the rights of the public in so far as they may be properly involved. The court has therefore listened attentively, and carefully considered the exhaustive arguments of counsel. Undoubtedly it will not be forgotten that, under what I have long believed a most unfair and unrighteous discrimination in the law, the government, representative of the people, has no appeal from the decision of a court of this character however technical or erroneous, and however completely it may nullify the purpose for which criminal laws were enacted. On the other hand the accused is given the right of appeal and exception on every judgment made, and in many instances the right of reiterated appeals. For this additional reason the court should exercise the utmost care and circumspection before it will turn the government out of court. If, then, there are

fair grounds supported by reasonable considerations, whether by precedent or not, which will adequately secure to the prisoners a fair trial and a righteous determination, such defenses as that upon which the prisoners rely will be discouraged unless a different course is obligatory. If his substantial constitutional and legal rights can obviously be protected, if no harm can come to him by maintaining the indictment, the right of the public to present its side of the case on the facts should not be denied. If the accusation of crime made by the constitutional inquest, the grand jury, is supported by adequate proof which, in the absence of contradiction, will justify conviction of guilt there is also the equal right of the public to hear the evidence and the merits of the prisoner's defense. This is fundamental law in its evolution made every day more and more applicable by the increasing demands for protection for our increasing interests and our marvellous civilization. Besides in the issue of this character the prisoner is the movant, the burden is upon him to assail and maintain his assault against the presumably orderly and regular proceedings directed by the governmental authority. "*Omnia præsumuntur rite et soleniter esse acta.*"

It is true that the government of the United States in its efforts to secure the return of the prisoners for trial was for a time confounded by the erroneous judgment of a local Canadian judge. This conduct has been condemned by the highest judicial authority intrusted with appropriate jurisdiction in that mighty empire to which the Dominion of Canada is subject. I mean the privy council of his majesty King Edward VII. It is also true that an extradition commissioner expressly intrusted by Canadian law with the decision of the matters involved, after hearing all that the government of the United States advanced or the prisoners cared to submit, made his judgment of extradition upon the substantial charges presented by the United States. More than this on habeas corpus proceedings instituted by the prisoners as they had the right to do, a judge of the King's Bench in Canada affirmed the action of the commissioner of extradition. The requisition of the President of the United States was made. The prisoners have been restored to the jurisdiction from which they fled. It may be added that another Canadian judge had previously maintained the rights of our government to the extradition of these men. Then it is true that two judges of that Dominion have sanctioned this extradition upon a complaint setting forth the essential grounds set forth in the indictment, and the august tribunal presided over by the Lord Chancellor sitting in those mighty halls of justice in that

"Land of old and great renown
Where Freedom broadens slowly down
From precedent to precedent,"

have upheld the authority of those two judges to finally pass upon the questions, and their judgments have upheld the dignity and majesty of American law and the comity which should exist between the two great English-speaking nations who have taken the lead in all the

paths of civilization in every effort made by government for the protection of life, liberty, and property.

It is said that to uphold this indictment would be a reflection upon the national honor, but in view of this action of all the courts of Great Britain and the ample sufficiency of these indictments, it will appear, I think, that to annul them would seem a reflection upon the national intelligence. Why, then, is the court asked at one stroke to hew down the arm of justice as it would hold the scales in equal poise between the government and the accused?

The whole contention of the accused may be summarized in a single sentence. The indictment charges conspiracy, and the prisoners were returned to the bar of this court for something else. It is further charged that the prisoners are put on trial for crimes other than those for which the extradition was granted. As we have previously seen, generic terms were utilized by the great diplomatists and lawyers who drafted this treaty wherever it was deemed that specific language was not adequate. The purpose was to accomplish extradition and the trial on the merits which should follow. Fraud by an agent or trustee, and participation in extraditable crimes are illustrations of this character. The treaty does not attempt to define all of the definitions of crime which may be adopted by the Legislatures of the respective countries. It classifies topics and elements of crime in generic phraseology leaving for the respective governments the duty of framing its legislation so as to definitely denounce any and all injurious action embraced in the more comprehensive language of the treaty, to provide procedure for the trial and penalties upon conviction. How multiplied might be the instances of fraud in the United States and in the several states which might be expressed by the term fraud by an agent or trustee. Larceny after trust, embezzlement, making false entries to mislead and cover up the traces of guilt, the looting of a bank by its officers and the like. Indeed, innumerable are the instances of criminal fraud which have been or may be defined either by the Congress or by the Legislatures of the several states, under each of these extradition clauses. Nor does it seem to me of consequence that the pleader has denominated what is actual criminal fraud of this class which is extraditable under a definition of crime which is not extraditable. An indictment is to be construed, not by the name with which it is christened, but by the crime which it actually truly and fully sets forth in the averments of fact. If, then, it should appear that the pleader in this case termed as a conspiracy, a gigantic scheme to defraud the United States of hundreds of thousands of dollars, a scheme which in its substance and essence is made penal by the statute, which is made penal also by the criminal laws of Canada, if the averments are full, circumstantial, complete, putting the prisoner on notice of all the proof which the government intends to offer against him; if, in other words, it is an adequate description of joint participation in a gigantic fraud accomplished by a trusted agent of the government of the United States, how is anybody hurt because along with all this fullness of averment, this completeness of notice and information of the character of the offense charged, the pleader also terms it a conspiracy?

The ruling of this court in *United States v. Greene* (D. C.) 115 Fed. 344, on the demurrer to a similar indictment, has been cited as authority to support the plea of the defendant. It is urged that the court reiterated the word conspiracy as a designation for the offense, but the fact should not be disregarded that along with this expression was the fullest and most circumstantial detail of the facts, which were set out in the indictment, which were adopted by all the British and Canadian courts which passed on this question, which brought about extradition, and which gave information to the prisoners of the character of the charge against them and which must be proven substantially before the government can expect a verdict of conviction. It was described, not merely as a conspiracy, but as a joint and successful endeavor to defraud the United States by participation in the crime of its trusted agent and officer. Indeed, so copious were the specifications of fraud that the court, as appears from the passage following, felt obliged to condense the language used by the pleader:

"As such officer in charge of said Savannah district, he was vested with sundry powers, duties, and discretion during said period, and, amongst other things, with power in devising and drafting from time to time specifications for contracts for the improvements proposed to be made in said district; in drafting and suggesting forms of advertisements for giving notice to the public that competitive bids would be received by him; in fixing the time such advertisements would be published prior to the opening of bids; in suggesting and causing to be fixed and fixing the time designated in specifications for contracts within which the successful bidder would be required to commence work; in giving out information in regard to such contracts to be let; in receiving proposals for and recommending the awarding of such contracts, and in approving or rejecting the bonds required to be given by such contractors; in superintending the work to be done by such contractors in said district; in approving and accepting or rejecting the work done by such contractors, according as the same was in accordance with the requirements of such contracts or not; in suggesting and approving modifications of such contracts; in approving or rejecting the accounts rendered to him by such contractors for work done or claimed by such contractors to be done by them, according as said accounts should be fair and honest or false and fraudulent and, when in funds, as a disbursing officer, with power, duty, and discretion in paying such contractors or refusing to pay such contractors the amounts claimed by them to be due for work done according as such claims were honest and fair or false and fraudulent."

Similar or rather identical averments appear in the present indictment. Among these contractors were the prisoners. "From this statement," the court continued, "it will be seen that it was in the power of the engineer officer, provided his mind met in illegal conspiracy with the others charged, to do what it is charged that they all did; in short, to control all of the government contracts through a series of years, for the expenditure of appropriations of the public money for the rivers and harbors of this district, to have that work done in a cheap and inexpensive manner, to charge the government a great price for such services, and to divide the excess of illegal gain above the necessary expenditure between the conspirators." It is true we adopted the language of the pleader. The court throughout used the word "conspiracy," but always the impartial or observant mind will discover in connection with it the purpose to defraud the United States by the seduction of its agent, by the joint action that met in the

plot and the joint distribution of the profits. This I mean as alleged in the indictment. More than one crime is thus fully described in the indictment, and on more than one crime are the defendants extradited, and of all such crimes it may be said that they are criminal in this country and in the Dominion of Canada.

Further elaboration is unnecessary. "It is not true," said the court, "in an indictment of this character as contended by the counsel for the accused that each count must be treated as a complete and separate indictment in itself. On the contrary if counts which, considered separately, would not be regarded as complete, are perfected by apt reference to averments in other counts so that there is intelligible and definite information conveyed to the accused of the accusation against them, the constitutional requirement as to an indictment is met." All of the counts of the indictment were sustained except the ninth and tenth. To these the defendants demurred on the ground that the fraudulent character of the claim was not sufficiently set forth. The counts failed to disclose the means or details by which the conspiracies charged were to be made effective and although the charge of conspiracy was made in the language of the statute, because the pleader used merely general expressions and did not state the specific facts of fraud which he intended to prove, these counts were quashed in favor of the prisoners. The indictment now under consideration was soon returned by the grand jury in order that the accused might be furnished with information which the court held that they were entitled to have.

The conclusion of the court is as follows: That each of the first four counts of this indictment charges a corrupt agreement and conspiracy to defraud the United States on the part of a trusted officer and agent of the government; and further that the object of this conspiracy was sought to be effected by the overt acts therein charged; that by this corrupt agreement the officer and agent is charged with having in effect transferred and prostituted the exercise of the discretions of his office and the services of his employment from the United States his principal and employer to his co-conspirators; that such corrupt agreement constituted in itself fraud by an agent within the meaning of the fourth clause of the treaty; that the defendants Benjamin D. Greene and John F. Gaynor, charged in the indictment as co-conspirators and parties to that corrupt agreement, are charged with participation in the fraud of such agent.

We further conclude that in the last two counts of the indictment the defendants Benjamin D. Greene and John F. Gaynor are charged jointly with Oberlin M. Carter, engineer officer and agent of the government, with having knowingly caused to be presented to the officer and agent for his approval and payment the fraudulent claims described; that this constitutes a charge of fraud on the part of the officer and agent and participation in that fraud by the defendants Benjamin D. Greene and John F. Gaynor. It was precisely for the offenses thus charged that the defendants were committed for surrender to the United States by the judicial authorities of Canada.

Our conclusion, then, is that the extradition was amply authorized

by the treaty; that the prisoners were extradited for alleged crimes indictable in both countries; that the language of the present indictment is, in all substantial respects, adequate to secure their constitutional rights to full information of all the charges against them, and to accord them a fair and righteous trial so far as the indictment goes.

It follows that the plea must be overruled and disallowed.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. January 13, 1906.)

Nos. 476, 477.

JURY—DISTRICT FOR SELECTION OF JURY—CHANGE OF BOUNDARY.

Where, after the commission of an alleged crime in a federal district, the division of the district in which it was committed is changed by the creation of a new division therefrom, the district as "previously ascertained by law," within the meaning of the sixth constitutional amendment, which constitutes the vicinage from which the jury must be drawn for the trial of the accused, comprises the division as it stood before the change.

On Special Pleas of Defendants and Demurrer Thereto.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., and Alexander Akerman, Asst. U. S. Atty.

Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants.

SPEER, District Judge. The question presented by the plea and demurrer has, in some respects, already been passed upon by the court in this case. This appears from the opinion of the court filed February 17, 1902. 113 Fed. 683. Additional features, however, appear by the plea and demurrer, but they do not appear to be difficult of determination. The broad question involved depends upon the proper construction to be given article 6 of the amendments to the Constitution of the United States. This was one of those great provisions of personal right which were exacted by the American people as a condition to the adoption of the Constitution itself. It was proposed to the Legislatures of the several states by the first Congress on the 25th of September, 1779, and was ratified by a sufficient number of the states in that year and in the years immediately following. It provides:

"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The term "previously ascertained by law" necessarily imports previously to the commission of the crime, or at least to the accusation. Now it will not be disputed that the offense charged against the pris-

oners, if offense it be, was committed before the creation of the Southwestern division of the Southern district of Georgia, with provision for courts at Valdosta. At that time the Eastern division of the district comprehended the counties from which the grand jurors who found the indictments under consideration were drawn. The district as it then stood was, therefore, the district as it had been previously ascertained by law. It follows that since a large number of counties have been, subsequently to the alleged commission of the offense, withdrawn from the Eastern division and comprehended in the Southwestern division, the Eastern division now at this time is not as it had been previously ascertained by law. It follows that this principle of our organic law, which is over and above all other laws, obliges the court to try the defendants in the district as it stood at the time the offense is alleged to have been committed. The obvious intention of the framers of the Constitution was to create a vicinage for the court from which jurors must be drawn. The vicinage was the late Eastern division of the Southern district of Georgia, but that vicinage had been impaired, as we have seen, by an act of Congress. Acts of Congress cannot impair the Constitution or its effect. It follows, therefore, that as to these prisoners the vicinage in which they are to be tried is the Eastern division of the Southern district of Georgia as it had been previously ascertained at the time the offense is alleged to have been committed. This being the law, the court, not on its own initiative, but, as it will appear from the record and otherwise, having been requested more than once by the district attorney for the exercise of this power in order to obtain an impartial jury, determined to cause the jurors to be selected from that portion of the district most remote from the scenes of the transactions involved in this controversy. The counties from which the jurors are selected are among the most thrifty, enlightened, and progressive in the state of Georgia. They are the counties of Lowndes, Thomas, Decatur, Berrien, and Brooks as they then existed. The court had long experience of the intelligence, capacity, uprightness, and patriotism of jurors taken from that section of the state. They had long composed a part of the jury body at many terms in the courts at Savannah. How, then, was this jury to be obtained? Since a new jury must be had, we could not select jurors from the small Eastern division we now have, because it had been prescribed by law, and the prisoners were entitled to be tried in the district as previously ascertained. The law, familiar to all, requires that the jurors shall be returned by commissioners. One of these must be the clerk of the court, and the other a prominent member of the principal political party opposing that to which the clerk belongs. The home of the clerk is Savannah, and since the court had determined to draw the jury from the extreme southwestern counties of the state, how necessary was it that the additional commissioner should be selected from a locality where residence had given him long acquaintance with the people, and who was otherwise by intelligence and character fitted for the selection of pure, impartial, upright, and intelligent men to perform the grave service to the public, and to the prisoners who were involved in this prosecution. It was not difficult to find such a

man. He was Hon. William S. West of Valdosta, whose very name, wherever he is known, is significant of quiet and manly courage, of devotion to duty, the possessor of the confidence of all the worthy who know him, perhaps the leading citizen of his county, president of the Senate, and therefore ex officio Lieutenant Governor of Georgia. By such men was the jury selected. In his written argument one of the counsel for the accused this morning stated:

"Whether or not the appointment of Mr. West is to the prejudice of these defendants in this particular case he is not prepared to say."

The court, however, will say that the appointment of the commissioners and the jurors secured by him, the 500 jurors whose names are placed in the jury box by the commissioners, will in nothing be prejudicial to the prisoners unless the law and the evidence which may be submitted shall fully support such prejudicial action. These men will have an absolutely fair trial by fearless and impartial jurors, who will be guided by the evidence, by God, and by their consciences. No state in the American Union can show a finer body of jurors than the men of whose method of selection they complain. Indeed, no state in the Union can exhibit a finer jury body than that which invariably responds to the summons of this court. The character of the jury body of the Southern district of Georgia has been a tower of strength to the presiding judge in more than two decades of judicial service among this people. This has been largely due to the character of the jury commissioners. The mention of their names in the locality where they are known will carry conviction to any one. Such men as John Screven, J. H. Estill, Julian Schley, John D. Harrell, Edward S. Elliott, and others who might be mentioned, have been jury commissioners in these courts. And, widely known and respected as are all of these gentlemen, none surpass that high-minded Georgian and patriot American, William S. West, who, co-operating with the clerk, the son of an ex-governor of Georgia, the illustrious Herschel V. Johnson, selected the jurors who found these bills of indictment, and from whom may be taken the jury which will pass upon their guilt or innocence.

The plea is idle. It is bad for duplicity. It is in the teeth of the Constitution and the law, and the demurrer will be sustained.

UNITED STATES v. GREENE et al.

(District Court, E. D. Georgia, S. D. January 16, 1906.)

Nos. 476, 477.

1. EMBEZZLEMENT—PUBLIC MONEY OF UNITED STATES—SCOPE OF STATUTE.

Rev. St. § 5497 [U. S. Comp. St. 1901, p. 3707], extends the crime of embezzlement of public money to "every * * * person * * * who uses, transfers, converts, appropriates, or applies any portion of the public money for any purpose not prescribed by law."

[Ed. Note.—For cases in point, see vol. 18, Cent. Dig. Embezzlement, §§ 24-29.]

2. INDICTMENT—SUFFICIENCY OF AVERMENT—FUGITIVES FROM JUSTICE.

An averment in an indictment that the accused are "fugitives from justice" is sufficient, without further specification, to put them upon notice of the charge which the government means to prove.

3. EMBEZZLEMENT—INDICTMENT—DESCRIPTION OF OFFENSE.

An indictment for embezzlement of public money considered, and *held* to sufficiently describe the offense charged.

On Demurrers to Indictments.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Special Asst. U. S. Attys., and Alexander Akerman, Asst. U. S. Atty.

Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants Benjamin D. Green and J. F. Gaynor.

SPEER, District Judge. It is not impossible that at certain stages in the evolution of our criminal law the arguments so ably advanced by the prisoners' counsel would have been regarded as controlling on the construction of an ordinary criminal indictment. There has, however, been a great advance, not only in criminal pleading, but in the interpretation placed on criminal statutes. This has been accomplished with the beneficial purpose on the part of government to bring men accused of crime to trial on the merits before a jury of their peers. A clause of the Revised Statutes cited in a previous ruling in this case declares:

"No indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment or other proceeding therein be affected by reason of any defect or imperfection in matter of form only which shall not tend to the prejudice of the defendant." Rev. St. § 1025 [U. S. Comp. St. 1901, p. 720].

A similar doctrine, with a similar purpose, is found in the Code of our state. Pen. Code 1895, § 929:

"Every indictment or accusation of the grand jury shall be deemed sufficiently technical and correct, which states the offense in the terms and language of this Code, or so plainly that the nature of the offense charged may be easily understood by the jury."

The obligation is on the government in every case to make out its charge against the accused beyond reasonable doubt. It is a presumption of law that the prisoner is innocent. When the charge is made, it is then the duty of the court, in obedience to this modern practice in criminal cases, to discourage technical objections to indictments unless they allege defects prejudicial to the prisoner in his defense. That must be the test by which this demurrer will be determined. Now for a week we have been engaged in hearing objections of a legal, or alleged legal, character, made to prevent the trial on these indictments, and to secure the discharge of these prisoners upon technical grounds. Up to the present moment the court has not been able to discover anything in these objections which will deprive the prisoners of an essential legal right. Do the demurrers just argued point out any failure of averment in the indictment which will have that effect?

Take first, the argument based upon the decision of the Supreme Court in the Hartwell Case, 6 Wall. 386, 18 L. Ed. 830. The objection is, as pointed out in that case, that the penalty of the

statute under consideration is only directed against bank officers and the like, and, under the familiar rule of construction, this would not include the prisoners. When, however, we look to the statutory law as it has been enacted, we find in section 5497 [U. S. Comp. St. 1901, p. 3707] a clear provision, which adopts the definition of the crime as described in the case above mentioned, and extends it to all other persons, whether bankers and the like or not, and includes them also in the penalty attached. Doubtless the legislative mind, after the decision in 6 Wall., *supra*, was rendered, discovered that the defect in the original statute of 1866 was such that it permitted many who had been guilty of embezzlement of public moneys to go unwhipped of justice. This was the mischief. The remedy was furnished by the remedial statute, which, as stated, extends the operation of the law to all persons of whatever character. The facts stated in the indictment, if true, would bring the prisoners within that provision of the amended statute, and they are sufficiently set forth in the indictment. The Revised Statutes are binding on this court, as the Code of Georgia is in a Georgia court. It is the Code of the United States. It was adopted by act of Congress, which made it and all of its provisions the law of the land. Now Congress had power to enact the amendment. While this is apparently inimical to the ruling of the Supreme Court, it is now controlling on all the courts.

Let us next consider the objection decided before the law was changed, that these persons are not sufficiently described when called "fugitives from justice." Words are taken to import the interpretation ordinarily placed upon them, and this expression is in no sense ambiguous. The manner in which they fled, whether "darkly in the dead of night" or by a Pullman train; where they stopped; how they disported themselves during the period of their absence from this jurisdiction—much of that may be necessary to be proven. But when it is alleged in the indictment that they are fugitives from justice, they are sufficiently put upon notice of the charge which the government means to prove if it can, and which, should the government produce sufficient *prima facie* evidence, they must furnish evidence to refute.

So, too, with the objection of insufficiency of allegation with regard to the drafts payable to the treasurer of the Atlantic Contracting Company. This is that the averments state that these drafts are payable to the order of the treasurer of that company, and delivered to him, and that there was no averment that he had authority to indorse or negotiate them. I am, however, of the opinion that where it is alleged that a draft was drawn by a disbursing officer of the treasury upon funds under his control, and that it was delivered to an officer of the corporation with a fraudulent or criminal intent, it is sufficient, so far as that question is involved. The court will take judicial cognizance of the fact that the engineer officer had power to draw such a draft. The court will take cognizance of the fact that the treasurer of the contracting company had power to indorse the draft. It was then payable at the subtreasury, or over the counter

of any bank in the United States whose officers would accept the theory that the United States government is solvent. There is much else in the way of averment with regard to this feature of the indictment, all of which discloses its sufficiency as such.

It is also urged that there is insufficiency with regard to the description of the mattresses which it is alleged were used as an instrumentality of the alleged fraud, but these mattresses are not evidence which need to be described with very great particularity. Nobody is attempting to charge the defendants with stealing a mattress. If a charge had been made of that sort, it must have been described with the particularity necessary in an indictment for simple larceny in this state. The reference to these mattresses was, to an extent, incidental. They figured as an element of the alleged fraud charged upon these prisoners, and it is wholly impossible for the government to charge their number, their location, or their exact description. The law does not make unreasonable exactions on the pleader in preparing descriptive averments in an indictment of this general character. Let us suppose a man was indicted for fraudulent participation in a scheme to empty 1,000 barrels of turpentine of high grade, which had been sold at that grade, and by filling the barrels with turpentine of a much inferior grade. It would not, I think, be necessary for the pleader to set out the precise grade of the turpentine withdrawn and that substituted. The substantial charge is embezzlement, and the embezzlement and the accompanying fraud as accomplished are sufficiently described when the description is sufficient to fairly put the defendants on notice of the character of the proof which would be brought against them, so that they can prepare with their proof to meet it.

I believe I have sufficiently discussed the tenor and effect of the demurrer. In the opinion of the court, formed after very careful and attentive consideration of the authorities and the arguments of prisoners' counsel, that there is nothing in this case so far which ought to deny to the American people and to these prisoners the right to have the issues presented by the indictments tried upon the merits and passed upon by a jury of their countrymen, as the law directs.

For like considerations, the demurrer to the indictment charging the defendants with receiving money fraudulently obtained or embezzled will also be overruled.

An order will be taken accordingly.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. January 17, 1906.)

CRIMINAL LAW—CONSOLIDATION OF INDICTMENTS—CHARGES RELATING TO SAME TRANSACTION.

Separate indictments against the same defendants, charging severally conspiracy to defraud the United States, embezzlement from the United States, and presenting false claims against the United States, where the alleged object of all of the acts charged was the misappropriation of a fund appropriated by Congress to be expended in a specified river and har-

bor improvement, relate to the same transaction, within the meaning of Rev. St. § 1024 [U. S. Comp. St. 1901, p. 720], and may properly be consolidated for trial thereunder, where it will facilitate the trial and will not be to the prejudice of defendants.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1376.

Consolidation of or trial of indictment together, see note to *Dolan v. United States*, 69 C. C. A. 287.]

On Motion to Consolidate Indictments.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams, and Thomas F. Barr, Sp. Assts. U. S. Atty., and Alexander Akerman, Asst. U. S. Atty.

William Garrard, Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants.

SPEER, District Judge. Orally. The law upon this subject is not in any sense ambiguous. Section 1024 of the Revised Statutes [U. S. Comp. St. 1901, p. 720.] provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases, the court may order them to be consolidated."

Now, that is the act of Congress which is controlling upon the action of the court. It specifically makes the consolidation of indictments relating to the same transactions, and which may be properly joined, as fully equivalent to the joining in many counts, relative to the same transaction, and which may be properly joined in one indictment. It is fully sustained by the decisions of the Supreme Court quoted. Nothing is offered to the contrary, save the arguments or principles submitted by one of the counsel for the prisoners.

The law in our own states accomplishes the same thing in another way. For instance, in a charge of murder there is implied a charge of manslaughter, as I understand. The charge also for manslaughter of different grades, a charge of assault and battery, or, perhaps, a charge of simple assault. There are murders which are felonies, manslaughters which are felonies, manslaughters which are misdemeanors, included by operation of law in one indictment. Now, we scarcely lodge an indictment in this court, in an ordinary case of misdemeanor, which does not contain counts in regard to which are different punishments. Take a case of illicit distillation. The printed forms of the indictment will disclose a charge for carrying on the business of a distiller without giving bond, removing distilled spirits on which the tax has not been paid, for working in a distillery over which no sign is kept with the words "Registered Distillery" in plain letters, as required by law. Each of these offenses have different penalties attached to them by an act of Congress, and yet there is no difficulty whatever in trying and reaching a proper verdict where the accusations of these crimes are on an indictment of that sort. Now,

it is not to be questioned that much may be said, and forcibly said, upon the general lines of arguments submitted by Mr. Meldrim; but, unhappily for the argument, lucid and graceful as it is, the court is controlled by the imperative language of the statute.

Now, the next inquiry is: Are these acts or transactions connected together? Or, are they acts or transactions of the same class of crimes? In either case, there may be a consolidation. Let us look at the general aspect of the case. Of course, we are bearing in mind that what the court may say is accompanied by the statement, which has been made and will again be made at the proper time, that the prisoners are assumed to be innocent till the contrary is proved; yet it has been made manifest that it is the policy of the government to appropriate from the treasury often large sums to improve the harbors and rivers of the United States. This I believe is done under the general welfare clause of the Constitution, or under the provision to regulate interstate and foreign commerce. There has been a long contest over it by gentlemen who take different views of our organic law, some who insist that it is merely a compact, and so forth, with very limited and restricted powers, also insisting that Congress has no right to vote money for internal improvements of this character; but the prevailing idea has been all along that Congress possesses that right, and, when the act of Congress adopting the proper construction is accompanied by an appropriation for a particular locality, we never hear any bitter resentment expressed on the part of those who reside in that locality.

Thus it was by an appropriation of this character that Congress determined to improve the river and harbor of Savannah, and the port of Fernandina and its approaches. It appropriated sums for this purpose amounting to millions. The expenditure of these funds was intrusted to one of its engineer officers. He was made a disbursing officer. It is alleged in the indictment that these funds were not legally and honestly appropriated for the purpose which Congress intended, but by many crimes, also alleged in the indictments, that it went into—it was misappropriated by the disbursing officer and by the prisoners at the bar.

Now, how can it be said that these indictments do not relate to one and the same transaction? It was the improvement of the approaches to two of the seaports of the nation. It was money coming from a common source, the public treasury; it was money appropriated for a common purpose by the national Legislature; the crimes, it is alleged, were accomplished through the connivance of the disbursing officer of the government and the prisoners at bar.

Nothing can be, in the appropriate language of the assistant district attorney, more completely interlaced about one and the same transaction than the averments in these indictments. The object, according to the allegations, was the misappropriation of this fund, its embezzlement. The consequence injustice to the government and injustice to the people, if the charges are true, were disregarded, and, though perhaps presented in kaleidoscopic forms, if you please, it all relates to the same subject-matter.

Now, in the discretion of the court, it might be true, perhaps, that the court could direct a trial upon each separate issue. How unfair and impracticable would that be! We know how enormous the volume of evidence in this case must be. Is the court to be expected to ignore the power to consolidate all these cases and to impose upon the government and upon the people concerned in the administration of justice reiterated trials, where we must hear the same witnesses, examine the same maps, the same vast volume of records? Courts of law ought to avoid all the burdens as far as possible, in the administration of justice. There can be no possible injury to the defendants. They can meet the charge of embezzlement just as readily as they can meet the charge for misdemeanor. The courts of the United States are not made for the purpose of delaying trials. They are not made for the purpose of wearing out the patience of the government officers and breaking down the prosecution by the multiplication of trials. The object of such courts always is to bring the trial to issue on the merits, and all these different merits may be consolidated into one case.

For all this reason I am very clear (and it is not necessary to cite authorities to support my opinion, they have been already cited), that the court is obliged by its duty to order this consolidation.

UNITED STATES v. GREENE et al.

(District Court, E. D. Georgia, S. D. January 24, 1906.)

1. CONSPIRACY—CRIMINAL PROSECUTION—EVIDENCE.

On the trial of defendants, charged with conspiracy to defraud the United States, evidence is admissible to show the state of mind of one charged as a co-conspirator with respect to the matters to which the alleged conspiracy related, prior to the date when it is alleged to have been formed.

2. SAME—DOCUMENTS IN POSSESSION OF CO-CONSPIRATOR—LETTERPRESS COPY OF LETTER.

A letterpress copy of a letter purporting to have been written by an alleged co-conspirator of defendants on trial, found in his possession and shown to be in his handwriting, is admissible as original evidence to show his state of mind at the time the letter was written, where that may be material evidence in proof of the conspiracy, without showing that the original letter was sent to the person to whom it was addressed.

On Objection of Defendants to the Admission of Certain Evidence Offered.

See 115 Fed. 343.

Marion Erwin, U. S. Atty. Gen., Thomas F. Barr and Samuel B. Adams, Special Asst. U. S. Attys., and Alexander Akerman, Asst. U. S. Atty.

Peter W. Meldrim and William W. Osborne, for defendants.

SPEER, District Judge. The evidence to which objection is made is a letterpress copy of a letter purporting to have been written by then Lieut. O. M. Carter to Gen. Duane. It was obviously offered by the government for the purpose of indicating marked anxiety to remain in

charge of the works on the part of the then engineer officer in charge of the river and harbor improvements here. He is also indicted as a co-conspirator. It is of course understood that it was in the performance or execution of these works that the conspiracy and other crimes charged in the indictment have been alleged. Now a conspiracy in itself necessarily involves the state of mind of the conspirators. If one be a conspirator to accomplish an unlawful act, or a lawful act in an unlawful manner, obviously his state of mind may involve his desires, purposes, schemes of self-aggrandizement, and the like. It is competent, therefore, in such cases, to show the state of mind of one who is alleged to be a co-conspirator. It may also be competent to show the antecedent state of mind, if it has distinct relation to the general subject involved in the conspiracy, and if it be fairly inferable that in some view of the case, evidence of that state of mind will be relevant. Now the antecedent state of mind of Carter is sought to be shown by a letterpress copy of a letter which purports to have been written by Carter to a superior officer some time before the conspiracy was alleged to have been formed. The court cannot at this time declare that this letter is immaterial, and for that reason exclude it. It may possibly turn out to be merely the expression of an officer who desires a certain station. The government insists, however, that it will indicate on the part of Carter such a desire to continue this work, and such a knowledge of its opportunities, that when connected with evidence subsequently to be introduced it will be relevant to the issues to be submitted to the jury. Again, the court can only state that this cannot now be determined. If, however, we should ignore the statement of the government's counsel, and exclude evidence by piecemeal, it might have the effect to withhold from the jury the evidence of a conspiracy, though, if the evidence should be admitted, and construed all together, the existence of a conspiracy or other crime as charged in the indictment might be deduced therefrom. It is, moreover, objected that this letter should be excluded because it is not the original; that no notice was served on Gen. Duane to produce the original; that in its nature it is secondary evidence; and that no effort has been made to lay a foundation for the introduction of secondary evidence. Ordinarily, an objection of that sort must be sustained, but the object of all evidence is the ascertainment of truth, and courts are not restricted to Procrustean rules, if the varying character of the events involved require a modification of such rule. The inquiry being as to the state of mind of Carter, the question is not whether he sent this letter, but whether he wrote it as the expression of his mental condition at the time it was written. That he did write it is shown, not only by the handwriting, by the subject-matter, but by his possession of it. Conceding this to be true, in the absence of proof to the contrary, we have the right to presume that at the time he wrote the letter he intended to send it. It was written for transmission through the mail to a person who had a control in the matter to which his wishes related. Until the presumption above stated is rebutted, the court will presume that he intended to send it. But whether this is true or not, has the government the right to use it as a deliberately

recorded expression of his wishes, as indicating his state of mind. The letter was found in his possession; it was in his handwriting; it involved matters of duty with which it has already been made clear that he was charged. How, then, can it be questioned that this type-written paper, found in Carter's letterbook, kept by himself personally locked up in his oaken file case, was Carter's act? Is not that the truth? Who can doubt it? It would also seem to be in the nature of a written admission of his purposes. Said Mr. Greenleaf on this subject (13th Ed.) vol. 1, § 198:

"The possession of documents, also, or the having of constant access to them, sometimes affords ground for affecting parties with an implied admission of the statements contained in them."

This doctrine is also followed in the recent and comprehensive work, Wigmore on Evidence, vol. 1, par. 260. The same view is adopted by Rice on Evidence, par. 49. Here is cited the eminent authority of the Massachusetts Supreme Court. The author states that the ruling is unimpaired, and that the logic that originally supported it retains all of its force and vigor. There the court admitted press machine copies of letters purporting to have been written by a defendant to be read to the jury. These were adjudged competent upon two grounds. They were admissible as documents in his possession, to which he had constant access. There the press copies, as they are called, were in fact proved to have been in the handwriting of the defendant. That is true here. There the press copies were in truth a part of the original letters as written by him, transferred by mechanical pressure to other sheets, but such a transfer, said the author, did not destroy the identity of the handwriting as shown on the impression, or render it unrecognizable by persons acquainted with its characteristics. The Supreme Court of New York has held the same where the secondary evidence of the contents of a writing are supported by proof of its genuineness. Of course the rule would be different if it was sought, without other evidence, to charge a third person with responsibility for the recitals of a press copy offered. Thus if a factor in this city had secured a lien from a farmer in Thomas or Lowndes, where it was necessary before it could be enforced to prove a demand, it would not be competent for the factor here merely to introduce his letterpress book, for he must show by proof that the demand reached the person upon whom the demand must be made. In that case, of course, the original demand must be produced or its absence accounted for before secondary evidence could be admitted. But that is not this case. This letter is not offered to bind a third person. It is not offered to affect Gen. Duane, the person to whom it was written. If it were, he would have the right to demand the production of the original. Besides, while it was termed a personal letter, it was, in its essence, an official letter, for it related to an official matter, and was intended to influence official action. It was found in the file which belonged to the government, although under Carter's control. All the earmarks of authenticity are there. It is therefore part of the records of Carter's own office. It was made by him, and placed there by him, and is therefore admissible against

him. See Wright & Tatham, Adolphus & Ellis' Reports, Kings Bench, 364-367. As primary evidence, under the circumstances, it has a force equivalent to that of an official letter. But this is comparatively unimportant. It was offered, as stated, merely to show Carter's state of mind with regard to the work in the improvement of the river and harbor of Savannah and the Georgia coast. Whether it will have any effect to this end must be subsequently determined. Nor will it be held to affect the alleged co-conspirators, who are now on trial, unless the facts show that this state of mind of Carter ripened into the conspiracy charged, and that they took part in it. The government, however, must be permitted to build up its case if it can, and if admissible must not be prevented from bringing to the attention of the jury the facts, documentary or otherwise, upon which it relies to do this; and since no person whatever can be harmed by this letter if it be considered as standing by itself, and since to write it was manifestly Carter's work, this is admitted for the purpose for which it was offered; that is, the attempt to show his state of mind, which the government insists, with the co-operation of the prisoners at the bar, ripened into a broad and injurious conspiracy, and for no other purpose.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. January 26, 1906.)

CONSPIRACY—CRIMINAL PROSECUTION—EVIDENCE.

Letters held admissible in evidence on the trial of defendants, charged with conspiracy to defraud the United States in relation to contracts for public work, as tending to show an outside business association and intimacy between defendants and their alleged co-conspirator, who was the government engineer in charge of the public work.

On Objection of Defendants to Admission of Certain Evidence.
See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., and Alexander Ackerman, Asst. U. S. Atty. Peter W. Meldrim and William W. Osborne, for defendants.

SPEER, District Judge. Orally. The following letters are offered by the government and objected to by the defendants. The first is a letter of January 22, 1891, written from the office of B. D. Greene, consulting engineer:

"New York, Jan. 22d, 1891.

"Dear Carter: Yours at hand. I have seen Mr. Richardson and he will see Mr. Depew soon and find out what he can. He says he knows they are going to build soon. He promises to let me know when the time comes to make a proposal. Would it not be well for Mr. W. to write a line to C. V. and ask him about it saying that he had a group of friends who wished to make a proposal when the time came. This would make it doubly sure. I can't find any book on Bridges that is any good. Saxon don't know of any. Let me know if any thing is done as I suggest above. When Mr. Bolles returns I will find out from him if he knows a good book.

"Yours truly,

B. D. Greene."

Then follows the next letter from Carter to E. V. Rossiter:

"Washington, D. C., Mar. 27, 1891.

"Mr. E. V. Rossiter, Grand Central Depot, N. Y.—Dear Sir: When I presented your letter to Dr. Webb today he told me that he had already virtually let the contract for the Herkimer-Poland Extension to Mr. Westbrook, a partner of Gen. Husted, that the greater part of it had actually been let; that work had begun on last Monday & that he preferred to let the rest of the contract to the same party to whom he had already let the greater part. I regret exceedingly that I had no opportunity to submit a proposition for that work—either as a whole or in part as I feel confident that it would have inured to the Company's benefit as well as to my own.

"Very sincerely yours,

O. M. Carter."

The next letter is from Carter to Dr. W. S. Webb. This is written from the—

"United States Engineer Office, River and Harbor Improvements and Fortifications in Georgia and Northeastern Florida. Subject: Adirondack R. R.

"Capt. O. M. Carter, Corps of Engineers U. S. A., in Charge.

"Savannah, Ga., April 6, 1891.

"Dr. W. S. Webb, Pres. Wagner Palace Car Co., Opposite Grand Central Depot, New York City—Dear Sir: Referring to our conversation of the 27th ult. I beg to state that if any Extension of your Adirondack R. R. to Tupper Lake or elsewhere is contemplated I should be glad to have an opportunity of submitting a proposition for the construction of the same.

"My associates & myself are in a position to begin work at once; to make a contract of any amount of work & to carry the same forward to your entire satisfaction.

"Very sincerely yours,

O. M. Carter."

This additional letter is offered, marked "personal":

"United States Engineer Office. Subject: Buffalo Work.

"Savannah, Ga.

"Mr. Walter Catte, Chief Engineer N. Y. Central & Hudson River R. R., Grand Central Depot, New York—Dear Sir: Referring to our conversation of Thursday the 14th instant concerning the proposed Buffalo work, I shall be much obliged if you will write or wire me at least a fortnight or three weeks before said work comes up. Should the work come up sooner than you anticipate, I can be in New York in thirty-six hours in response to telegram. Thanking you in advance for your courtesy, I am very truly yours,

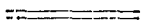
"O. M. Carter."

These letters are offered in support of the charge made by the government that the engineer officer, Carter, who had exclusive charge at the time of the extensive government works in Georgia and northeastern Florida, had embarked with the accused with whom he is jointly indicted here in various other enterprises. These letters prima facie are clearly admissible for that purpose. The last letter of the series, before the Catte letter was introduced this morning, it will be observed is written by Carter himself. In the series, then, there is a letter from one of the alleged conspirators. This is B. D. Greene. In this letter Greene inquires of Carter, "Would it not be well for Mr. W.," who, the district attorney states, will be shown to be Mr. Westcott, Carter's father-in-law, "to write a letter to C. V.," who, the District Attorney states, he will show to be Cornelius Vanderbilt, and inform the latter gentleman "that he had a group of friends who wished to make a proposal when the time came." These two letters might indicate a close communi-

cation between Greene and Carter. It leaves somewhat indefinite the work which the group of friends, it seems (provided all of this is accepted as genuine), were attempting to secure through the agency of "Mr. W." from "C. V." Carter's letter offered at this particular time would seem to clear up this matter. It is written from the United States Engineer office, river and harbor improvements and fortifications in Georgia and Northeastern Florida, and the subject is stated to be "Adirondack R. R." and it is written to Dr. W. S. Webb. The district attorney, Mr. Erwin, who like Mrs. Jarley's wax works is the "delight of the nobility and gentry," states that Dr. Webb is related to "C. V." Whether this is true or not, on the face of it Carter's proposition refers to his own associates and seems unequivocal. Who those associates are the jury must infer, if they can, from this and other evidence. He says:

"I beg to state that if any extension of your Adirondack R. R. to Tupper Lake or elsewhere is contemplated I should be glad to have an opportunity of submitting a proposition for the construction of the same. My associates and myself are in a position to begin work at once, to take a contract for any amount of work and to carry the same forward to your entire satisfaction."

These associates the government will insist are Messrs. Greene and Gaynor. An association is thus clearly stated. The jury will look to the proof to ascertain if these accused were the associates. Whether it was competent for Carter, an engineer officer of the United States, educated by the United States, and in charge of government work, to take part in outside work of this sort need not now be discussed; but his statement, showing an association for purposes other than the duties to which he was assigned in his district, are clearly stated in the letter, and his language must be construed as intending exactly what he states, namely, that he was in such association. This is also material for the purpose of showing intimacy between the alleged co-conspirators, as charged in the indictment, often essential to the proof of conspiracy or joint participation in criminal conduct.



UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. January 26, 1906.)

CONSPIRACY—EVIDENCE—LETTERS BETWEEN ALLEGED CO-CONSPIRATORS.

On the trial of defendants contractors charged with conspiracy with a codefendant, who was an engineer officer in charge of government work, to defraud the United States with respect to such work, telegrams, and letters sent by such engineer to one of the defendants on trial prior to the conspiracy charged; but at a time when defendants were connected with the work, which informed such defendant of the publication of an affidavit made by an inspector on the work, charging such defendant with an attempt to bribe the affiant, and with stating that he had power to cause affiant's removal by the engineer, and which telegrams and letters urged such defendant to send a statement and an affidavit dictated therein in denial, are admissible in evidence for the purpose of showing the attitude of the engineer in the matter, and such joint action as to indicate an improper understanding and relation between the defendants on trial and the engineer officer, where it is also proposed to follow it by other evidence

showing a continuance of such intimacy and relation to the time of the conspiracy charged.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Conspiracy, §§ 100-102.]

On Objection of Defendants to Evidence Offered.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., Alexander Akerman, Asst. U. S. Atty. Peter W. Meldrim and William W. Osborne, for defendants.

SPEER, District Judge. The following telegrams and letters are offered by the government:

"Night Telegram, Savannah, Ga., June 6, 1889.

"Capt. B. D. Greene, No. 2 E. 15th St., New York City: Gen. Alexander desires me to ask you to telegraph to the 'Morning News,' at once, the following statement over your signature:

"The affidavit of Mr. Curtis so far as it alleges an attempt upon my part to bribe him and so far as it relates to statements said to have been made by me, reflecting in any manner whatever upon Lieut. Carter, is false in every particular. An affidavit to this effect will follow in due time.

"O. M. Carter. C."

"Night Telegram, Savannah, Ga. June 6, 1889.

"Capt. B. D. Greene, No. 2 E. 15th St., New York, N. Y.: The affidavit of Curtis to which my telegram refers is as follows:

"In February B. D. Greene renewed the above proposition of Gaynor, stating that he would add to my salary five hundred dollars per month, and would get Lieut. Carter to increase said salary—He said it was in his power to secure my appointment, and that he had also the power to have Lieut. Carter remove any obnoxious inspector, instancing Inspector G. W. Brown, who was removed to Fernandina in (1886) eighteen eighty six, and stating that Brown's successor was worth to him sixty (60) dollars per day.'

"O. M. Carter. C."

"June 6, 1889.

"Dear Greene: It is absolutely necessary that you send affidavit as I requested. I had a long talk with Alexander & other of my friends & they all agreed that the first thing to be done was for you & Gaynor to assert under the sanction of an oath (as Curtis has stated his story), that so far as it relates to you it is unqualifiedly false. Things have been worked up to such an extent that a letter asking for a suspension of judgment will hurt us both irremediably. Alexander & Mackall suggest the following affidavit—

"Before me, &c. personally appeared B. D. G. who, &c., deposes and says: "Certain sworn & other statements of a Mr. W. R. Curtis reflecting upon me have been brought to my attention & I desire to solemnly assert—

"That I never approached Mr. W. R. Curtis with a bribe or other inducement to do wrong; that I did not state that I could have had power to secure his appointment as inspector; that I did not state that I had the power to have Lieut. Carter remove obnoxious inspectors, or that I had Mr. G. W. Brown sent to Fernandina in 1886 or that Mr. Brown's successor was worth to me \$60 per day. The sworn statement of Mr. W. R. Curtis dated May 31, 1889, is, so far as it relates to me or to statements attributed to me that reflect in any manner whatever upon Lieut. Carter, false in every particular.

"Sworn & Subscribed to &c.'

"You may not think this necessary just now, but it is true & due me & I am here & know the situation & you must do it at once. You ought to come here. Do not fail to insert in the affidavit each & every statement

that I have made. I asked John to telegraph you to come here. Every one thinks the affidavit ought to be published at once, other things can follow. John's affidavit, so far as it relates to him, will be ready.

"I copy this sheet as I wish to remember form of affidavit Gen. A. prepared.

"Truly,

O. M. C."

A notice to produce these telegrams and this letter had been duly served on the defendant Greene. His counsel respond that the letters are not in his possession, custody, or control, and since the letter book taken from Carter's file, to which reference has been made, shows distinct copies proven to be in his handwriting, they may be admitted as secondary evidence provided that they are per se competent and material. The objection is raised that the only effect of these letters is to call attention to charges previously made against Carter by one Curtis who was an inspector on the works with regard to which the alleged conspiracy in this case is charged in these indictments; that this would be injurious to him and to the prisoners, and should not be offered to affect the accused or either of them. The reply of the government is that these letters show an attitude on the part of Carter toward Greene and Gaynor which indicated great intimacy, and which also exhibited on his part, not only a disregard for his duty as engineer officer in charge of those works, but an effort to defeat in its inception an investigation which involved charges of a serious character. When the evidence was first offered it had not been disclosed by the District Attorney that Curtis was such inspector, and the evidence offered seemed to be *res inter alios acta*, and to have no relevancy to the case on trial. When, however, it was disclosed that Curtis was an inspector, another aspect of these letters is presented. It appears from Carter's statement in the night telegram of June 6th that Inspector Curtis charged that Greene renewed a proposition of Gaynor to increase the salary of the inspector to \$500 a month; that he would get Lieut. Carter to increase the salary; that it was in Greene's power to secure Curtis' appointment; that it was in his power also to have Carter remove obnoxious inspectors. An illustration of this was the case of inspector G. W. Brown who was removed to Fernandina in 1886, and that the inspector who was Brown's successor was worth to Greene \$60 per day. This charge appears to have been made in the form of an affidavit by inspector Curtis, who, defendants' counsel states, had been removed. It does not appear as yet whether he was discharged before or after the charge was made. Carter states in another telegram of the same date that Gen. Alexander wished Carter to ask Greene to telegraph the Savannah Morning News at once to the effect that Curtis' statement of the alleged bribe was false, and that an affidavit would follow in due time. The letter of June 6, 1889, purports to emphasize in the strongest way that Greene should send such an affidavit from New York to Savannah. Carter suggests the telegram which Greene should send and also the form of the affidavit which he asks Greene to make. It purports to urge Greene to come to Savannah, urges him to insert in the affidavit each statement that Carter had made, informs him that he asked John (presumably John F. Gaynor, the other de-

pendant) to telegraph Greene to come here, and informs him that John's affidavit will be ready. Now, if this letter was offered for the purpose of showing that Carter had been guilty of improper conduct and investigated at another time, it might not be admissible on the hearing of this charge. The jury will be carefully cautioned that they ought not to permit the affidavit of Curtis to affect them in this inquiry; for in that sense it does not seem to the court that the Curtis charge or inquiry would be material here. It is usually not competent except in a certain class of crimes to offer evidence to show that the accused has been guilty of other, but similar, offenses. There are frequent exceptions, however, to this rule, but this does not seem to be a case for the operation of such exception.

We must consider Carter's specific attitude with relation to this case, and the purpose for which these letters and telegrams were offered. Carter was the engineer in charge, whose duty it was to see to it that the contractors should not bribe or attempt to bribe the inspectors. When Curtis made such a published charge, instead of attempting to induce a denial from Greene and Gaynor, it was his duty at once to institute an investigation, and from a position as representative of the government, and antagonistic to Greene and Gaynor, should have urged such an investigation to the uttermost. So, too, with regard to the charge made by Curtis that Greene offered to get Carter to increase the inspector's salary, or the alternative proposition that Greene had the power to have Carter remove any obnoxious inspector. This was a reflection on Carter, in his position as engineer officer of the government, quite as serious as the charge against Greene of attempted bribery of the inspector. Instead of then co-operating with Greene and Gaynor to induce a denial of these charges by them, it was his duty, not only to the government, but to his own position as an officer, to court an immediate and rigorous investigation. If the letters have the effect as evidence, which the government insists they should have, Carter did nothing of this kind. Instead of acting for the government which was his first duty, he acted in behalf of these contractors against whom the government inspector brought charges of the most serious character. Instead of demanding an investigation of the attempt to smirch his own character and conduct, if the letter is accepted as true, he called upon the contractors with whom he should have dealt at arms length to come to his aid with their denials and affidavits.

The object of this evidence is to show such joint action and mutual support on the part of Carter (who ought always to have represented the government) and the contractors whose interests were to the contrary, as would indicate an improper understanding and improper relations between these parties. The District Attorney states in his place that he purposes to show by other evidence that this joint and mutual support ripened and fructified into the conspiracy with which the accused now stand charged. Whether he succeeds in doing this or not, if it be true, as appears from the face of these letters and telegrams that Carter felt at liberty not only to call upon Greene and Gaynor, or either of them, for affidavits and telegrams denying an

injurious charge which Curtis made, but that the relations between Carter and Greene were so close that he felt at liberty to dictate the telegram and the affidavits he wished Greene to make, it may tend to show a degree of intimacy between the alleged co-conspirators which is always material in evidence on charges of conspiracy or criminal joint action. Of course, the letters and telegrams are admitted because of what appears on the face of the papers taken in connection with the statements of the supplemental proof to be offered by the District Attorney.

For these reasons, the evidence objected to is held admissible.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. February 8, 1906.)

CRIMINAL LAW—EVIDENCE—BOOKS OF THIRD PERSONS.

Entries regularly made in the books of a business concern in the usual course of business and contemporaneously with the transactions which they record, especially when supported by the testimony of the employé who made them as to their correctness, are admissible as evidence of the facts shown thereby in a suit between third persons, or on the trial of a criminal prosecution against third persons.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1023.]

On Objection of Defendants to Admission of Evidence.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., and Alexander Akerman, Asst. U. S. Atty.

William Garrard, Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants.

SPEER, District Judge (orally). The admissibility of books of this general character, merchants', tradesmen's, bankers' books, or any books keeping regular record of transactions, has very ancient origin. Under the civil law the production of merchants' and tradesmen's books of accounts regularly and fairly made in the usual manner was deemed presumptive evidence. And says Mr. Greenleaf (section 116, p. 146):

"And, generally, contemporaneous entries made by third persons"

which is this case

"in their own books, in the ordinary course of business, the matter being within the peculiar knowledge of the party making the entry, and there being no apparent and particular motive to pervert the fact, are received as original evidence, though the person who made the entry has no recollection of the fact at the time of testifying, provided he swears that he should not have made it, if it were not true."

It was in order to meet that requirement that the question was asked this witness whether he would have made an entry if it were not true.

"The same principle has also been applied to receipts, and other acts contemporaneous with the payment or fact attested."

Again, the entries of third persons are admitted upon the following principles:

Where the "entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here the value of the entry, as evidence, lies in this: that it was contemporaneous with the principal fact done, forming a link in the chain of events, and being part of the *res gestæ*. It is not merely the declaration of the party, but it is a verbal contemporaneous act, belonging, not necessarily, indeed, but ordinarily and naturally, to the principal thing. It is on this ground that this latter class of entries is admitted, and therefore it can make no difference, as to their admissibility, whether the party who made them be living or dead, nor whether he was, or was not, interested in making them; his interest going only to affect the credibility or weight of the evidence when received."

The reason would be stronger if there should be no interest at all.

Now, are the entries trustworthy? That is the crucial question. We are after the truth in this case. What motive appears from the evidence which would have induced this gentleman, the bookkeeper of this New York concern, to have made untrustworthy entries? None whatever appears, and, indeed, he testifies to his knowledge of each particular transaction with reference to which these entries are made. A very learned discussion of this topic will be found in the recent and valuable work of Wigmore on Evidence (volume 2, par. 1522):

"The reasons justifying the admission of this class of statements, untested as they are by cross-examination"

and they may be tested here,

"have not been as clearly defined by the judges as in other hearsay exceptions; but they seem fairly clear. They fall within the second general type already described; i. e., the situation is one where, even though a desire to state falsely may casually have subsisted, more powerful motives to accuracy overpower and supplant it. In the typical case of entries made systematically and habitually for the recording of a course of business dealings, experience of human nature indicates three distinct, though related, motives which operate to secure, in the long run, a sufficient degree of probable trustworthiness and make the statements fairly trustworthy."

The first of these is:

"The habit and system of making such a record with regularity calls for accuracy through the interest and purpose of the entrant [that is, the book-keeper], and the influence of habit may be relied on, by very inertia, to prevent casual inaccuracies, and to counteract the casual temptation to misstatements. This reason has been referred to in the following passage: 'Tindal, C. J., in *Poole v. Dicus*, 1 Bing. N. C. 649: It is easier to state what is true than what is false; the process of invention implies trouble, in such a case unnecessarily incurred.'"

Why should this gentleman have exerted in any unnecessary manner his invention to have made inaccurate entries in these books at the time these entries were made? Again:

"Since the entries record a regular course of business transactions, an error or misstatement is almost certain to be detected and the result disputed by those dealing with the entrant. Misstatements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification."

This might be illustrated, if there was any evidence before the court, by the reference of the learned counsel for the defense to certain

insurance companies in New York, which observation, however, could have no possible effect upon the determination of this legal question. "As a rule this fact (if no motive of honesty obtained) would deter all but the most daring and unscrupulous from attempting the task." Mr. Ford does not appear to be a "daring and unscrupulous man." "The ordinary man may be assumed to decline to undertake it. In the long run it operates with fair effect to secure accuracy."

Again:

"If in addition to this, the entrant makes the record under a duty to an employer or other superior"

here he was under duty to Reed & Flagg,

"there is the additional risk of censure and disgrace from the superior, in case of inaccuracies—a motive on the whole the most powerful and most palpable of the three."

This reason has been more than once mentioned, and a number of authorities are cited.

There is, however, perhaps a controlling authority on this subject in the decision of the Supreme Court of the United States, which I hurriedly ascertained during the progress of this argument, in *Fennerstein's Champagne Case*, 3 Wall. 145, 18 L. Ed. 121. The facts involved are given in the following headnote:

"In order to show the actual market value of merchandise at a particular place in a foreign country, letters by third parties abroad to other third parties, offering to sell at such rates, if written in ordinary course of the business of the party writing them, and contemporaneously with the transaction which is the subject of the suit, are admissible as evidence, even though neither the writers nor the recipients of the letters are in any way connected with the subject of the suit, and though there is no proof that the writers of the letters are dead."

In the case Mr. Justice Swayne said:

"We think the letters in question in this case were properly admitted."

I think they stand upon precisely the same footing as the books here. Indeed, the case at bar is much stronger for the reasons already given—the proven verity of the books, I mean, and their trustworthiness.

"In reaching this conclusion,"

the learned justice continues,

"we do not go beyond the verge of the authorities to which we have referred. In some of those cases the person asserted to be necessary, as a witness was dead. But that can make no difference in the result. The rule rests upon the consideration that the entry, other writing, or parol declaration of the author was within his ordinary business. In most cases he must make the entry contemporaneously with the occurrence to which it relates. In all he has full knowledge, no motive to falsehood, and there is the strongest improbability of untruth. Safer sanctions rarely surround the testimony of a witness examined under oath. The rule is as firmly fixed as the more general rule to which it is an exception. Modern legislation has largely and wisely liberalized the law of evidence."

This decision was made in 1865, and the process of liberalization of the rules of evidence has steadily proceeded from that date to this.

For all these reasons I think the books are clearly admissible.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia, E. D. March 9, 1906.)

CRIMINAL LAW—EVIDENCE—TESTIMONY OF DECEASED WITNESS GIVEN IN PRIOR PROCEEDING.

A proceeding before a commissioner of a Circuit Court of the United States for the removal of a person charged with a crime against the United States to another federal district for trial, in which the accused is present and witnesses are examined and cross-examined, is a judicial proceeding, and the testimony of a witness who is fully examined and cross-examined in the presence of the accused on the issue of probable cause, and which was taken and transcribed by a stenographer and is duly authenticated, is admissible on the subsequent trial of the accused, where the witness has died in the meantime.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1230-1232.]

On Objection of Defendants to the Admission of Evidence.
See 115 Fed. 343.

Marion Erwin, U. S. Atty., Alexander Akerman, Asst. U. S. Atty., and Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty. Peter W. Meldrim and William W. Osborne, for defendants.

SPEER, District Judge. The government offers the testimony of four witnesses who are now dead. These witnesses were R. F. Westcott, W. H. Venable, C. H. Van Deventer, and Thomas J. Agnew. They all died during that period in which the accused had absented themselves from the jurisdiction of this court, and while the government was resorting to judicial proceedings in order to secure their return from Canada or other distant jurisdiction to which they had repaired. Had the case been brought to trial at the time when it was originally assigned, all of these witnesses were in life and all might have testified in person. In point of fact, all had testified before John A. Shields, United States commissioner, in the case pending in the Southern District of New York wherein the government sought to secure the return of the prisoners from that judicial district to this district, where the indictments were pending. We are left in no doubt as to that subject.

In the first place, the record of the proceedings before Commissioner Shields makes it indisputable that, not only the prisoners on trial were present, but that they were confronted with the witnesses against them, including these witnesses now dead, and had the most unusual opportunity, not only for the cross-examination of these witnesses, but to introduce evidence in reply to their testimony and any other evidence which might tend to show that there was no probable cause of their guilt and that they ought not to be removed to this district for trial. In addition, this has been judicially ascertained by the District Court of the Southern District of New York. This holding was, in effect, affirmed by the Circuit Judge of that district and was completely and in express terms affirmed by the Supreme Court of the United States on appeal from the decision of the Circuit Judge. *Greene v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L.

Ed. 177. For a clear understanding of these facts we have but to look to the statement of the case made by the Supreme Court itself. Adopting the declaration of the District Judge as its own, that court recites:

"The commitment by the commissioner and his finding of probable cause have been made after an extremely full hearing of all the evidence offered on both sides. No evidence reasonably pertinent has been rejected."

Not only, as appears from the record now before the court, was the fullest cross-examination had, but objections that irrelevant and incompetent testimony was offered by the government were made and considered by the commissioner, overruled by him, his judgment was not disapproved by the District Judge, and was affirmed by the Supreme Court itself. The District Judge further stated that:

"As respects the finding of probable cause, I have carefully considered the very extended briefs and arguments of counsel, and have examined the voluminous evidence with a view to ascertain whether there was competent evidence before the commissioner sufficient in itself to sustain his finding of probable cause."

And said the Supreme Court in its opinion (183 U. S. 258, 22 Sup. Ct. 222, 46 L. Ed. 177):

"On subsequent hearings before the commissioner, evidence pro and con as to probable cause was given, and also as to the drawing of the grand jury, and that officer decided that 'after full and fair examination touching the charges in the annexed warrant named it appears from the testimony offered that there is probable cause to believe the defendants guilty of the charges therein contained.' And he thereupon for the second time committed the defendants to the marshal's custody to await a warrant of removal to be signed by the District Judge. When the application for the warrant of removal was made to that judge, he held that a proper case was made out and signed the order for removal."

In defining the action of the District Judge in affirming the conclusions of the commissioner, the Supreme Court, Mr. Justice Peckham delivering the opinion, remarks:

"When the judge refers to the testimony taken before the commissioner, although he does in terms say that he expresses no opinion upon the merits, yet he states that upon the evidence before him it is a proper case to be submitted to a jury for trial. That is, in effect, a finding of probable cause."

Nor was there, as insisted by defendants' counsel, any holding of the Supreme Court in this case that, because the indictment from the Southern District of Georgia was produced, the sole question before the commissioner was one of the identity of the prisoners. On the contrary, it is, indeed, interesting to observe that the Supreme Court at that time withheld any declaration as to the conclusiveness of an indictment as evidence of probable cause. It remarked (183 U. S. 260, 22 Sup. Ct. 223, 46 L. Ed. 177):

"It is not a condition precedent to taking action under section 1014 of the Revised Statutes [U. S. Comp. St. 1901, p. 716, which provides for the removal from one federal judicial district to another of persons accused of crime] that an indictment for the offense should have been found."

It states that:

"In this case there was a sworn charge—in other words, a preliminary affidavit—prima facie showing the commission of an offense against the United States, cognizable by the District Court of the United States for the Southern District of Georgia. To substantiate the charge, a certified copy of an indictment found in the Georgia Court was produced, and in addition evidence was given before the commissioner which, as he found, showed probable cause for believing that the defendants were guilty of the offense charged in his warrant."

Subsequently, in *Benson's Case*, 198 U. S. 1, 25 Sup. Ct. 569, 49 L. Ed. 950, the Supreme Court of the United States amply sustained the views of this court, expressed when these prisoners were permitted for months to resist in New York the process of this court. There the Supreme Court declares that it is scarcely seemly for a committing magistrate to examine closely into the validity of an indictment found in a federal court of another district. In conclusion the court analogizes the proceeding to an adjudication which obtains in case of international extradition, and adds:

"There must be some competent evidence to show that an offense has been committed over which the court in the other district had jurisdiction and that the defendant is the individual named in the charge, and that there is probable cause for believing him guilty of the offense charged."

It follows, then, from this recitation, that the judicial character of the action of the commissioner cannot be questioned. Where there is accusation, arrest, submission of evidence for the prosecution, submission of evidence for the defense, examination, cross-examination, and effective judgment rendered, the proceeding is judicial. A United States commissioner is indeed a judicial officer. In *Benson's Case*, 198 U. S. 11, 25 Sup. Ct. 569, 49 L. Ed. 950, the court stated that his functions are practically those of an examining magistrate in an ordinary criminal case. He is appointed by the court and is commissioned with certain judicial powers. Section 627 of the Revised Statutes [U. S. Comp. St. 1901, p. 499] provides:

"Each Circuit Court may appoint, in different parts of the district for which it is held, so many discreet persons as it may deem necessary who shall be called 'commissioners of the Circuit Courts,' and shall exercise the powers which are or may be expressly conferred by law upon commissioners of Circuit Courts. This power has been expressly conferred upon him by law."

We turn to section 1014 of the Revised Statutes and we find:

"For any crime or offense against the United States, the offender may * * * by any commissioner of a Circuit Court * * * of any state where he may be found * * * be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

The statute provides for the return of copies of the process into the clerk's office of the court, and in cases where the offense is committed in another district makes it obligatory upon the judge of the District Court where such offender on the report of the commissioner is imprisoned seasonably to issue and of the marshal to execute a warrant for his removal to the district where the trial is to be had. The

hearing and investigation under the affidavit and warrant before Judge Shields in New York was therefore obviously a judicial proceeding.

It is, however, insisted by counsel for the defendants, that, although a judicial proceeding, the commissioner had no right to hear any evidence which, to use his expression, "was not embraced in the four corners of the warrant." But this would not be true, even if the commissioner had before him the indictment itself. In the case of *Greene and Gaynor v. Henkel*, 183 U. S. 249, 22 Sup. Ct. 218, 46 L. Ed. 177, it is stated that the absence of technical averments even in the indictment does not prohibit the commissioner from hearing evidence which supplies such defects and shows probable cause to believe the defendants guilty of the commission of the offense defectively or insufficiently stated therein. A fortiori, would it follow that in case of a preliminary warrant, where an investigation is more general in its character and where more elastic powers are granted the commissioner, that he could hear all material evidence relating to the general topic of crime therein charged against the accused.

It is, however, urged that it is not competent in any criminal case to admit the testimony of a witness given on a previous trial unless the witness himself can be brought before the court. As tersely stated by the assistant district attorney, Mr. Akerman:

"The contention of the learned counsel would perhaps be better founded if the Supreme Court of the United States had not decided the precise question against him."

This decision is found in the *Mattox Case*, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917. There two witnesses on a former trial, Thomas Whitman and George Thornton, had since died. A transcribed copy of the reporter's stenographic notes was admitted by the court and constituted the strongest proof against the accused. The accused were charged with the capital crime of murder. There it was insisted, as here, that the constitutional provision, that the accused shall be confronted with the witnesses against him, was infringed by permitting the testimony of witnesses sworn upon the former trial to be read. Said the Supreme Court, Mr. Justice Brown rendering the opinion:

"The idea that this cannot be done seems to have arisen from a misinterpretation of a ruling in the case of *Sir John Fenwick*."

This case was a parliamentary proceeding by bill of attainder. It was the last trial by bill of attainder among the English-speaking people. The charge was high treason. We gather from the luminous and brilliant pages of Macauley's *History of England* that, though convicted, the prisoner would have been pardoned by William III, had his offense merely comprised a plot for the assassination of that monarch, but the king could not forgive a gross and public insult which Fenwick had offered the queen, the beloved and amiable Mary. There, however, the witness had not died. The wife of the accused had spirited him away, and, notwithstanding the bitterness of the Parliament, with that high regard for law which has characterized the English-speaking race, the testimony was excluded. But in that

case there had been no opportunity for cross-examination on a former trial between the same parties. Nevertheless, the case misled a writer on Evidence to state that it was authority for the proposition that the testimony of a deceased witness cannot be used in a criminal prosecution, and it possibly had the same effect upon the learned counsel for the defendants in this case.

The Supreme Court, however, had declared the rule in England to be clearly the other way, citing a number of notable precedents and an eminent text author. 2 Starkie on Evidence, p. 208. And, said the learned justice delivering the opinion as to the practice in this country, "we know of none of the states in which such testimony is now held to be inadmissible." Certainly this is true in our own state. In that Code of our state which has made copious draughts, not only upon the English but the Roman law, whose first and perhaps most illustrious codifier, that noble Georgian, T. R. Cobb, has left to the people whom he loved a juridical monument in its inestimable pages not less valuable to them than the Code Napoleon to the people of France, we find in section 1001 the provision following, which should satisfy the jurists and the people of this state:

"The testimony of a witness, since deceased, or disqualified, or inaccessible for any cause, given under oath on a former trial, upon substantially the same issue and between substantially the same parties, may be proved by anyone who heard it and who professes to remember the substance of the entire testimony, as to the particular matter about which he testifies."

In some cases, recited by the Supreme Court in the Mattox Case, where witnesses who had testified on a former trial were not dead, but were out of the state, and for similar reasons the testimony has been excluded; but said the Supreme Court:

"Upon the other hand, the authority in favor of the admissibility of such testimony, where the defendant was present either at the examination of the deceased witness before a committing magistrate, or upon a former trial of the same case, is overwhelming."

There are, of course, grave reasons wherever it is possible that the witness who testifies against the accused should be present. These are recapitulated by the Supreme Court in the case just cited. But said that great tribunal:

"But general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot free simply because death has closed the mouth of that witness, would be carrying this constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed in order that an incidental benefit may be preserved to the accused."

And in the same case it is further declared that:

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination."

It adds that:

"All the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said."

See, also, *U. S. v. Macomb*, Fed. Case No. 15,702, vol. 26; *Rice on Evidence*, p. 345 et seq.; *Starkie on Evidence*, 409; *Greenleaf on Evidence*, 163; *Roscoe's Criminal Evidence*, p. 66; *Reynolds v. U. S.*, 98 U. S. 145, 25 L. Ed. 244.

There is a learned discussion of the entire topic in *Wigmore on Evidence*, vol. 2, § 3905 et seq., and many authorities cited, leading the learned writer to the conclusion, as stated in section 1397, that such an argument as that presented by the counsel for the defendants is wholly unfounded. The contention is utterly inconsistent with the exigencies of society, and reduced to its last analysis, might even exclude on the trial the dying declarations of the innocent victim of unprovoked and secret murder or unnamable outrage.

For these reasons the objections are overruled.

UNITED STATES v. GREENE et al.

(District Court, S. D. of Georgia. E. D. March 22, 1906.)

CRIMINAL LAW—EVIDENCE—EXPERT TESTIMONY—CONFORMITY OF WORK TO CONTRACT.

An engineer, testifying as an expert in respect to work done under a government contract for a river and harbor improvement, may properly give his opinion upon the question whether a stated form of construction of a part of the work was within the specifications for such part contained in the contract, which is an engineering question; but it is not competent for him to state his opinion whether or not such mode of construction was permissible under the contract as a whole, or under other provisions authorizing its modification, which involves a construction of the contract, and is not within the province of an expert or other witness.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 1059; vol. 20, Cent. Dig. Evidence, §§ 2311, 2317.]

On Objection by the Government to a Question Asked an Expert Witness by the Defense.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., and Alexander Akerman, Asst. U. S. Atty.

William Garrard, Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants.

SPEER, District Judge. The following question is propounded to Mr. Ripley, a civil engineer, who on behalf of the defense is testifying as an expert.

Question by Mr. Osborne: "After reading, Mr. Ripley, the specifications for 1892 and 1896, in Savannah and Cumberland Harbor, will you state

whether or not it is your engineering opinion as to whether or not the multiple mat, as described by you, is permissible under those specifications?"

The question, as expressed, is one of that character which is calculated, in the absence of close and critical attention, to embarrass the court and possibly the jury also. The specifications, in view of which the contracts were made for the improvements proposed under the contracts of 1892 and 1896 by the proper authorities of the government and accepted by the contractors, constitute a written contract. About this contract there is no ambiguity whatever. It provides for three designs of mattress. The third design is that which the government contends was to be used in the construction of the works in question. It is described as follows:

"This mattress will consist of a bottom grillage of poles of live saplings of pine or other timber of a kind approved by the engineer officer in charge. The poles must be straight, of slight taper, of an average diameter of from four to five inches, and not less than three inches at the small end, and must be placed from four to eight feet apart between centers, both longitudinally and transversely, and spliced together with long scarf joints in a manner satisfactory to the engineer officer in charge. Upon this grillage will be placed a layer of closely compacted fascines surmounted by a top grillage similar in design to the one at the bottom. The poles of each grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillages will also be securely fastened together in such manner as the engineer officer in charge may approve."

It is now offered to prove by this witness that a multiple mat, such as that he has described, is permissible under the specifications, taking them as an entirety. Premitting for the present the inquiry whether or not the witness himself has described a multiple mat, or whether in the science of engineering a multiple mat is anywhere technically designated by that name, it would seem that the question resolves itself to this: Taking the specifications as an entirety, is it competent for the defense to show by one of its experts that to construct a multiple mat of eight courses of loose brush is a compliance with the precise and definite specifications as described in the plan of mattress No. 3? To this question as a whole the court has no right to deny the witness the power of answering "Yes" or "No" as he may think proper. For support to this answer, however, he has no right to look to the construction of the contract. That is not within his province. That is a matter for the court. It would be, therefore, wholly unjustifiable for the witness to rely for the propriety and correctness of his answer, if he chooses to make it, upon any other clause of the contract save the specifications, which define what the mattress No. 3 should be. The discretionary powers of the engineer under the superintendence of the War Department, the increase or diminution of the price to be paid accordingly as such discretion may be exercised in requiring a more costly or a cheaper structure, is not within the range of the witness' duty. These are options which, in the first instance, belong entirely to the party of the first part, namely, the government of the United States. The court rules, therefore, that the witness has no power to base his answer upon any construction of the contract which

may have impressed itself upon his mind. Any alterations in the contract, if made, must be made in accordance with the law, and with an increase or diminution of the price according to the facts, as the law and the contract prescribe. He may look to the literal specifications of the third design, and say whether or not the multiple mat, as it appears from the evidence, is a compliance with those specifications. To this extent the testimony will be regarded as that of an expert in the line of his profession as an engineer. He has no right and no power to look to other clauses of the contract, and place upon them such construction as he thinks proper, and then determine whether the multiple mat is a compliance with some clause of the specifications which has no necessary relation to mattress No. 3. To accord him this power would be to turn over to him the functions of both the court and the jury. At the proper time it will be the duty of the court to construe the contract. To hold otherwise on this question would make it possible for an expert to testify that, after the government and the contractors had entered into a distinct and specified contract to accomplish a piece of work by distinct methods and specified forms of material, another and entirely distinct contract for completing the project originally designed was permissible under the provisions of the first made. This far transcends the privileges of an expert or any other witness. It is per se a judicial function.

The witness will be permitted to answer if such a multiple mat as has been described, or which he may, if he thinks proper, describe, is permissible in view of the specified description of mattress No. 3, but beyond this the question upon this particular topic will not be allowed. If, however, it is or may be contended from the evidence that any other one of the three designs of this contract were adopted by the engineer for use in the construction of these jetties, the witness may be asked if such a multiple mat is permissible, or is a compliance with such specifications. His opinion, however, must be held down to the engineering problems involved, and may not extend to any opinion on his part involving the legal effect of the language used in the contract.

UNITED STATES v. GREENE et al.

(District Court, S. D. Georgia. April 13, 1906.)

1. CONSPIRACY—CRIMINAL PROSECUTION—FACTS TO BE CONSIDERED BY JURY.

Upon the trial of a charge of conspiracy, where the prosecution depends upon inferences to be drawn from facts to prove the conspiracy, great latitude of proof must be allowed, and the jury should have before them, and are entitled to consider, every fact which has a bearing upon and a tendency to prove the ultimate fact in issue.

2. CRIMINAL LAW—INSTRUCTIONS—REASONABLE DOUBT.

A reasonable doubt in a criminal case is not a mere possible doubt, but exists where, after the entire comparison and consideration of all of the evidence, the minds of the jurors are left in such a condition that they cannot say they feel an abiding conviction, to a moral certainty of the truth of the charge. By reasonable doubt is not meant a strained

or whimsical conjecture, but an actual sincere mental hesitation, caused either by insufficient evidence or by unsatisfactory evidence.

[Ed. Note.—For cases in point, see vol 14, Cent. Dig. Criminal Law, §§ 1267, 1268, 1904-1922.]

3. SAME—CIRCUMSTANTIAL EVIDENCE—WEIGHT AND SUFFICIENCY.

Direct and circumstantial evidence differ merely in their logical relation to the fact in issue. Evidence as to the existence of the fact is direct. Circumstantial evidence is composed of facts which raise a logical inference as to the existence of the fact in issue. A conviction may well be had upon circumstantial evidence, but to warrant such conviction the proven facts must not only be consistent with the hypothesis of guilt, but must clearly and satisfactorily exclude every other reasonable hypothesis save that of guilt.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 1262-1269, 1883-1888.]

4. CONSPIRACY—CRIMINAL PROSECUTION—EVIDENCE OF INTIMACY BETWEEN PARTIES CHARGED.

Previous intimacy between persons charged with conspiracy is competent and important proof on the trial, and proof of close intimacy is especially important, if the duties of the parties respectively were intended to be in opposition, and should the occasion arise might forbid such intimacy, as where the conspiracy charged was to defraud the government in respect to contracts for public work, and the alleged conspirators were respectively contractors for such work and the government engineer officer in charge of the same.

5. CRIMINAL LAW—FACTS RELEVANT TO ISSUE—FLIGHT OF ACCUSED.

It is always competent to prove the flight of the accused as having a tendency to establish guilt; but such fact, if shown, is not conclusive, nor does it raise a legal presumption of guilt, but is to be given the weight to which the jury think it entitled, under the circumstances shown. In this connection they may take into consideration the defendant's age, intelligence, and financial ability to make a defense.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, §§ 779-780, 1257.]

6. SAME—LIMITATION OF PROSECUTION—PERSONS FLEEING FROM JUSTICE.

Where a person charged with crime against the United States in the courts of one federal district, when found elsewhere, resists removal to such district, with intent to avoid the jurisdiction and process of the court therein, such action constitutes a fleeing from justice, which, under Rev. St. § 1045 [U. S. Comp. St. 1901, p. 726], takes away from him the privilege of pleading the statute of limitations, and, until he submits himself to such jurisdiction, the statute does not run in his favor as against prosecution for any offense charged to have been previously committed in said district.

[Ed. Note.—For cases in point, see vol. 14, Cent. Dig. Criminal Law, § 278.]

7. SAME.

Although, under the extradition treaty of 1890 between Great Britain and the United States and the laws of Canada, a person whose extradition is sought by the United States from the Dominion of Canada has the right to oppose his extradition by legal proceedings, he is nevertheless, during the pendency of such proceedings, a person fleeing from justice, within the meaning of Rev. St. § 1045 [U. S. Comp. St. 1901, p. 726].

8. CONSPIRACY—CRIMINAL PROSECUTION—INSTRUCTIONS—REVIEW OF EVIDENCE.

Evidence reviewed in the charge to the jury on trial of consolidated indictments and counts severally charging conspiracy to defraud the United States between contractors for public work and the government

engineer officer in charge of the same, the presentation of fraudulent claims against, and embezzlement from, the United States.

See 115 Fed. 343.

Marion Erwin, U. S. Atty., Samuel B. Adams and Thomas F. Barr, Sp. Assts. to U. S. Atty., and Alexander Akerman, Asst. U. S. Atty. William Garrard, Peter W. Meldrim, William W. Osborne, and Alexander A. Lawrence, for defendants.

SPEER, District Judge (charging jury). A grand jury drawn conformably to law from the judicial division and district having jurisdiction has presented three indictments against the prisoners. The indictments are numbered 322, 371, and 476. The first was returned December 8, 1899, the second February 28, 1902, and the third November 18, 1905. The accused indicted in the three indictments are Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter. Of the persons named, Benjamin D. Greene and John F. Gaynor are on trial. The indictments have been consolidated, the accused have pleaded not guilty to the charges made, and thus the issues are formed which you are to determine. The indictments will be before you. They have been read or sufficiently explained. It is, however, proper that the court shall direct your attention to the substance of the charges made in the several counts.

Conspiracy to defraud the United States is one of the alleged crimes. It is made in indictments 322 and 371. It is made punishable by section 5440 of the Revised Statutes [U. S. Comp. St. 1901, p. 3676]:

"If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than \$1,000, and not more than \$10,000, and to imprisonment not more than two years."

Before this statute becomes applicable two or more persons must conspire to commit an offense against the United States, or to defraud the United States in some manner, or for some purpose. Having thus conspired, if one or more of such parties do an act to effect the object of the conspiracy, all the parties to the conspiracy shall be liable to the penalty. While this statute denounces conspiracy, it does not define it. It is an agreement of two or more persons to accomplish an unlawful purpose, or a lawful purpose by unlawful means. The essence of this offense is the unlawful combination. In union there is strength. This is true of combinations to do wrong as of combinations to do right. One man may desire, and even plan, to commit crime; but, where several agree to a common criminal design, the probability of their success, and therefore of injury to society, is largely enhanced. For this reason the mere act of conspiracy, the mere unlawful agreement, was indictable by the common law and is indictable in many, if not all, of the states. It is, however, true that the legislation of Congress, to which we must look exclusively for the definition of crimes of which we have jurisdiction here, provides that

one or more of the parties to the conspiracy must do some act to effect its object before it becomes punishable by national law.

Your inquiry as to this charge will be: First, was there the conspiracy as charged? If you find there was, you will next inquire: Was any act done by one or more of the parties to such conspiracy to effect its object? Such acts need not be the acts of the alleged conspirators actually on trial, but finding the conspiracy you may consider such acts of either one or more, or all the persons indicted, to ascertain if any act to effect the object of the conspiracy was done.

Now, why does Congress require something to be done before an unlawful agreement is indictable? It is because of the humanity of our laws. Under the English law, the mere conspiracy was indictable; but by the law of our general government, quoted, the conspirators may conspire all they please, provided that none of them do anything to carry out the object about which they conspire. In other words, it was the purpose of Congress to give them what is termed the *locus penitentiae*; that imports an opportunity or point at which they may repent and abandon their unlawful purpose. But when anything is done by one of the conspirators to effect its object, it is regarded by our law as such an aggravation of the conspiracy that there is no longer a place for repentance, and the penalties of the statutes attach.

How may a conspiracy be proved? By witnesses to the agreement itself, or by proof of facts from which the jury may infer it. Rare indeed are the cases where a conspiracy can be proven by witnesses who heard it made. From its very nature, it is a secret or furtive agreement. Indeed, a famous writer upon criminal law, Mr. Archibald, declares that:

"A case cannot be easily imagined in which a conspiracy can be expressly proven, unless where one of the persons implicated in the conspiracy consents to be examined as a witness for the prosecution."

A conspiracy, however, is more dangerous to the public on this very account. It follows, in nearly all cases, that the charge of conspiracy is supported by proof of facts from which the jury may fairly infer it. You have already gathered from what I have said that, where several parties conspire or combine together in conspiracy, each is criminally responsible for any act of his associate, or associates, done to effect the object of the crime. In such cases, in contemplation of law, the act of one is the act of all. One person alone cannot be convicted of conspiracy. Two may be. One may be, provided that another or others also indicted are shown to be guilty with him. It is also true that, upon the trial of charges of this character, where the prosecution depends upon inferences to be drawn from facts, great latitude of proof must be allowed. "The jury," said the Supreme Court of the United States, "should have before them every fact which will enable them to come to a satisfactory conclusion, and it is no objection that the evidence covers a great many transactions and extends over a long period of time, provided, however, that the facts have some bearing upon and tendency to prove the ultimate fact in issue.

Having, as I think, sufficiently for the purposes of your inquiry explained the crime of conspiracy in general, it now becomes my duty

to attempt to make plain the particular conspiracy with which the prisoners are here charged. While there are three indictments and many counts, all of which you must consider, for the purposes of condensation and brevity, at present I direct your attention to indictment No. 371. This indictment, in language appropriate in a legal sense, charges that on the 1st day of January, 1897, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter did conspire to defraud the United States of large sums of money. It is alleged that persons indicted had devised a fraudulent scheme for this purpose. This scheme, the indictment recites, on or about the year 1891, was first concocted and put in operation, and had been "continuously in process of execution," until renewed in the conspiracy entered into at the date mentioned in 1897. It is further charged that the conspiracy and acts done to effect its object continued thereafter in process of execution by the alleged conspirators.

The charge of conspiracy is, in substance, as follows: Oberlin M. Carter was an officer of the corps of engineers of the United States Army. From about 1888 until about the 20th of July, 1897, he was, as such engineer officer, in charge of what is called the Savannah district. His duty involved the execution of river and harbor improvements in the district mentioned. In this capacity he was vested with power, duty, and discretion to propose projects for the improvement of rivers and harbors, and projects for the expenditure of money appropriated by Congress for this purpose. It was his duty to devise and draft specifications for contracts for such improvements. His was the duty and discretion to recommend the acceptance of such contracts by his superior officers, to draft and suggest forms of advertisements, and to fix the period in which these should be published, and thus to give notice to the public that competitive bids would be received by him for the construction of the works proposed. His also was the power of suggesting and fixing the period in such contract specifications, within which a successful bidder would be required to commence work. He had the duty to give out information in regard to contracts to be let, to receive proposals for contracts, to recommend the award of the same, to approve or reject the bonds required of contractors, to superintend their work, to approve or reject the same as it might be in accordance with the requirements of the contract or otherwise, to suggest and recommend modifications of such contracts to be made by the Secretary of War, in certain cases without competitive bids and without public advertisement. He had also power and duty to approve or reject the accounts rendered to him by contractors for work done or claimed to have been done by them. It was his duty to approve such accounts if they were fair and honest, and to reject them if they were false or fraudulent. He was the disbursing officer of the government for all the purposes of his work, and, when the funds therefor had been appropriated and set apart for the work of his district, he was vested with the power, duty, and discretion to pay the contractors, if their claims for work done were

honest and fair, and to refuse to pay them if such claims were false and fraudulent.

It is further charged that it was comprehended in the fraudulent scheme and device that Carter should misuse the official powers, duties, and discretion above enumerated; that he should do this so fraudulently that competitive bidding, for contracts to be let for the government by him, should be cut off, so that his co-conspirators would be the only successful bidders for the contract work of the district. In this manner it was contemplated that all such contract work would be secured by one or the other of the alleged co-conspirators, or by some other person for their benefit, with the result that the works constructed for the United States on such contracts would be let at high and exorbitant cost.

In furtherance of this project, it is also charged that Carter, as engineer officer, would frame the specifications of contracts for constructing jetty works and training walls with a specified fraudulent intent. This consisted in the contrivance of specifications in certain contracts of three designs of "mattresses" to be used as a part of the projected improvements. For these the contractors were to be paid by the United States at a certain price per square yard. Such contract, with its specifications, would provide that the engineer in charge might, at his option, require the contractor to put in the works a large number of square yards of a particular design of what is called a "log and brush mattress," and other specifications provided that the engineer at his option and at the same price to be paid by the United States, in lieu of the log and brush mattress, might require the same number of square yards of another specified design of what is usually called a "brush mattress." The log and brush mattress was costly in its character, and was therefore expensive to the contractor. The cost of the brush mattress was not only much cheaper to the contractor, but of much less value to the United States. By a vague description in the specification of the cheaper and inferior, that is to say the brush mattress, the engineer, by a fraudulent and strained construction, would accept and approve large numbers of square yards thereof at very much less cost to the contractor, and of a value much less to the United States than would be the same number of square yards of the log and brush mattress which might under the specifications be exacted by the engineer.

It is charged that the scheme comprehended that such specifications should be so devised and drafted by the engineer officer that all persons not parties thereto should have no information as to which design of mattress would be required until after the bids for the contracts were received. It followed that bidders not parties to this scheme would be compelled, it is charged, to make bids at prices based upon the most expensive construction mentioned in the specifications. On the other hand, it is further charged that the defendants would be advised by Carter before their bids were put in, and opened, that, if they or any one of them should be the successful bidder, the engineer officer would require mattresses of the cheapest design, and that the design itself would be construed most liberally in their favor. This, it is

stated, was done with the intent that the alleged conspirators, or some other person or corporation acting for them, should always be the successful bidders for such work at the lowest cost to the contractors, and at the highest cost to the United States. The effect of this, as otherwise stated in the indictment, was to require the successful bidder to furnish, at the option of the engineer officer, at one price per unit of work or material, several types of such work and of such material, largely varying in cost to the contractors—the option of the engineer officer, so far as the general bidder knew, was not to be exercised until after the letting of the contract, but that Carter would, prior to the time of opening the bids for such work, secretly inform the parties to the fraudulent scheme that he would require only the cheapest type of such material and work. This, it is alleged, was done to enable the contractors to obtain the contract at least expense to themselves and at greatest cost to the United States. It was also contemplated that, if some person not a party to the fraudulent scheme charged should be the successful bidder, the engineer officer would require him to furnish that type of work or material specified in the contract most costly to him; and, further, that the engineer would in such case give the specifications such rigid and unfair construction, against the interest of the contractor, that the performance of such contract would be ruinous to him. This was done, it is alleged, with the further purpose to cut off all competition between other contractors, and the parties to the fraudulent scheme. In addition to this, it is alleged that the scheme contemplated that Carter, as such engineer officer, should, in the actual construction of the work done under contracts obtained by or for the benefit of his co-conspirators, so change the quantities and type of material and work as would insure to them the maximum profit in such contracts, and he should do this even though the changes thus made would result in imposing upon the government work and material of very inferior value.

It is further charged that, when some person not a party to the scheme was the lowest bidder at the letting of such contracts, and one of the co-conspirators had put in a bid at a higher rate, Carter, as engineer officer, would recommend the rejection of the lowest bid for any slight defect in the proposal. In other instances, where it was discovered that a lower bid had been made, in order to carry out the fraudulent scheme, as such officer he would permit the parties to the scheme to present hurriedly written proposals at a lower figure for such contracts and written guaranties thereon, and Carter would knowingly and corruptly approve for acceptance such proposals, although he might also know that the written guaranties were forgeries. It is charged that in addition he would knowingly approve for acceptance by the United States written modifications of such contracts and written consents of the contractors' bondsmen, although he knew the signatures of the contractors were forgeries, and it is alleged that he would knowingly and fraudulently approve for payment claims and accounts rendered to him as disbursing officer by the alleged co-conspirators, or by one of them, or by a person or corporation who had nominally secured contracts for their secret benefit. And, finally, as

disbursing officer, it was charged that when in funds he would fraudulently pay over to the parties to said scheme, or one of them, or to some person or corporation for their benefit, the accounts of money for which their claims were rendered, and that the parties to said fraudulent scheme, including Carter himself, would divide and appropriate to their own use, the money thus fraudulently obtained.

It is further charged that on or about the 1st day of January, 1897, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter, were proceeding with the construction of certain works in this district. This was under two contracts. These had been obtained by the alleged co-conspirators, on October 8, 1896. They were obtained, it is alleged, for their secret benefit, but in the name of the Atlantic Contracting Company, through Oberlin M. Carter, engineer officer in charge, fraudulently, at high and exorbitant prices and cost to the United States, by means of the fraudulent scheme hereinbefore described. One of these contracts was for the construction of jetties at Cumberland Sound. The other was for the construction of training walls and improving Savannah Harbor.

It is further charged that the alleged conspirators on the 1st day of January, 1897, in this district, did conspire together to defraud the United States of large sums of money by means of the fraudulent schemes and device heretofore described, and that this scheme was applied, not only to the execution and completion of the work under the contracts made on the 8th day of October, 1896, but also to the presentation to and approval by Oberlin M. Carter, engineer officer, of claims and accounts, and the payment of money on the same, and to the division of such money so fraudulently paid between the parties to said fraudulent scheme and conspiracy.

It is further alleged that the conspiracy extended also to the concealment of the money so fraudulently paid, and so fraudulently divided between the conspirators; that the fraudulent scheme was also applied so as to obtain for the conspirators, or for some person or corporation for their benefit, all contracts for river and harbor improvements which might thereafter be let in the Savannah district; that this was done through Oberlin M. Carter, as such engineer officer; and that he also, in pursuance of said fraudulent scheme, as aforesaid, obtained for the accused modifications of contracts, and the presentation and approval of claims and accounts upon the contracts so modified, at high and exorbitant prices, and the payment of money on the same, and the division of such money so fraudulently paid between the defendants. The jury will observe the charge is that the conspirators agreed on or about the 1st day of January, 1897, to apply these fraudulent schemes alleged to have been concocted in 1891, not only to the contracts of October 8, 1896, but to modifications of such contracts obtained, or to be obtained.

It is further charged that, on or about the 1st day of January, 1897, the alleged conspirators, including the defendants on trial, were proceeding with the construction of certain works in this district. This was under the two contracts of the 8th day of October, 1896. These

had been obtained by the defendants, for their secret benefit, in the name of the Atlantic Contracting Company. They had been fraudulently obtained by means set forth in the fraudulent scheme hereinbefore described. One of these contracts was for the construction of jetties at Cumberland Sound, and the other was for the construction of training walls and for improving the harbor at Savannah. Then follows the specific charge that the defendants did on that day conspire to defraud the United States of large sums of money by applying the fraudulent devices relating to the execution of the work under such contracts to the execution and completion of the work of the contracts of October 8th, upon which they were then engaged, and to the presentation and approval of claims and accounts, and the payment of moneys on the same, and the division thereof.

I will at this point caution you that all I have said, or may say, in this description or analysis of the indictments, refers to matters alleged, and not to matters in evidence. You will recall my instructions to the effect that, before a conspiracy of this character is punishable by the statute of the United States heretofore explained, some act must be done by one or more of the conspirators to carry its object into effect. This, in the terminology of the law, is called an overt act. This imports an act which manifests the intention of the conspirator to carry out his criminal design. Such an act is now charged to have been done by two of the alleged conspirators. It is that Michael A. Connolly, one of the persons indicted, did on the 17th day of March, 1897, assist the said Oberlin M. Carter in the preparation of a certain document, purporting to be articles of agreement entered into between Oberlin M. Carter, captain corps of engineers, United States army, and the Atlantic Contracting Company. This document purported to modify the contract which had been made on the 8th day of October, 1896, between the Atlantic Contracting Company and Oberlin M. Carter, captain corps of engineers, for the work at the entrance of Cumberland Sound, Ga. It purported to be signed by O. M. Carter, captain corps of engineers, United States army, and by the Atlantic Contracting Company, John F. Gaynor, president, and by William T. Gaynor, secretary. Upon these appeared the name of Michael A. Connolly as attesting witness to the signatures. It is charged that Michael A. Connolly did then and there himself write thereon the name and signature of the said William T. Gaynor, secretary; further, that the said Michael A. Connolly did likewise then and there assist the said Oberlin M. Carter in the preparation of a document purporting to be dated on the 18th day of March, 1897, and purporting to be the written consent of Anson M. Bangs, and Eugene Hughes, the contractors' bondsmen, on the contract of October 8, 1896. This consent purported to relate to the modified agreement for work at Cumberland Sound, dated March 17, 1897, above described, and it is charged that Michael A. Connolly did then and there write the signatures, "Anson M. Bangs" and "Eugene Hughes," signed to said document, which purported to be their assent as sureties. It is further charged that he did then and there write the signatures "James C. Bogart" and "Henry Smith," which signatures purported to be signed on said document as

witnesses to the signatures of Anson M. Bangs and Eugene Hughes thereto.

It is further charged that Oberlin M. Carter did then and there knowingly cause said documents with false signatures of William T. Gaynor, Anson M. Bangs, Eugene Hughes, James C. Bogart, and Henry Smith signed thereto, as aforesaid, to be then and there forwarded to the War Department of the United States, with Carter's recommendation for their approval by the Secretary of War.

Another overt act charged to have been done to carry the object of the conspiracy into effect is that the alleged conspirators, Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter, did on the 1st day of July, 1897, knowingly, willfully, and fraudulently cause to be presented for approval and payment to Oberlin M. Carter, engineer in charge of the Savannah district, a certain claim against the United States; the said conspirators knowing that the claim was fraudulent. The claim is as follows:

"Savannah, Ga., July 1, 1897.

"The United States Engineer Department to the Atlantic Contracting Company, Dr.

"To labor and material furnished during the month of January, 1897, under formal written contract dated October 8, 1896, on work of improving Harbor at Savannah, Georgia, as follows:

31,724.23 square yards of brush mattress, at .95.....	\$30,138 02
2,297.86 cubic yards of fourth-class stone at \$2.75.....	6,319 11
	<hr/>
	\$36,457 13
Less 10 per cent. retained.....	3,645 71
	<hr/>
Amount due.....	\$32,811 42

"Submitted by

The Atlantic Contracting Company,

"By Edward H. Gaynor, Treasurer."

It is charged that this claim was fraudulent, because the price charged for the brush mattress was the high and exorbitant price provided for in the contract of October 8, 1896, for Cumberland Sound; also that the quality of the material in said brush mattresses, and in the fascines composing the same, as furnished in said work and charged for in the claim, was inferior to that called for in the specifications for said contract; that the form of construction of both mattresses and fascines are different from and inferior to the forms prescribed in the specifications; that the mattresses contained less material per square yard of mattress surface than the specifications required; and that all this was done in accordance with the fraudulent devices in the scheme hereinbefore described, and through the fraudulent exercise of his powers and discretion by said Oberlin M. Carter, as engineer officer, in favor of the contractors, and against the United States.

The second count charges the fraudulent scheme which it is alleged was renewed and adopted by the conspiracy in substantially the same language as in the count just explained. Other overt acts, however, are described and charged. The first is that Oberlin M. Carter, engineer officer, as aforesaid, did then and there issue to the

Atlantic Contracting Company a certain check, signed by him in his official capacity, and drawn on the Assistant Treasurer of the United States, New York, and payable to the order of the Atlantic Contracting Company, for the sum of \$345,000, for contract work improving Cumberland Sound, Ga., and did then and there deliver the said check to John F. Gaynor, in payment of a claim of the said Atlantic Contracting Company, for said sum, for work claimed to have been done by that company in the improvement of Cumberland Sound under the contract of October 8, 1896, which claim he, the said Oberlin M. Carter, then and there knew to be fraudulent. The check is set forth in words and figures following:

"War. U. S. Engineer, Office Engineers.

"No. 275,037. Savannah, Ga., July 6, 1897.

"Assistant Treasurer of the U. S., New York.

"Pay to the order of the Atlantic Contracting Co. three hundred and forty-five thousand dollars (\$345,000.00).

O. M. Carter,

"Capt. Corps of Engrs. U. S. A., Engineer, U. S. A.

"State object for which drawn:

"Contract work. Improving Cumberland Sound, Ga."

Here also are reiterated, in substance, the charges as set forth in the second count, wherein the alleged fraudulent character of the claim is described.

A third overt act is charged with relation to the issuance of another check of the same general character, for the sum of \$230,749.90, for contract work improving Savannah Harbor, Ga. This check, it is also charged, was delivered to John F. Gaynor in payment of a claim of the Atlantic Contracting Company for said sum. It is set forth in the indictment, as follows:

"War. U. S. Engineer, Office Engineers.

"No. 270,537. Savannah, Ga., July 6, 1897.

"Assistant Treasurer of the U. S., New York.

"Pay to the order of the Atlantic Contracting Company two hundred and thirty thousand, seven hundred and forty-nine 90-100 dollars (\$230,749.90).

"O. M. Carter.

"Capt. Corps of Eng. U. S. A., Engineer U. S. A.

"State object for which drawn:

"Contract work. Improving Savannah Harbor, Ga."

It is alleged to be fraudulent for the reasons substantially stated in similar claims hereinbefore described.

The charge of the third count is presented with some variation from the language used in stating the charges previously explained. While it would appear to be the charge of a conspiracy complete in itself, with relation to certain formal written contracts, each dated the 8th day of October, 1896, one of which was for the construction of jetties at Cumberland Sound, and the other for the construction of training walls and improving the harbor of Savannah, in a general sense, the means of which the persons charged availed themselves are similar to those set forth in the previous counts. To this is superadded the charge that Carter, as engineer officer, knowingly and corruptly, with intent to defraud the United States, would approve for acceptance written modifications of such contracts, and with false and forged

signatures of the contractors' bondsmen to written consents to such modifications, and would forward such false documents to the War Department of the United States, as if they were genuine documents, for the approval of the Secretary of War. This was done, it is charged, with the intent to secure to the alleged conspirators, without competition, supplementary contracts at high and exorbitant prices. It is charged that the contractors themselves would be the only real bidders for such contract work; that this was done secretly for the benefit of the conspirators, naming them; and that Carter not only inaugurated such projects, but would so superintend the execution of the same that large amounts of unnecessary and useless work would be fraudulently undertaken and done.

There is the further charge that Carter, as engineer officer in charge, would so falsely and fraudulently exercise his powers in the approval and acceptance of the work that the contractors would receive payment for the construction of such work under such contracts at high and exorbitant rates for the poorest and cheapest class of material and work put under such contracts at least cost to such contractors.

As an overt act done in pursuance of this conspiracy, and to effect its object, it is charged that Michael A. Connolly assisted Carter by committing the same forgeries as charged in the first count; that this was done with the same fictitious consents, and with the same forged signatures of Anson M. Bangs and Eugene Hughes, of James C. Bogart and Henry Smith therein described, and that Carter did knowingly cause said document with said false signatures to be forwarded to the War Department of the United States with his recommendation that they be approved by the Secretary of War.

As another overt act done in support of this conspiracy, it is charged that the conspirators did knowingly, willfully, and fraudulently cause to be presented to Carter for approval and payment a claim for the sum of \$345,000 for labor and material and supplies claimed to have been furnished the United States from December, 1896, to June, 1897. It is charged that the conspirators well knew that this claim was fraudulent; that the labor, material, and supplies furnished and charged for at the prices fixed were of inferior quality and not in accordance with the specifications of the contract; that the brush mattresses and fascines were not in accordance with the forms prescribed; that the mattresses charged for by the square yard contained less material per square yard of mattress surface than the form of mattress required by the specifications of the contract; and that the claim was false in this respect that the quantity of material charged for at the contract price was largely in excess of the quantity actually furnished.

The fourth count of the indictment is framed under a different penal statute of the national laws. This is section 5438, Revised Statutes [U. S. Comp. St. 1901, p. 3674]:

"Every person who makes or causes to be made, or presents or causes to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who,

for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim—every person so offending in any of the matters set forth in this section”—shall be liable to the penalties prescribed.

When you look to the indictments you will find that the fourth count charges conspiracy to commit the crime defined in the distinct clause of the statute. This provides:

“Every person who enters into any agreement, combination or conspiracy to defraud the government of the United States or any department or officer thereof or aiding to obtain the payment or allowance of any false or fraudulent claim shall be liable”—to the penalties of the statute.

The conspiracy charged in the fourth count is an explicit charge that Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter did combine, conspire, confederate, and agree together to defraud the government of the United States by obtaining through Oberlin M. Carter, in his official capacity heretofore described, a certain false and fraudulent claim. This was for labor and material claimed to have been furnished by the Atlantic Contracting Company under the contract entered into on the 8th day of October, 1896, for improving Cumberland Sound; that the claim was for the sum of \$345,000; that Carter was a disbursing officer of the United States intrusted with the disbursing of money applicable to such improvements; that he was vested with power, duty, and discretion to approve such claims; that the conspirators, all of them, knew that the claim was false and fraudulent, in this, that the labor, material, and supplies furnished and charged for at the prices fixed in the contract were inferior in quality and not in accordance with the specifications, nor were the brush mattresses and fascines composing them in accordance with such specifications; and that the quantity of material charged for was largely in excess of that actually furnished.

As an overt act to effect the object of the said conspiracy it is charged that the alleged conspirators presented a false and fraudulent claim in words and figures as follows:

“Savannah, Ga., July 1, 1897.

“The United States Engineering Department to the Atlantic Contracting Company, Dr.

“To labor and material furnished during the month of December, 1896, on work of improving Cumberland Sound, Georgia, under formal written contract dated October 8, 1896, as follows:

18,727.34 square yards of mattresses at \$1.10.....	\$20,600 07
1,968.06 cubic yards of third-class stone at \$3.90.....	7,675 43

\$28,275 50

Less 10 per cent. retained..... 2,827 55

Amount due.....\$25,447 95

“Submitted by

The Atlantic Contracting Company,

“By Edward H. Gaynor, Treasurer.”

—and that this claim was false and fraudulent for the reasons just stated.

The fifth and sixth counts contain no charge of conspiracy, but are framed under the clause of the statute which provides:

"Every person who makes or causes to be made or presents or causes to be presented for payment or approval to or by any person or officer in the civil, military or naval service of the United States, any claim upon or against the government of the United States or any department or officer thereof, knowing such claim to be false, fictitious or fraudulent, or who for the purpose of obtaining or aiding to obtain payment or approval of such claim makes, uses or causes to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, shall be liable to the penalties of the statute."

The fifth count contains no charge of conspiracy. It presents the specific allegation that the parties indicted did unlawfully, willfully, and fraudulently cause to be presented to Carter false and fraudulent claims for labor and material furnished by the Atlantic Contracting Company under a contract entered into on the 8th day of October, 1896, for the construction of retaining walls and improving the Harbor of Savannah; that this claim was for the sum of \$230,749. It is charged to be of the same fraudulent character and for the same reasons set forth in the preceding count which has just been explained.

The sixth count is similar in character. It charges that in the same manner and with the same criminal purpose these same parties did present to Carter, in his official capacity, a fraudulent claim of the sum of \$22,612.46. This claim was then and there presented in the form of a voucher and account in the words and figures following:

"Savannah, Ga., July 1, 1897.

"The United States Engineering Department to the Atlantic Contracting Company, Dr.

"To labor and material furnished during the month of December, 1896, under formal written contract dated October 8, 1896, on the work of improving Harbor at Savannah Harbor, Georgia, as follows:

21,356.67 square yards of mattresses at .95	\$20,288 84
1,758.59 cubic yards of fourth-class stone at \$2.75	4,836 12

\$25,124 96

Less 10 per cent. retained.....	2,512 50
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Amount due	\$22,612 46
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"Submitted by

The Atlantic Contracting Company,
"By Edward H. Gaynor, Treasurer."

This is charged to be false and fraudulent for the same reasons set forth with relation to the fraudulent claims alleged to have been presented in the fifth count.

The sixth count of this indictment concludes with the following charge:

"And the grand jurors aforesaid, upon their oaths aforesaid, do further present that after the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, Edward H. Gaynor, Michael A. Connolly, and Oberlin M. Carter had, in said Southern district of Georgia, on or about the 1st day of July, Anno Domini 1897, conspired and agreed together to defraud the United States as

aforesaid, and after the said conspirators had done the acts hereinbefore set forth to effect the object or said conspiracy, and at a time, the exact date of which is to the grand jurors aforesaid unknown, but which was prior to the 1st day of December, Anno Domini 1899, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor left the Southern district and state of Georgia, and continuously remained away from said Southern district and state of Georgia until or about the 1st day of February, Anno Domini 1902, and during said period, to wit, from said time prior to the 1st day of December, A. D. 1899, to the 1st day of February, Anno Domini 1902, continuously, the said Benjamin D. Greene, John F. Gaynor, William T. Gaynor, and Edward H. Gaynor were persons fleeing from justice."

A brief explanation will suffice to explain to you the charges in indictment No. 322. The same persons are indicted. It is charged that they formed and operated for some years in the district a certain scheme to defraud the United States under contracts for river and harbor improvements. This scheme is fully described in the indictment and is substantially the scheme heretofore explained to you. The devices to be used as charged were of three general classes: The first, those relating to the fraudulent letting of the contracts to the defendants without competition and at exorbitant prices; second, those relating to the execution of the work in disregard of the specifications and of fair dealing, and the fraudulent acceptance of such work by the engineer; third, those relating to the approval and payment by the engineer of the accounts to be rendered for such work. That the work was done at exorbitant and fraudulent prices, that the accounts were fraudulent, that the division of the fruits of the fraud between the engineer and the contractor followed, is also charged.

It is further charged that on October 8, 1896, the defendants had fraudulently obtained from the engineer officer, by means of the said fraudulent scheme, two certain contracts, described in the indictment, let by the engineer. The distinct charge of conspiracy follows. It is made in the following language:

"The said Benjamin D. Greene, and naming the other alleged co-conspirators, on said 1st day of January, 1897, in the said Eastern division of the Southern district of Georgia, then and there unlawfully, knowingly, and feloniously amongst themselves, and with said divers other persons to the grand jurors aforesaid unknown, did band, conspire, confederate, and agree together as aforesaid, to defraud the United States of said divers large sums of money hereinbefore mentioned, by means of applying said fraudulent scheme in and to the execution and completion of the work under said contracts so made on the 8th day of October, 1896, as aforesaid, and in the obtaining of the money for the fraudulent accounts which should be rendered under said contracts to said Oberlin M. Carter, as such engineer officer as aforesaid, and generally to carry said fraudulent scheme into execution in the obtaining of all contracts of like character which might thereafter be let in said Savannah district by the United States through the said Oberlin M. Carter, as such engineer officer."

In the second count, as an overt act done to carry out the object of the conspiracy, it is charged that the defendants Connolly and Carter knowingly prepared on March 17, 1897, a document with false signatures and false witnesses, giving to the defendant contractors, without competition, a contract for harbor improvements by dredging, and

that Carter approved this contract and recommended its acceptance by the Secretary of War.

The third count charges as an additional overt act that the defendants on the 1st day of July, 1897, caused to be presented to Carter as such disbursing officer a certain claim against the United States, which claim is set out in a former count in words and figures. And it is further charged that they knew the claim to be false and fraudulent.

The fourth and fifth counts charge as to other overt acts the issuance by Carter of two certain checks as disbursing officer. These are described in the respective counts, and these it is charged were issued for claims presented by the defendants which he and they knew to be fraudulent.

In the sixth count is charged the conspiracy alleged to have been formed on or about January 1, 1897, and is in legal effect the same as the third count in indictment 371, which has been heretofore explained; but it sets forth the conspiracy there charged without reciting the antecedent scheme or combination, as had been done in the first count of that indictment, and in this also.

The seventh count charges an overt act to carry out the object of the conspiracy, the presentation of the claim for \$345,000 for labor, material, and supplies, heretofore described. And the eighth count charges another overt act, namely, the issuance by Carter, as engineer officer in charge of the Savannah district, of a certain check in payment of said claim which he then and there knew to be fraudulent. The check is set forth in this count of the indictment, and is the same check for \$345,000 which has been heretofore read.

The last two counts, namely, ninth and tenth, of this indictment, have been stricken on demurrer. This was the first indictment found. It was clearly not obnoxious to the statute of limitations for the crimes alleged, and therefore contains no charge that the accused now on trial were fugitives from justice.

The grand jury has also indicted the persons accused for the crime of embezzlement. Generally it may be said that this is a charge of crime based upon substantially the same facts and circumstances upon which the government relies to sustain the indictments already explained. Embezzlement may be defined as a fraudulent appropriation of another's property by a person to whom it has been intrusted, or into whose hands it has lawfully come. The offense is of statutory origin, and the particular statute of the jurisdiction in which it is charged must be considered in order to determine the constituent elements of the offense there defined. This is in section 5497 of the Revised Statutes [U. S. Comp. St. 1901, p. 3707]. Omitting irrelevant language, it will read:

"Every * * * person not an authorized depository of public moneys, who knowingly receives from any disbursing officer * * * or other agent of the United States any public money * * * otherwise than in payment of a debt against the United States, or who uses, transfers, converts, appropriates or applies any portion of the public money for any purpose not prescribed by law * * * is guilty of an act of embezzlement of the public money so * * * used, converted, appropriated or applied, and shall be punished," etc.

The indictment framed pursuant to this statute is No. 476. It describes the official character of Carter, his trust for the improvement of rivers and harbors in the Savannah district, his powers, duties, and discretion, particularly that of approving or rejecting claims and accounts, his discretion as a disbursing officer and agent of the United States for the payment of such claims from funds intrusted to him. It is then charged, by virtue of his office, and whilst he was so employed, that he had possession of the sum of \$575,740, in lawful money, the property of his employer—the United States. It is further charged that the other defendants, Greene, the three Gaynors named, and Connolly, not being authorized depositaries of the United States, received from Carter this sum, well knowing that it had been fraudulently paid out by him, and did then and there, with like guilty knowledge, apply this public money to the payment of two fraudulent claims against the United States aggregating that amount. These claims, it is alleged, Greene, the Gaynors, and Connolly caused to be presented in writing to Carter, and that they well knew the claims thus presented upon which the money was paid were fraudulent, and that such payment was an application of the public money of the United States for a purpose not prescribed by law. The indictment sets out a description of the claims and the particulars in which they are alleged to have been fraudulent. A description of the claims and the particulars; that is, a repetition. This description does not vary in any material way from that utilized in the other indictments. The method of the alleged fraudulent payment by Carter is also described. And it is charged that Greene, the Gaynors, and Connolly, so knowingly applying the public money of the United States for a purpose not prescribed by law, did then and there embezzle the same.

The second count of this indictment contains a similar charge of embezzlement. This describes an alleged fraudulent claim relating to the Cumberland Sound work, and the amount alleged to have been embezzled is \$345,000.

The third count charges a similar offense. It describes a claim alleged to be fraudulent relating to the Savannah Harbor work. The sum alleged to have been embezzled is \$230,749.90.

It will be observed that the fourth count of the indictment makes a general charge of embezzlement against the persons named in the first three counts and against Carter also, and charges him as participating with the others in the felonious embezzlement of the sum of \$575,749.90, which is the aggregate of the sums alleged to have been fraudulently claimed on the Cumberland Sound work and on the Savannah Harbor work. It is also alleged to be the parcel of money of which the said Oberlin M. Carter then had the custody, management, and control by virtue of his employment. And they are all charged that they did fraudulently and feloniously apply and dispose of the same to their own use and benefit; said application of said money being not for a purpose prescribed by law.

To each count of said indictment for embezzlement there is appended the following charge:

"And the grand jurors aforesaid, upon their oaths as aforesaid, do further present that after the commission of the said embezzlement, and after the acts done hereinbefore set forth, to accomplish said embezzlement, at a time the exact date of which is to the grand jurors aforesaid unknown, but which was prior to the 1st day of December, A. D. 1899, the said Benjamin D. Greene and John F. Gaynor left the Southern district and state of Georgia, and continuously remained away from said Southern district of Georgia until on or about the 1st day of February, A. D. 1902, when they returned to said Southern district of Georgia, and again on or about the 7th day of March, A. D. 1902, the said Benjamin D. Greene and John F. Gaynor again left the Southern district of Georgia and remained away from said Southern district and state of Georgia until on or about the 9th day of October, A. D. 1905, and that during said period, to wit, from the said time prior to the said 1st day of December, A. D. 1899, and the said 9th day of October, A. D. 1905, the said Benjamin D. Greene and John F. Gaynor were persons fleeing from justice. Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the said United States."

Such is the analysis of the indictment.

The grand jury having returned into court the indictments thus explained, and the accused having pleaded not guilty, the issues are formed to which for the last three months the jury and the court have given their undivided attention. There are, gentlemen, certain fundamental principles to which at this stage of my effort to assist you I will call your attention. One of these is that ours is a government of laws, and not of men. It follows that the triors of every accusation equivalent in importance to that under consideration, namely the jurors, should clearly understand not only the law, but the reason for the existence of the law, in whose administration their assistance is invoked. Among the chief causes of the formation of our government was the necessity for making rules for the regulation of interstate and foreign commerce. At one period of our history, even after our independence of Great Britain had been established, we had no such rules. Rhode Island might, and did, tax imports from Massachusetts and New York at a greater rate than similar commodities from Great Britain or any other foreign land. South Carolina might establish a custom house to exact imposts on products shipped from Georgia, and Georgia might do the same thing against South Carolina or any or all of the 13 original states. This produced a condition which was seen to be intolerable, and some of the great men who had achieved our liberties set to work to arrange a treaty or agreement of commerce between Maryland and Virginia, and incidentally to control the navigation of the Potomac River and the Chesapeake Bay. Washington, Madison, and other illustrious Americans of that day were promoters of this plan. But when the first conference was held at Alexandria, in Virginia, it was at once perceived that such an understanding was necessary, not only between Maryland and Virginia, but between all of the states which had taken part in the Revolution and had but four years previously established their independence. Further consideration between the statesmen and patriots of that day evolved the great convention of 1787, which framed the Constitution, the foundation law of our government. The convention which framed this Constitution was a body of men of whom the history of time affords no superior. It was composed of 55 members. The grade

of intellectuality was exceedingly high. Many of the states had taken care to send the older patriots. Four had signed the Declaration of Independence 11 years before. Many were brilliant patriots of '76. Eighteen belonged to the Continental Congress. The convention truly represented the wealth, conservatism, and culture of the states. While many of the delegates in this day would be termed aristocrats, they were all devoted to the maintenance of the largest liberty consistent with the public safety, but no more. The convention comprised men familiar with the history of nations, and competent to deduce the lessons of experience from the annals of time: Jurists of profound and solid learning, who well knew how much the noble science of jurisprudence had accomplished in the advancement of liberty and just government; soldiers, whose fortitude in the physical suffering of the battle and camp enabled them to estimate correctly the blessings of peace, which good government alone can insure. At last it was finished, and the illustrious Bancroft declares:

"The members were awe-struck with the result of their counsels. The Constitution was a nobler work than any one of them had believed possible to devise."

Jefferson has proclaimed that "it was the wisest ever presented to man"; and Gladstone, whose marvelous career had begun when your fathers were yet unborn, and who has yet lately departed, one of the noblest instances of enduring intellectuality the world has ever known, has declared:

"As the British Constitution is the most subtle organism which has proceeded from progressive history, so the American Constitution is the most wonderful work ever struck off at a given time by the brain and purpose of men."

The objects of this Constitution, which is but a brief instrument, are adequately stated in its preamble:

"We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to Ourselves and our Posterity, do ordain and establish this Constitution for the United States of America."

Such were the purposes of the law which organized the great Republic. This Constitution created a national Legislature. It comprehends, as you know, a Congress composed of the Senate and House of Representatives. This is the lawmaking body. The Constitution granted certain powers to Congress. Four of these and the laws, made in pursuance thereof, may be easily discoverable among the foundation stones on which the indictments before you must rest:

First: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

Second: Congress shall have Power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Third: Congress shall have Power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and

all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Fourth: "No money shall be drawn from the Treasury but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time."

Under the laws made pursuant to the grant of the taxing power, the funds which the proof before you shows were intrusted to the disbursing officer of the government, and were subsequently expended, were collected from the people. Under the power of Congress relating to the expenditure of this money, acts of appropriation were made by Congress before a dollar of it was available for river and harbor improvements on the coast and on the interior waterways of Georgia. These appropriations were made under and in obedience to the principle of the preamble to promote the general welfare, and under the express grant of Congress to regulate interstate and foreign commerce. The object of this grant has for many years been held to include the promotion of interstate and foreign commerce, and, since much of this was conducted by maritime and waterway navigation, it has been as steadily held by our government that Congress had and has the power to make appropriations for the improvement of our harbors, of the approaches thereto, and of our navigable streams.

Commerce, said the Supreme Court, includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than that in which they lie. Again, in a famous case between South Carolina and Georgia involving the improvement of the Savannah river, the Supreme Court declared that the right to regulate commerce includes the right to regulate navigation and hence to regulate and improve navigable rivers and ports on such rivers, and the same doctrine was emphasized in the case of Carter when it was carried to the Supreme Court of the United States.

A further brief consideration of the philosophy of our organic law will show you the reason for the laws with the violation of which the accused stand indicted. There is no syllable in the Constitution which expressly declares that conspiracy to defraud the government or embezzlement of government funds is criminal. There is, however, the grant of power to Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all others powers vested by this Constitution in the government of the United States, or in any department or officer thereof." Now, when Congress was given power to collect the money of the people, it followed ex necessitate that it must have the power to pass laws for its protection. When it was required that Congress should not spend money of the people except for the purpose for which it was appropriated, it became necessary to pass laws to guard the money which had thus been appropriated. When Congress was given the power to regulate interstate and foreign commerce, it was given the power to enact the laws to make that regulation of such character as would

promote interstate and foreign commerce, and would be contributory to the welfare of the people. And so these laws under which these indictments are framed were enacted by the representatives of the people of the states in Congress assembled.

Pardon me, if in passing I call your attention to another principle of that great instrument of organic law. It provides:

"This Constitution and the Laws of the United States which shall be made in pursuance thereof: and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the Contrary notwithstanding."

Not only is this to be found in the Constitution of the United States, but this provision is expressly reiterated in our own Constitution, and is expressly enacted in the first section of the Code of Georgia, that famous codification which is the pride of our jurists and the people of this state.

It follows, then, that this case in contemplation of the indictments involves, to an extent, the basic principles of our government; the safety of the money collected from the people for governmental purposes; the fidelity and integrity with which the Constitution and the laws design that it shall be appropriated for the purpose for which it was voted. In this case, this was an improvement, for the people of our state, the people of other states, and foreign lands dealing with us, of the facilities and instrumentalities of commerce found in those harbors, estuaries, and rivers with which the God of nature has so richly endowed our shore line, and on whose bosoms the commerce of this people may be borne from the farms where it is they are produced to producers and customers in other states and in foreign lands. It is, then, gentlemen, no ordinary case. It should command the liveliest attention of the conscientious, patriotic, and intelligent citizens who are selected from among their fellows and at whatever hardship to themselves, consecrated by law for its fearless, impartial, and righteous determination. Nor should you forget that it involves other basic principles of government. These are clearly outlined by the Bill of Rights in the Constitution. This provides that:

"No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger."

It also provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

In the practical application of that sovereign rule which secures to the accused an impartial trial, there are other settled principles of the law to which your attention must be called. One of these is that the burden of proof is upon the prosecution. This imports

that the government is always under the obligation of proving every fact necessary to substantiate the accusation which, through its time-honored instrumentality, the grand jury, it has preferred against the person accused. This rule is but another illustration of the humanity of American law. It is familiar to all who have taken part in the trial of criminal cases. A proposition equally familiar is the logical sequence to that just stated. It is that the accused is presumed to be innocent until by the submission of proof the jury is satisfied that he is guilty as charged. How simple and yet how sovereign are these safeguards of liberty. But the law is not framed exclusively for the protection of the accused. It has regard, also, to the interest of society as well. It follows that while the burden of proof is on the prosecution, and while the accused is presumed to be innocent, yet when the weight of evidence, considered as a whole, satisfies the jury beyond a reasonable doubt that the charge is true, the presumption of innocence is destroyed, and, in those fortunate communities where the laws are observed, a conviction is at once the logical and legal result.

It is important that you should clearly understand the term "reasonable doubt." It does not import a mere possible doubt, because everything relating to human affairs and depending on moral evidence is open to some possible or imaginary doubt. A reasonable doubt is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in such a condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge. By "reasonable doubt" is not meant a strained or whimsical conjecture, but an actual, sincere, mental hesitation caused either by insufficient evidence or by unsatisfactory evidence.

The term "evidence" includes not only that offered on the part of the government, but that also offered for the defense. If, then, including the testimony of the accused, who in these courts is permitted to give evidence under oath, upon consideration of all the proof, there is a reasonable doubt remaining, the accused is entitled to the benefit of it by an acquittal. There can be, however, no reasonable doubt of a fact or conclusion, if it has been clearly established by satisfactory proof. In this case the evidence has been both direct and circumstantial. "Direct" evidence is that which immediately points to the question at issue. It is positive in its character. It often depends upon the credibility and intelligence of the witnesses who testify to a knowledge of the facts. It may also be documentary in character. "Indirect" or "circumstantial" evidence is that which tends to establish the issue only by proof of facts sustaining by their consistency the hypothesis claimed, and from which the jury may infer the fact. "Direct" and "circumstantial" evidence differ merely in their logical relations to the fact in issue. Evidence as to the existence of the fact is "direct." "Circumstantial" evidence is composed of facts which raise a logical inference as to the existence of the fact in issue. A conviction may well be had upon circumstantial evidence; but, to warrant a conviction on evidence of this character,

the proven facts must not only be consistent with the hypothesis of guilt, but must do this so clearly and satisfactorily as to exclude every other reasonable hypothesis save that of guilt.

While the basic principles defining the rights of the accused, and the obligations of the government in criminal cases, are the same in the state as in the United States courts, there is an important difference in the relations of the court and the jury, in the degree of assistance which may be rendered the jury by the court, to which I must call your attention.

The Supreme Court of the United States has declared:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to a jury [that is, the judge of the United States courts] may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts."

In another case the rule is more elaborately stated. Referring to the relations of the court and jury in these courts, while declaring that what is said by the court as to the facts is only advisory, and in no wise intended to fetter the exercise finally of the juror's own independent judgment, the Supreme Court observed:

"Within these limitations, it is the right and duty of the court to aid them by recalling the testimony to their recollection; by collating its details; by suggesting grounds of preference, where there is contradiction; by directing their attention to the most important facts; by elucidating the true points of inquiry; by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is none more important resting upon those who preside at jury trials."

Some practitioners seem to think with the eccentric Horne Tooke, who told Lord Mansfield, before whom he was being tried, that his Lordship's only business was to help the tipstaves keep order while the jury tried the case. Some of the states, but not all, deny to the judges the right to assist the jury in finding the facts; but this practice the Supreme Court of the United States has expressly held has no place in the practice of the United States courts. And said that eminent lawwriter, the late Seymour D. Thompson, in his work on "Charging the Jury":

"Such a system is scarcely more wise than it would be to select a lawyer, a doctor, a clergyman, a farmer, a merchant, a shoemaker, a blacksmith, a saloonkeeper, a street-car driver, a capitalist, and a barber, constitute them a ship crew, and start them out on a voyage in company with an experienced navigator, who is permitted to give them general instructions on the theory of navigation, but who is prohibited from giving them any positive order how to navigate the ship, and from correcting any blunders they may make in navigating it."

It must be, however, borne in mind that all the court may feel at liberty to say is said merely to assist, and not to control, you. Yours, under our system, is the absolute right to find the facts for yourselves. The truth has been anchored in our jurisprudence for centuries that

12 good men in the jury box are, of all others, the best attainable triors of facts. You must therefore recall the facts for yourselves, and my summation is merely advisory, to aid you as far as I can. This case has lasted three months. There are multitudes of exhibits, and more than 12,000 pages of evidence, I believe. The effort of the court, in the limits above stated, to present the salient and what seems the more material facts, may be, in such a case as this, as it is intended to be serviceable to you in reaching the just and righteous conclusion which the law and your duty require; but the duty of finding the facts is exclusively your own.

It is appropriate here to state a settled rule of evidence that previous intimacy between persons charged with conspiracy is competent and important proof on the trial. "It is usual," said an eminent writer on the criminal law, "to begin by showing that the defendants all knew each other, and that a certain degree of intimacy existed between them, so as to show that their conspiring together is not improbable; and if to this can be added evidence of any consultations or private meetings between them, there is, then, a strong foundation for the evidence to be subsequently given, namely, of the overt acts of each of the defendants, in furtherance of the common design." Proof of close intimacy would seem especially important if the duties of the parties respectively were intended to be in opposition, and, should the occasion arise, might forbid such intimacy. As I remember the evidence, it appears that Lieutenant O. M. Carter, corps of engineers, of the United States army, was assigned to duty under Gen. Gillmore, of the same corps, about August 1, 1884. His duties were connected with the river and harbor improvements made and to be made by the government of the United States in what is known as the "Savannah District." The defendants Benjamin D. Greene and John F. Gaynor were engaged in doing river and harbor work in the Savannah district about that time. Subsequently Carter, Greene, and Gaynor became acquainted. Carter, it will be observed, was a trusted officer of the government, a graduate of West Point, and because of proficiency in his studies had been appointed to the corps of engineers. Placed here by the government, for the purpose of guarding its interests, it was his duty to deal at arm's length with the contractors whose work he was ordered to supervise. His commanding officer, Gen. Gillmore, had his headquarters in New York. Carter was in local charge. His salary was fixed by act of Congress, and paid from the public treasury. It was at this time \$2,208. If he had other means or sources of income at this time, the fact does not appear from the evidence. As early as 1886 evidence is offered to show that a loan of \$1,600 was made by Greene, one of the contractors, to Carter, the trusted representative of the government. It amounted to 72 per cent. of the annual salary of this officer. It is true that this loan was afterwards repaid with interest, but whether, as the government contends, intimacy as a matter of fact existed between the engineer officer and the contractors, the jury must determine from this and other proof. The question is not whether any of these suggested projects between Carter and the

contractors, if they existed, were in themselves corrupt or criminal. They are offered merely to show intimacy. It need not be criminal intimacy, but this feature of the proof in cases of conspiracy is met, if the mere fact of intimacy is shown.

Among the number of letters from Carter to John F. Gaynor is one dated November 2, 1885. It contains this expression:

"If you know of any lumbermen who want to buy pine lands in Georgia, I think I can put you into something paying."

While stating that he can get a tract of 60,000 acres of virgin yellow pine on the Altamaha river, and has contingent opportunities to get 104,000 acres more, he adds:

"If you know of any one to whom you can sell, or if you are too busy, and will send me the names of big firms who might want to buy, I will attend to the matter myself. It is not yet cold enough to go to work on our project."

What that project was, the evidence does not disclose. "So I am looking up pine lands and whooping up the convention." It was stated in the opening argument of the district attorney that the convention was to promote large appropriations by Congress for rivers and harbors, and this seems to have been further recognized in the argument on both sides. This was something more than a year after his assignment to duty in this district. At a later period, namely, May 24, 1888, in a letter addressed to "Dear Captain," signed "O. M. C.," and indexed in his letterbook under the name B. D. Greene, it appears that the contemplated ventures were not confined to timber lands. After some information about the cost and consumption of gas manufactured by certain companies, we read as follows:

"Be careful about the air jack and not let any inventor steal our ideas and leave us out. * * * I think we can essay to give him (Minis) one-fourth, and you, John and I to take one-fourth each, if it comes to anything. Keep a record of the expense, and we will share that, anyway, but above all things don't let some one steal our thunder, as I believe there is something in it. * * * I have just been offered a chance in a marble quarry which looks well. * * * Do you know where is the best place to have it tested and its marketable value obtained? * * * If it amounts to anything, of course I want you to go in with me, but say nothing to John, as this is another matter. I hear nothing further about the railroad."

If by "John" the defendant John F. Gaynor was meant, it was apparently contemplated, it would seem, to let him into a share of the profits on the air jack, but to exclude him from the quarry.

Another letter, dated June 11, 1888, from Carter, indexed as before, "Dear Captain," is asked:

"What could you afford to pay for rock delivered to you on the cars at Savannah or at Brunswick (to be used at Fernandina)? I expect to go to some quarries on the line of the S. F. & W. in about ten days, and they say they will put rock in at Savannah and Brunswick at whatever rates I say. Of course, I haven't seen the quarries yet, but if the rock is good, it will be worth looking into."

In a letter of August 23d, in the same year, 1888, addressed "My Dear Captain," signed "O. M. C.," not indexed, after saying, "I had a long talk with Gordon yesterday about the timber question," that prices had more than doubled within the last two years, he writes:

"I saw Huestead about the marble, and he says that he learns that a very badly shattered specimen was shipped to New York. Don't fail to see Clay," he writes, "the next time you go to town, as Minis is very anxious, and I think more than ever there is something in it." He adds: "I have had Oconee and Ocmulgee transferred to me. Craighill is in California." The Oconee and Ocmulgee are Georgia rivers upon which improvements were contemplated, and Craighill was Carter's commanding officer, who, it afterwards appears, was under duty to visit and inspect the work in his local charge.

Again, on September 1, 1888, the letter books disclose a communication to "Dear Captain," from "O. M. C.," relative to a lease of quarry lands at Rome. "I have many things to talk to you about," is written. "I have also my eye on some coal lands near Birmingham."

Again, on September 23, 1888, from the same to the same, it is stated:

"There may be some delay in getting out specifications for works, as everything goes to Craighill, and he is away a great part of the time. Will send as soon as they are out. A paving company has just been organized here that I can get 50 shares in. I have nothing to invest just now, as my money is tied up at home, but I thought you and John might like to take \$1,250 or \$2,500 worth of stock. Let me know if you wish to venture in it. By the way, I think I can get the Central Railroad to agree to deliver from 500 to 1,000 tons of granite at their wharves daily at from \$1.50 to \$1.70 per ton. I sincerely hope the Chili scheme is not a paper one only. It looks too bright to last."

The jury may consider this as throwing light on the question whether or not Carter was interested in the Chili scheme.

From the same to the same, November 22, 1888, this again treats of the pneumatic jack, also scheme for tying cotton, a visit from a Mr. Clay, and states:

"I told him that I wished you, Gaynor. Minis with me in the jack, but only you, Gaynor, himself and myself in the cotton tying business. Whatever you do, I shall be satisfied with, but my suggestion is that you, Gaynor, Minis, Clay and I shall each have a one-fifth interest in the jack [in the other you, Gaynor, Clay and I have one-fourth]. I think we have a thing which is worth millions, the best thing since the air brake. Whatever the Chili business comes to, this appears to be certain."

Again, you may consider if the Chilean project was in part Carter's or was it true, as Greene testified, that Carter had nothing to do with it?

"Minis just this moment came in. He thinks he ought to have one-fourth, and that you and Gaynor ought not to want as much as he. But I explained Gaynor's value in labor troubles, and so forth, and he acquiesced in my opinion."

From the same to the same, May 26, 1889, the ventures multiply:

"Yours of 24th received. I saw Shepard and gave him the specimens I collected. From his partial tests he was very enthusiastic, saying I had the most valuable thing in the country, that it would make all connected with it rich, that he wanted to go in, and so forth. * * * I saw Gordon yesterday and told him I wished the same parties as before, namely, you, John, Comer, himself and myself in it. He objected, said he wished to share equally with me, but did not wish to admit others, and so forth; said this

was a new deal, and so forth. It was much as I had anticipated, but, of course, John and I go in on my share, which may amount to something. * * * Shall you be here within a week? If not, can you manage to let me have \$2,000, if I should need it? I don't want to be frozen out of a good thing. Gaynor is not here, and I have not seen him in some days."

In a letter from Carter to Gen. Dunne, April 10, 1888, reference is made to Gen. Gillmore's death, and the writer states that he has had local charge of Savannah Harbor, Cumberland Sound, Brunswick Harbor, Altamaha and Savannah rivers, and Fts. Clinch, Oglethorpe, and Pulaski, and:

"I should be very glad if I could be retained here and put in charge of them. * * * I should be very glad to have the command as indicated."

There is other evidence upon which the government relies to show intimacy between Carter, Greene, and, apparently, Gaynor also. It appears from the evidence that a Mr. Curtis, now dead, who was an inspector on the works under Carter, reported that Greene and Gaynor had attempted to bribe him. As representing the government, it was obviously the duty of Carter to investigate, and report upon, this charge. On the contrary, it appears that on June 6, 1889, he wired Greene in New York as follows:

"General Alexander desires me to ask you to telegraph the Morning News at once, the following statement over your signature: 'The affidavit of Mr. Curtis, so far as it alleges an attempt upon my part to bribe him, and so far as it relates to statements said to have been made by me, reflecting in any manner whatever upon Lieutenant Carter, is false in every particular. An affidavit to this effect will follow in due time.'"

It will be observed that this embodies the telegram which Carter states that Gen. Alexander desired Greene to send to the Morning News. What Greene did in response to this telegraphic appeal does not fully appear, except from his testimony. This is followed by another telegram from Carter to Greene, dated the same day, giving the affidavit of Curtis to which the first telegram related. The affidavit of Curtis is set out as follows:

"In February, B. D. Greene renewed the above proposition of Gaynor, stating that he would add to my salary \$500 per month, and would get Lieutenant Carter to increase said salary. He said it was in his power to secure my appointment, and that he had also the power to have Lieutenant Carter remove any obnoxious inspector, instancing Inspector G. W. Brown, who was removed to Fernandina in 1886, and stating that Brown's successor was worth to him \$60 per day."

This is followed by a letter from Carter to Greene of the same date, which reads as follows:

"Dear Greene: It is absolutely necessary that you send affidavit as I requested. * * * Do not fail to insert in the affidavit each and every statement that I have made. * * * John's affidavit, so far as it relates to him, will be ready."

In this is inclosed a copy of the proposed affidavit.

From this correspondence, as far as stated, the jury may be able to determine the character of the relations which existed between the engineer officer in charge of the government's interests, and the contractors engaged in government work, to be paid for by the check

of this officer from moneys appropriated by Congress. If Curtis charged a contractor with an attempt to bribe an inspector, it was the engineer's business to investigate, to press the inquiry, and ascertain the truth. If, to the contrary, he is found conducting the defense, it is material for the jury, as illustrating the relations of the parties. Carter states that Gaynor's affidavit "will be ready." Now, this evidence is not offered to show that Curtis' charges were true, nor that Greene had made a corrupt agreement with him. The truth of Curtis' charge is aside from the question of the relevancy of this evidence. The material fact is that Curtis made a charge against the contractor, and the engineer officer at once proceeded to prepare the contractor's defense. And all of this is offered merely to show strong and close intimacy between Carter and the contractor.

It appears that many ventures were contemplated or suggested, in yellow pine, in the air jack, in marble quarries, in rock quarries, in coal lands near Birmingham, in a paving company in Savannah, in a scheme for tying cotton, in some discovery, the nature of which the letters do not disclose, but "the most valuable thing in the country which would make all connected rich." A contingent application for another loan of \$2,000 is made. Carter informs Greene that the general in command, or division engineer, is in California; that he will let him have specifications as soon as possible, and on Gen. Gillmore's death makes application to be retained in local charge in this district. More than one reference was made to the Chili scheme. This you may deem to be sufficiently developed in a letter from Greene to Carter, October 25, 1888. Carter's letters to Greene, have been addressed, as you perceive, "Dear Captain"; Greene's letter to him is addressed "Dear Carter," and the letter is as follows:

"John goes to Chili on Thursday. * * * About six months from now \$6,000,000 harbor work is coming up in Chili, and all have assurance of our ability to get it. * * * John goes down on the ship with the general manager of the syndicate, so you see our show seems good. * * * Now, I want to do up Charleston, Savannah and Fernandina, by July 1st, next, so that we can go down by that time, if not before. * * * This, I think, is the chance of our lives. Now, let that dredging, so John and I can sell out our stock, and hurry up the two works all you can, so that we can get going by New Year's. This is important. This Chili business is business, and I think within ninety days we shall be into that tunnel. What do you think of this? Of course, the scheme I outlined when I first wrote you about Chili a month or more ago will be carried out, and a year hence will find us both struggling with the Spanish lingo."

This is signed "B. D. G." Greene testifies that Carter had nothing to do with this matter. In view of this statement, and on the evidence of these letters, the jury will find the fact as it exists.

In this epistolary correspondence, Mr. John F. Gaynor for the first time appears. It is April 28, 1889. His letter is written, not to Carter, but to Greene. "Friend Greene," he writes "I saw General Fields today. He goes to Chili Wednesday. He says the President of Chili cabled him to be there by the first of June, and so forth. He says that the arrangements he made with us in regard to the harbor work he stands by and it is a go."

The correspondents seem next to be engaged in projects nearer home. On January 22, 1891, B. D. Greene writes to Carter in New York as follows:

"He [Mr. Richardson] says he knows they are going to build soon. * * * Would it not be well for Mr. W. to write a line to C. V. and ask him about it, saying that he had a group of friends who wished to make a proposal when the time came?"

He adds in a postscript:

"I shall be back here on February 20, and we can see if anything can then be done about the Utica business."

"Mr. W.," we are informed, is Mr. Westcott; "C. V.," Cornelius Vanderbilt. Who composed the "group of friends" may be a matter of legitimate inference by the jury.

Two months later, March 27, 1891, Carter himself writes to E. V. Rossiter, Grand Central Depot, New York, refers to contract for Herkimer-Poland Extension, and remarks: "I regret exceedingly that I had no opportunity to submit a proposition for that work." Subsequently he wrote a letter to Dr. E. S. Webb, president Wagner Palace Car Company, refers to extension of Adirondack Railroad to Tupper Lake, and states:

"My associates and myself are in a position to begin work at once; to take a contract for any amount of work and carry the same forward to your entire satisfaction."

Who were his "associates" the jury will determine.

To Walter Katter, chief engineer of the New York Central & Hudson River Railroad, he writes asking to be informed when certain proposed Buffalo work would come up. To C. P. Bassett, Newark, March 30, 1891, he writes asking when proposals in connection with work in connection with water supply, sewerage, and drainage of Orange would be opened. To A. M. Newton, New York, he writes:

"I gave a letter to Captain Greene for you which explains itself. I have written Doctor Seward that you would come to Orange," and so forth.

In connection with all this correspondence to which Carter and Greene were parties, the stock certificate book of the Empire Construction Company was put in evidence. It was found in Carter's file case, among his papers, and was preserved by government authorities in box marked "B 31." It shows certificates of stock issued to John F. Gaynor and Edward H. Gaynor. The name "B. D. Greene, President," is signed to some of the certificates. In the back is a certificate certifying that ——— is the owner of 1980 shares of the capital stock of the company. The certificate is signed by B. D. Greene. The first certificate was issued to B. D. Greene for 1980 shares. Across this is written: "Canceled. B. D. Greene, President." Since it is true, as a matter of law, that a transfer in blank by the president of a company made this stock available for the benefit of its possessor, the jury will determine whether or not this transfer, taken in connection with the fact that the stock was found in Carter's file case, is sufficient evidence that he had an interest in it. It otherwise appears from the evidence that this Empire Construction Company subsequently obtained the contract for sewerage, etc., at Orange.

All of this may be considered by the jury, whose duty it is to determine whether it discloses a state of intimacy in projects, particularly of a financial character, between Carter and Greene and Gaynor. These incidents are not offered singly and alone to show that the charges are true, but, as is usually necessary in cases of this character, to show the one ground of the charge, namely, close intimacy and association.

The jury will bear in mind that the ventures suggested involve the air jack, marble quarries, stone quarries, the cotton tying scheme, the "most valuable discovery in the country," coal lands—did not apparently involve the business of contracting. And the New York contract follows—or correspondence about the New York contract follows: It should also be noted that after this time the correspondence apparently relates to attempts to secure contracts, and, finally, to contracting itself.

This is the evidence the government offers to establish relations of intimacy between Greene and Gaynor, the contractors, and Carter, the engineer officer, beginning as early as 1885, soon after the latter was assigned to duty in the Savannah district, and continuing to 1891. Upon the subject of intimacy the evidence of the defendants is silent, save the testimony of Greene himself. He testified there was no particular intimacy between himself and Carter, and that he did not see him frequently. To this testimony of the defendant you will give such weight as you think under all the circumstances it deserves. Legitimate inferences to be drawn from the correspondence which I have summarized, and other evidence involved in or relating thereto, are competent for the jury to make. To some extent the relations of the parties are traced to 1891, and in this year the government charges that the scheme to defraud the United States, in which it is alleged the defendants and Carter participated, was formed. This is my recollection of the evidence, but the jury must find the fact for themselves.

As heretofore stated, a close intimacy between Carter and the contractors was not in itself criminal. This is also true with regard to joint ventures or enterprises which they had entered or contemplated. That such ventures, if they existed, were not to be commended under the circumstances, in view of Carter's position, is another and an entirely different matter. The evidence, however, is highly important, if the government has brought to your attention additional evidence tending to show a corrupt agreement between the engineer officer and the contractors, and other evidence tending to show that their relations culminated in the scheme and conspiracy for which they stand indicted. It is therefore not proper for the jury to segregate each element of proof from the others. By this course, it might be true that a number of transactions, apparently insignificant in themselves, but which, taken all together, indicate a consistent criminal purpose, would be regarded as harmless or noncriminal, yet when considered as an entirety they might afford satisfactory proof of participation in fraud to the extent of the conspiracy charged. It is proper, therefore, that you should consider in connection with the

proof of the intimate relations between the parties indicted, if you are satisfied that they were thus intimate, the character of the work in which they were connected, and all the other evidence in the case. In this connection, it will be your duty to consider the various contracts for jetty construction made from 1884 to 1897, to be performed in the Savannah district. At first, as lieutenant and afterwards as captain, Carter was the engineer in charge of the river and harbor improvements in Georgia, and a portion of Florida, from August 19, 1884, until July 20, 1897. From 1884 to 1888, his commanding officer in charge of the district, Gen. Q. A. Gillmore, had his headquarters in New York. Gen. Gillmore died early in 1888, and after that time Carter was in complete local charge.

On September 1, 1884, John F. Gaynor appears and enters into a contract with Gen. Q. A. Gillmore. Another contract had been made by Gen. Gillmore with Lara & Ross, but with this Gaynor had no connection. In general, it may be said that the contracts mentioned, and all the others offered in evidence, relate to the construction of jetties, spur-dams, and training walls. This was mainly done by the use of what are called "mattresses," "fascines," etc. Also, in general, it may be said that jetties, dams, and similar structures were used for the purpose of controlling the flow of tidal and other streams, so as to restrict the tidal or other current into narrower compass, to thus increase the velocity of the flow to scour and thus deepen and widen the channel, with a view to facilitate commerce on the ocean and interior waterways.

With regard to many of these contracts, there are no charges of fraud, embezzlement, criminal conspiracy, or other unlawful conduct. They are, however, offered for the purpose of showing the prices at which work was let in the Savannah district at different periods, the method of construction, the method of payment, and to portray the general relation of the defendants, particularly those on trial, to the contracts for river and harbor improvements in this district, both before and after the year 1891. They are offered, also, as proof of the scheme alleged to have been concocted in 1891 between the parties indicted. It is insisted by the government that all the contracts in the district let from 1891 to 1896 were pursuant to this scheme, and obtained by the alleged co-conspirators, including the two defendants on trial, or for their benefit. An exception to this was the contract of A. J. Twiggs. A further most important contention is that for the work done under the contracts from 1891 to 1896, except on the contract of Twiggs, disbursing checks amounting in the aggregate to \$3,176,908.86, issued and signed by Carter in payment therefor, were divided, primarily, into two parts; one of these was deposited in local banks, and disbursed for payment of the work actually done, and the expenses actually incurred; that the other and much the greater part, which it is contended were the profits, was, as a result of the conspiracy charged, carried to New York, and in one way and another described in the evidence, divided between Carter, the engineer of the government, and the contractors,

who are the two defendants on trial, B. D. Greene and John F. Gaynor.

The contracts prior to the year 1891, and therefore prior to the date of the scheme alleged, are offered to show, in addition to the purposes above described, the knowledge that Carter, Greene, and Gaynor, as the defendants on trial will for convenience be termed, had of the district, their intimate knowledge of the character of work being done, of the specifications drawn, of the mattresses and other work provided for by the contracts, how the contracts and specifications were fixed so that bidders before the date of the alleged conspiracy would secure the opportunity of fair and competitive bidding. This in connection with proof of subsequent dates is also offered to show that, after the alleged scheme was formed in 1891, there was a marked change in the specifications, and in the manner in which the bids were let, and in which the work was done.

It is not necessary for the court to recount a list of the jetty contracts made in the Savannah district from September 1, 1884, to October 8, 1896. The jury will remember the proof upon which the government relies to satisfy them that the defendants on trial obtained an interest in each and all of these contracts, except those of Lara & Ross and Albert J. Twiggs. The sole contract in which, according to the contention of the government, the defendants on trial had no interest, was that at and near Augusta, which was accorded to A. J. Twiggs. I do not recall any evidence contradictory of this contention. It will be borne in mind that it is not charged in the indictment that there was any corrupt agreement with relation to the contracts controlled by the defendants on trial anterior to 1891. It is proper that I should advise you that the mere fact that the defendants obtained all of these contracts is not in itself criminal. You should, however, in the opinion of the court, construe the almost unbroken success of these contractors, in obtaining control of contracts of such importance, through a period of time so long, in connection with the existence of the intimate relations between the engineer officer and themselves, if such relations have been satisfactorily established.

In the same connection you will consider the proof offered to show the numerous, mutual, and joint ventures into which it is insisted that the contractors and the engineer entered or attempted to enter; the proof that there was a disposition on the part of this engineer officer to eagerly and rapidly acquire money, and possibly fortune. This too, while in itself not reprehensible, yet if manifested in a manner which satisfies you that he depended on the co-operation and assistance of the defendants on trial, and if it also appears that they met his advances and afforded that co-operation, either in the way he suggested or in a more effective way, such evidence as indicating the purposes and motives of the party may become increasingly significant when construed in relation with subsequent proof, if it has been presented; which may be more incriminatory in its character and more distinctly probative of the charges, or either of them, made in the indictment.

Tabular evidence has been afforded you, also, of the size of the contracts let from 1890 to 1896 in the Savannah district, and the period of time in which they were advertised. It was shown that this evidence was compiled from data also submitted to the court and jury and to which reference is made. The table itself is known as Exhibit 161. From this it appears that there are 17 contracts, varying in the amount involved from \$10,000 to \$3,150,000. It also appears that 10 of the contracts involve less than \$50,000 each. Relative to the charge in the indictment of meager and insufficient advertisement, it is proper for the court to direct your attention to a few of the larger contracts.

The contract of November 5, 1890, for improvements in the Savannah Harbor, of which John F. Gaynor was the contractor, involved \$235,000. It was advertised in Savannah, in the Morning News, for 21 days; in Charleston, in the News and Courier, 21 days; in the Times-Democrat, New Orleans, 20 days; and in the Engineering News, in the Marine Journal, and in the Scientific American each 16 days.

The contract of October 22, 1892, for jetties, was secured by the Atlantic Contracting Company, for dredging by P. Sanford Ross. The work involved in the aggregate, \$3,150,000. In Savannah it was advertised in the Morning News 25 days; in the News and Courier, in the Engineering News, in the Times-Union, 24 days; and in the Seaboard, New York, 23 days.

The contract of October 8, 1896, was for jetties and dredging in Savannah Harbor. The first class of work was secured by the Atlantic Contracting Company; the latter by P. Sanford Ross. The amount involved was \$1,005,000.

On the same day a contract was let for Cumberland Sound, which was secured by the Atlantic Contracting Company. It involved \$2,350,000. These last two contracts were advertised in Savannah, in the Morning News, for 22 days; in the Florida Citizen, Jacksonville, for the same time; in the Engineering News, New York, 19 days; in the Marine Journal and in the Engineering Record, for 17 days each. It may be said generally of all the contracts, from 1890 to 1896, that the longest period of advertisement was made in the Savannah News for 27 days, and the shortest for 15 days; and the longest in the Engineering News, New York, 23 days, and the shortest, 11 days.

Your attention is called to the act of Congress of August 11, 1888, § 3 (Rev. St. Supp. p. 160), which provides:

"That it shall be the duty of the Secretary of War to apply the money herein or hereafter appropriated for improvements of rivers and harbors, * * * in carrying on the various works by contract or otherwise, as may be most economical and advantageous to the government. Where said works are done by contract, such contract shall be made after sufficient public advertisement for proposals in such manner and form as the Secretary of War shall prescribe."

The regulations made by the Secretary of War, and having, with certain restrictions, the effect of law, have been identified in evidence by Maj. Charles McClure. The United States Army Regulations of 1889 (section 602) provides:

"Officers advertising sales of property or for proposals for labor or supplies, will, as a rule, allow thirty days to intervene between the date of the

first publication of the advertisement and the time of sale or date designated for the opening of proposals. A shorter period may be named if the necessities of the service render it advisable, but no period of less than ten days shall be designated except in cases of emergency."

Section 505, of the regulations of 1895, has a similar provision: "Advertisements in newspapers announcing sales of property or inviting proposals for furnishing labor or supplies will, as a rule, allow thirty days to intervene between the date of the first publication and date of sale or opening of bids," with the same provision for a shorter advertisement in certain cases. And section 520 of the same volume provides: "In case of large purchases, a period of thirty or more days should intervene between the date of the first publication and of opening proposals." And of this law and these regulations Carter is charged with a knowledge; this is as matter of law.

As showing the knowledge of Carter, in fact, as to the length of advertisement proper, a letter from him to Gen. Craighill, chief of engineers, dated November 4, 1896, is offered. This relates to a contract for the construction of a battery by the Venable Construction Company. It was necessary to have a wharf constructed before the work could proceed under that contract, and Carter writes, "The delays have been so great that an advertisement of thirty days will retard the work and the battery," and asks for authority to call for proposals on ten days' notice. Evidence is also offered to show that while the first appearance of the advertisement, calling for proposals for what is known as the October 8, 1896, contract at Savannah, was on August 17th, the date of the advertisement was June 6th. It otherwise appears that on June 4th Carter forwarded to the chief of engineers the form of advertisement dated as above, with specifications, asking for authority to advertise, etc.; that there was a delay in the matter until about August 15th, but that Carter, because of such delay, did not change the date of the advertisement. On the 15th, Carter, who was in Washington, wired Connolly, his clerk, in Savannah, to advertise all work to be opened September 8th, and that he had specifications. This was followed by another telegram from Carter from New York: "Date all advertisements June 6, but all will be opened September 8th." Col. Tweedale, chief clerk of the War Department, testified that when an advertisement was submitted to the department it was his duty to examine it, strike out superfluous words, etc., but that the question of date of advertisement does not enter into the consideration of the War Department; that being a matter for the engineer officer to fix, in view of the regulations. That it was the duty, also, of that officer to allow sufficient time for advertisement. Col. Marshal, corps of engineers, U. S. A., testified for the defense that he had advertised, he thought, every length of time from 15 to 60 days; that he considered the special case and advertised the length of time he thought would be sufficient for the purpose. Col. J. H. Willard, corps of engineers, U. S. A., testifies that the length of advertisement is determined by the chief of engineers on the recommendation of local engineers; that he had in one case, involving \$750,000, advertised 60 days; that he had advertised a dredging contract for 20 days, when \$15,000 was

involved, and he was very anxious to get immediate results. Evidence is offered to show that on August 18, 1892, the chief of engineers telegraphed Carter to "request authority to advertise for bids," and that such a letter requesting authority was actually written on August 18th, and form of advertisement inclosed; but that by the direction of Carter both were dated back to August 17th. As the bids were to be opened on September 17th, a date recommended by Carter, it is insisted that this was an effort on the part of Carter to create the impression that there had been 30 days' advertisement. The jury will attach such importance to this evidence, if they deem it sufficiently proven, as they think proper. It appears, from all of this evidence, that it was incumbent on the engineer officer to advertise a sufficient length of time to give all persons interested an opportunity to ascertain the date of the opening of bids, to investigate the character of the work to be let, and to make estimate of the bidder's ability to undertake the contract. If the discretion vested in the engineer officer was exercised in favor of fair and open bidding and wide publicity, as with other engineer officers who have testified, no complaint can be made; but, if he exercised the discretion vested in him with the intent to shut off competition and to aid the defendants in obtaining contracts, then it would be a matter material for the jury to consider with relation to the general intent of the indictments.

A number of engineer officers testified that for the purpose of giving general knowledge, and for informing those likely to bid, they regularly kept in their offices a list of contractors who were in the habit of bidding for government work. To such persons they were in the habit of voluntarily mailing specifications, so soon as the project was determined on. They did not wait for the demand for such specifications. You will inquire if this conduct on the part of many engineer officers was different from that adopted by Carter, and, if you find that such difference existed, you may consider this also in connection with the general charge in the indictment that a part of the alleged scheme between Carter and the defendants on trial was to hold back specifications and make a meager and partial distribution of them, so that other parties would not have an opportunity to compete. It is all a question for the jury.

P. Sanford Ross, Schermerhorn, and others whom you will recall, testified for the defense that they kept informed in various ways of the appropriations made or contemplated by Congress, and kept in touch with proposed contract work. This evidence was to the effect that newspaper advertising was of no great value to such concerns as theirs. This is probably true if such a concern wishes to obtain uninterrupted control of profitable contracts. Advertising in newspapers and scientific publications is, however, the means adopted by the government of reaching possible bidders, and, if the engineer officer corruptly endeavored to limit such method, he is culpable, and if, from all the evidence, the jury is properly satisfied that it was part of the corrupt scheme in the indictment, and involved the defendants on trial, they may give such weight to it as they think proper in determining the truth of the general charges made in the indictment.

It appears that it is the settled practice of the War Department for bids or proposals to be made in triplicate, and a part of each bid or proposal is a copy of the specifications. Prospective bidders, therefore, must have three specifications of the work to bid on. These specifications are printed by the government and furnished to the engineer for distribution; the number of copies desired being requested by the engineer officer. Of the copies furnished, 125 are sent to the chief of engineers for distribution to engineer officers throughout the country.

It is contended by the government that a part of the fraudulent scheme concocted by the defendants was that Carter would keep an accurate list of all applicants for specifications, and that he would in various ways seek to ascertain the names of proposed bidders, and give the knowledge acquired by him to the defendants, and thus enable them the better to put in bids that would be successful, and to discourage and keep off other proposed bidders. In support of this contention, abstracts from the records of the engineer's office have been offered, together with documents from which the data was obtained. These abstracts give in concise form the names of applicants for specification, number sent, dates, reference to data, and so forth. These lists were made up from the names of persons who actually applied for such specifications, and it does not appear from the evidence that, like the other engineer officers who testified in behalf of the defense, Carter kept lists of contractors to whom he would voluntarily send such information.

It appears that for the bidding which ripened into the contract of October 22, 1892, known as the "Big Contract," 250 specifications were requested. Of these 125 were forwarded to the chief of engineers. It appears that there were 21 applicants for specifications, and that to 12 of the applicants Carter sent one copy each. The letters inclosing specifications were copied in Carter's letter-press book, which was in evidence, and it appears that it was the custom of Carter to inform applicants that, if they intended to bid, two other specifications would be sent, and he usually added: "If you do not intend to bid, please return the inclosed specification." It does not appear from the evidence either of the engineer officers who testified for the government, or those who testified for the accused, that any of them required the specifications forwarded to an applicant to be returned to the engineer officer in case the applicant did not intend to bid. To 10 of the applicants for the same specifications, Carter sent one full set each. So, as to the Cumberland Sound 1892 contract, there were 10 applicants for specifications. To 9 he sent only one copy each. In the case of the Cumberland Sound 1894 contract, Carter received 13 applications, and to 9 he sent only one copy each. There were 34 applicants for specifications for the work under the October 8, 1896, contract, for Savannah Harbor, and, of these, to 21 were forwarded full sets. This is largely a matter of record. The Court states it; the jury must find the facts for themselves. And, of the 34 applicants for specifications for work under the Cumberland Sound 1896 contract, 19 were sent only one copy each.

Numerous letters were offered relative to applications for specifications. In some of them the applicants state that, owing to shortness of time, bids could not be submitted. Col. Marshall and Col. Quinn, for the defense, both testified that it had been their practice to send one copy of the specifications to applicants, unless they had reason to think the applicants contemplated bidding. It was also testified by some of the witnesses that sometimes applications were made for specifications by contractors or others who wished to furnish some part of the material needed by the successful bidder, and that in such cases one copy was sufficient. It cannot be claimed that this practice of keeping a record of the applications, or the meager and grudging distribution of them, if this existed, is in itself criminal. The question is: Did Carter make use of this method as an instrumentality of a corrupt scheme to secure all the contracts for the defendants on trial? The jury will remember the testimony of Twiggs, a prospective bidder, but who, for a consideration of \$500 and a promise to be allowed to furnish certain stone, had turned over the bid prepared by him to John F. Gaynor. If I recall the testimony correctly, Twiggs was in Savannah at the time of which he spoke. He says he asked Gaynor if he was not afraid of some other bid, and told him of one he heard was coming from Augusta; that Gaynor then wrote a note, rang for a boy, and sent the note to some one, and in a very short time he got a reply, which he tore up, and then remarked to Twiggs: "No, there will be no other bids to interfere with it." Whether this information was obtained from Carter is a matter for the jury to determine under all the circumstances.

The testimony of Agnew is that he visited Carter's office, and was told by Connolly, Carter's stenographer and clerk, who was also indicted, but is not on trial, that specifications could only be obtained from Carter in person.

Frank A. D. Hancock testified that he applied for specifications, and Carter inquired if he was a representative, saying he did not give specifications to representatives. McAlpin & Schley, having obtained a full set of specifications, Carter on September 7th, a day before the opening of bids, wrote to them asking them to return the specifications if they did not desire to bid. W. H. Venable testified that he expected to bid, but did not wish to be known in the matter. That he had a Mr. W. W. Osborne, an attorney, make application to Carter for specifications, and that he failed to get them. The following letter is in evidence:

"Law Offices, Barrow & Osborne, Savannah, September 4, 1896.

"Capt. O. M. Carter Savannah, Ga.—Dear Sir: We have a client who asks us to get from you immediately copies of specifications for the jetty work for Savannah Harbor and Cumberland Harbor. We would like these specifications at once.

"Very truly yours,

Barrow & Osborne."

The reply of Carter is:

"Replying to your inquiry of the 4th instant, please send to me the name and address of the parties desiring specifications."

Another letter from Barrow & Osborne gives the name of the applicant as R. A. Johnson, Augusta, Ga. A letter is also introduced

from Carter to this supposititious Johnson, who we may presume was the alter ego of Venable, inclosing one copy, stating that, if he desired to bid, two more copies would be sent.

There is also evidence which is offered to show that Carter and the defendants on trial used other methods of shutting off competition.

Hancock, to whom reference has been previously made, testified that he, with McAlpin & Schley, contemplated bidding for work known as contracts of October 8, 1896; that he called on Carter for specifications and had a conversation with him in his private office. Carter asked if he realized the character of the work. Said that it would require a very expensive outlay. The engineer informed Hancock, according to his statement, that a railroad and trestling would have to be built to the site of the work at Cumberland; that the plant to conduct the work would cost \$400,000; and that there would be no money available for about 12 months, and, to use the language of the witness: "I had better be very careful or my friends might be in trouble."

In reply to his application for specifications, Carter said it was necessary in their system to make some record of the distribution of specifications, as they were limited in the number of them, but that he would mail them.

Agnew also testified that after several efforts he obtained specifications; that these were used by Ross & Co.; that the latter's bid was sent to him to put in; that on the morning of opening the bids Ed. Gaynor urged him not to put in bids, and finally offered him \$500 not to do so. He further testified that John F. Gaynor urged him to accept the offer, and, I quote his language: "Ed. Gaynor said to me that, if I put in a bid, it would cause them to lose a great deal of money." He further testified that, about 10 minutes before 12 on the day of opening bids, "Ed. Gaynor came in and picked up an envelope off Capt. Carter's desk and substituted another for it." The bidders were read out by Carter. They were Ross & Co., Rittenhouse & Moore, and Anson M. Bangs. The latter was the successful bidder.

According to the testimony of Mr. Gleason, the signature of Anson M. Bangs to the proposal for this contract was in the handwriting of Connolly, the stenographer and clerk of Carter; that most of the writing in the body of the proposal was in the handwriting of Connolly; that the signature "W. T. Gaynor," was in the handwriting of Connolly. This testimony as to these signatures, and that they were in Connolly's handwriting, was not disputed or denied in any manner. It is important to bear in mind, also, that the evidence is that, under the contract thus secured, nominally at least by Bangs, the cost of brush mattresses was reduced to 57 cents per square yard. The contract price in the previous contract was \$1.05, and in the succeeding contract, 1896, \$1.10 per square yard. It otherwise appears in the testimony that, while in the name of Bangs, the defendants on trial were concerned in it. The jury may then justifiably inquire if they were not permitted to underbid not only other bidders, but their own previous bid, in order to control the contracts. And, if they could afford to reduce their bid nearly one-half to prevent competition, the

jury may inquire if the government would not have made great saving if competition generally had been permitted.

W. H. Venable, whose depositions were read, testified that he contemplated bidding for work under the 1896 contract; that he called on Capt. Carter and obtained specifications; that Capt. Carter explained the intricacies and difficulties of the work at Savannah and Cumberland; that there was no appropriation available; that the work had to be executed, whether money was forthcoming or not; that the work had to go along in the way set forth in the specifications; that the equipment would cost \$400,000; that a tramway had to be built. As Venable was leaving Carter's office, he met Edward H. Gaynor, and told Gaynor that he expected to bid, but if he could sell stone he preferred not to bid. He then had a meeting with Greene and John F. Gaynor at the hotel. He testified that he made a contract with the Atlantic Contracting Company, by John F. Gaynor, president, under which he was to furnish stone to it as contractor. According to this testimony of Venable, John Gaynor then asked him for his bid, which had been prepared; "he wanted to take up those as he had with the others." The further testimony is that Greene told Venable just after the contract was awarded that he had "prepared a bid of \$200,000 less than the one he put in, and had it in his pocket"; that he intended to put that bid in in case "anyone else there, any bidders unknown, had put in a bid." If this is true, the effect upon the Treasury can be well appreciated.

It is true that the defense called a number of witnesses like P. Sanford Ross, and Schermerhorn, and others, men who had large experience, who protested that there had been no collusion and no difficulty in obtaining adequate information about contracts and specifications. Capt. Greene also denied any collusion on his part, or on the part of Gaynor, or any attempt to suppress competition. Upon all the evidence submitted for the defense upon this, as upon every other point, you should bestow your careful consideration, and bear in mind always that the burden of proof is on the government, and, under the rules previously explained, the jury must find the facts and make their conclusions accordingly.

We take another step forward. This case comprehends incidents running through nearly a quarter of a century, and the jury must bear with the court in its attempt to help them, but not to control them. We must listen to and consider with patience and fortitude what are the duties of the engineer officer as shown by the proof.

Maj. Cassius E. Gillette succeeded Carter as engineer officer in the Savannah district. He was sworn as a witness for the government. His testimony is in part devoted to a description of the powers, duties, and discretion of an engineer officer in charge of a district to which he is assigned for the work of improving the rivers and harbors. From this testimony, and the testimony of Sterly, and Cooper, of Conant, of Bacon, and of other engineer officers who have been sworn, and also from the law and regulations of the War Department, which have the effect of law, it appears that it is the duty of an engineer officer to propose projects for improvement. This he does in his discretion, but

the project requires the approval of his superior officers. It remains, however, for Congress to make appropriations for the performance or execution of the work proposed. Usually a part only of the amount appropriated is immediately available. It then becomes the duty of the engineer officer to submit a project of expenditure of the funds available, to point out the order of construction, and to recommend whether the work by the government is to be done by contract or with hired labor. Here also, subject to the supervision of his superior officers, he has full power and discretion. As the representative of the United States, he controls the money placed to his credit for the payment of contractors. It is his duty to sign disbursing checks for work done or material furnished. Subject also to the approval of his superior officers, he prepares specifications for proposed work, and has power, duty, and discretion in drafting them. This extends to the language used, to the various details, and his also is the duty and discretion to recommend their acceptance. He thus originates the specifications. It is also his duty to draft and suggest forms of advertisements by which notice is given to bidders; to recommend the newspapers in which they should be inserted, and the length of time the advertisements should run. He designates the time in which the successful bidder will be required to finish the work. It is his duty to see to it that information is given to the public in regard to the proposed works and contracts. He receives proposals for contracts and recommends their acceptance or rejection. He also approves or rejects bonds tendered by contractors. His most important duty, perhaps, is the superintendence of the work done by contractors, and he is fully responsible therefor. It is his duty to accept it or reject it, accordingly as it is in compliance with the contract and specifications, or otherwise. If the interest of the United States demands it, he has the duty to suggest supplemental contracts and make recommendations concerning them, but these are not effective until they are finally acted upon by the Secretary of War. He has also full power to approve or reject the accounts rendered to him by the contractors for work claimed to be done, accordingly as such accounts are fair and honest, or false and fraudulent; and he is entirely responsible for the payment of money placed to his credit. In the absence of orders from ranking officers to the contrary, he is primarily responsible for all that is done. He is on the ground. He is the active representative of the government. From him the War Department receives the information upon which it acts or asks Congress to act. He must guard and protect the interests of the United States and see to it that the money appropriated by Congress for the improvement of rivers and harbors of his district are honestly and properly expended for this purpose. To this end, it is his clear duty to endeavor to secure competition for bids for work to be done, and after the contract is secured to require the work to be done in accordance with the specifications, and, when it is completed, it is also his duty to accept it or reject it, accordingly as it is in compliance with the specifications or otherwise.

There is little, if any, dispute about these obligations and duties

of the engineer officer to the government which has educated and commissioned him, which affords him ample maintenance and thus secures him in the enjoyment of social and official distinction commensurate with the dignity and importance of his trust. It is contended by the government, as we have seen, that so far from fulfilling these duties, the engineer officer subordinated the discretions and powers of his trust to the interests of the contractors, and the mutual greed of the contractors on trial and himself, with the result that large sums which were appropriated for the welfare of the people were diverted to the personal and joint gain of the contractors and himself. In support of this contention, the contracts have been offered and admitted in evidence. They include contracts made by Gen. Gillmore, the predecessor of Carter, the many contracts made by the latter with Greene and Gaynor, and the one contract made with Twigg. These, as stated, relate in large measure to the construction of jetties, training walls, and similar structures, by the use of mattresses, fascines, and stone. In the contracts entered into from 1884 to 1892, where two designs of mattresses were specified to be put in at the same price, the contractor was given the option of using either. This was largely done when the works were under the control of Gen. Q. A. Gillmore, and for a time after his death while under the control of Carter. It is, however, further contended that beginning with the contract of September 16, 1892, Carter changed the specifications and contracts so that three designs of mattresses were specified. These, it is claimed, varied greatly in cost to the contractor, and by the specifications of the engineer officer the option was reserved to use any one of the mattresses he thought proper. How he would exercise this option, it is contended, he withheld from all bidders save the persons indicted with him. By this device it is insisted that all others not a party to the scheme were obliged to make bids at a price sufficient to meet the cost of the most expensive mattress design. It is further contended that, since the alleged conspirators were informed that the engineer would use only the cheapest design, this gave to them the opportunity to underbid all competitors, and while such bid on their part would be a low price for the most expensive design, and therefore, when contrasted with the bids of those not in the secret, would secure the contract, it would be an exorbitant price for the cheapest mattress, which they had been informed would actually be used.

The contract of September 1, 1884, is illustrative of the form used by Gen. Gillmore, who was then in control. The contractor was John F. Gaynor. The contract calls for what is known as the "log and brush" mattress, and for stone with which to sink it. It is the first and one of the simplest forms. Since it is subsequently referred to more than once, it seems proper to describe it. After stating that the work "will consist essentially in building up said dam, wing dams, and training walls, with successive courses composed of log and brush mattresses, overlaid with riprap stone, and putting riprap stone alone upon the works wherever required," the following description of the mattress is given:

"The mattress is simply a raft of round logs, not less than 12 inches in average diameter, and not less than 9 inches in diameter at the small end, placed in close contact, side by side, at right angles to the line of the wall or dam, and firmly held by transverse binders spiked or bolted to them. The binders will be smaller logs or poles, not less than five inches in diameter at the small end, and placed not more than eight feet apart, and those on the outside will be close to the ends of the logs. The spaces between the binders will be closely filled up with compact bundles of brush, placed parallel to the logs of the mattress, to such depth as to give a thickness of not less than six inches when compacted in the finished work; secured in place by pole binders, in such manner as the engineer in charge shall approve. The logs and binders used may be of loblolly or other cheap variety of pine, and must be of gentle taper and sufficiently straight, and the brush will be live, hard-wood brush. Logs will not be used that do not fit close enough together to hold the stone safely, even without the aid of brush."

Bidders were "required to name a price per square yard for mattresses in the work." The contractor in this case was paid 47 cents per square yard.

The first contract in evidence providing for mattresses of two designs was made by Gen. Gillmore with Lara & Ross, September 27, 1884. One of these is the log and brush mattress described in the previous contract, except the layer of live wood brush, and is five inches instead of six inches. The second design of the Lara & Ross contract is thus described:

"This mattress will consist of a bottom grillage of poles, of an average diameter of at least six inches, and not less than five inches in diameter at the small end, placed from four to six feet apart between centers, both longitudinally and transversely, and the lower poles will be parallel to the line of the jetty. The spaces between the upper poles of this bottom grillage will be filled in with small poles. Upon this raft will be placed two layers of stout hard-wood brush, crossing each other at right angles, each course to be five inches thick in the finished jetty, to be followed by a top grillage constructed like the one placed at the bottom. The upper layer of brush will be placed at right angles to the line of the jetty. The poles of each grillage will be securely lashed together by suitable wire or rope lashings, and the upper and lower grillages will also be securely lashed together, in such manner as the engineer in charge shall approve, so as to form a strong and compact mattress, not less than 16 inches thick in the finished work, the thickness being estimated between the bottom poles of the upper and the top poles of the lower grillage."

The model of the pole mattress is known as "No. 4." In regard to both mattresses, it is stipulated that they "will not be accepted until properly placed in the work and secured there by a layer of stone." The contract price for putting in mattresses under this contract was 59 cents per square yard. It is true that with the mattresses under the Lara & Ross contract the defendants on trial had nothing to do. The designs are proven, however, for the reason that they indicate the character and price of mattresses as used before the changes permitted by Carter, which are alleged to result in mattresses fraudulent in construction and exorbitant in price.

Tracing the history as directed by the evidence of mattresses with two designs, we now find that this was provided for in the contract for work at Cumberland Sound made with Anson M. Bangs, October 29, 1886. The designs are the same as the two set forth in the Lara

& Ross specification. The bidder was required to name one price, and, if he received the contract, he had the option as to which design he would use. The price was 47 cents per square yard. This was also true with regard to the contract of W. T. Gaynor entered into January 16, 1889. This was made by Carter. The same two designs are provided for, the same one price, and the design to be used was at the contractor's option. There the price has reached the figure of 63 cents per square yard.

On November 5, 1890, it is shown by the evidence that John F. Gaynor secured the next contract in which two designs appear. They were identical with the specifications made by Gen. Gillmore in the Lara & Ross contract, except as to the quantity of brush in the first design. They were to be paid for at one price, and which would be put in the works depended on the bidder's option; that is, the contractor's option. The contract price was now 85 cents per square yard.

Carter, as it appears from the evidence, was now in full charge. In addition, however, to the two designs mentioned, it is stated in the specifications of this contract that proposals will be received for certain pile work for fascines, and for brush mattresses 15 feet wide, to be placed on the channel side of the training wall. The description is:

"This mattress shall consist of a top and bottom grillage of poles, bound with wire or rope, and filled between with a layer of brush fascines packed closely together. These mattresses must be sunk in proper place and weighted with stone."

Both the fascines and this type of mattress itself are to be paid for by the cubic yard. A separate bid was asked for fascines. The price was \$1.40 per cubic yard for fascines. These fascines had to be made into mattresses when used alongside the training wall.

Another contract in which two designs of mattresses were specified, was that of March 2, 1891, with John F. Gaynor. These designs were again put in at the contractor's option, and were again bid for at one price. The price was 96 cents per square yard. In the contract of May 4, 1891, again with John F. Gaynor, the same two designs were provided for. These were again to be used at the contractor's option. The price for each design was the same, and was now 99 cents. In addition to these two designs in the contract of May 4, 1891, a "brush mattress" was described, for which separate bids were asked. This could be used at the engineer's option. The price was 97 cents. This "brush mattress" for which separate bids were asked in this contract, as we shall presently see, was in the next and later contracts, substituted by Carter, for the second design, or "pole mattress," which had been used from the Lara & Ross contract made by Gen. Gillmore up to that time in all contracts where two designs of mattresses were called for.

The next contract of this general character is that of September 16, 1892, that is to say, about a year and four months after the last contract mentioned. It was made between Engineer Officer Carter and Edward H. Gaynor. This contract was made in the year after that in which it is alleged that the scheme to defraud described in the in-

dictment had been formed. In this contract, in the language of Maj. Gillette, there was a "radical change." Here for the first time three designs of mattresses were described, and for the first time this statement appears: "Any of the following designs for mattresses may be used at the option of the engineer officer in charge." Prices were required from bidders "separately for each of the following items: First, mattresses, per square yard; second, riprap stone per cubic yard."

It follows that separate bids were not required for the separate designs of mattresses, but the price offered must have been per square yard on each. It follows that there was but one price, and the general bidder could make no estimate of his probable outlay on the contract. The undisclosed option of the engineer to select that design which he should direct to be placed in the works effectually forbade that opportunity to the bidder.

An examination of the three mattress designs described in the specifications of the contract of September 16, 1892, will disclose the fact that the first design is in substance the same as the first design in all the contracts we have considered with John F. Gaynor, made by Gen. Gillmore on September 1, 1884, to the contract of September 16, 1892. This difference is, however, notable. In the Gillmore contracts, the layer of brush on the raft of logs was sometimes five inches and sometimes six inches in the finished work. In the four contracts preceding that under discussion, the evidence is that Carter required this layer to be only four inches. In this and all future mattresses of this design, Carter required the layer of brush in the first design mattresses to be six inches in the finished work.

At this stage of the work we find that the second Gillmore mattress design, to be bid for at the same price, and put in the work at the contractor's option, is abandoned by Carter. Now, in the contract of September 16, 1892, he adopts a second design of his own. This is the "brush mattress," as described in the contract of May 4, 1891, for which a separate bid was asked. Hereafter it will be known as the "second design mattress." Its description as it appears in the contract of September 16, 1892, the jury will remember. According to the testimony of Maj. Gillette, this mattress will cost about $37\frac{1}{2}$ cents less per square yard than the first design of log and brush mattress set out in the contract. Greene, however, testified that the cost of the mattress, as I understand his testimony, was about the same.

It is also material that the jury now clearly understand the description of the new third design mattress described in the contract under discussion, namely, that of September 16, 1892. It will be remembered that Maj. Gillette testifies that this design was the cheapest construction of the three. Indeed, he testified that it would cost from $37\frac{1}{2}$ to 50 per cent. less than the first design of the same contract. The description is as follows:

"This mattress will consist of a bottom grillage of poles of live saplings of pine or other timber of a kind approved by the engineer officer in charge. The poles must be straight, of a slight taper, of an average diameter of from four to five inches, and not less than three inches at the small end, and must

be placed from four to eight feet apart between centers, both longitudinally and transversely and spliced together with long scarf joints in a manner satisfactory to the engineer officer in charge. Upon this grillage will be placed a layer of closely compacted fascines surmounted by a top grillage similar in design to the one at the bottom. The poles of each grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillage will be securely fastened together by suitable wire or rope lashings, and the upper and lower grillages will also be securely fastened together in such manner as the engineer officer in charge may approve."

Elsewhere in this contract is given a description of the fascines to be used, and this I will read, for your consideration:

"All fascines will be made of live brush of cedar, water oak, myrtle, sweet gum, or any other variety of wood approved by the engineer officer in charge. The fascines will be from 60 to 100 feet in length, and must be compressed tightly by an approved form of choker, to a diameter of nine inches at intervals of two feet, where they must be bound firmly with wire or tarred rope of approved strength. The brush shall be as straight and well trimmed as can be obtained. The fascines shall be carefully and thoroughly made and handled with care."

It may be said that this specification affords a description of the fascine required in all of the contracts. It is true that there is some difference in length and other slight variations, but that is the type. This contract was awarded to Edward H. Gaynor. It involved \$170,000, and the price was \$1.05 per square yard of mattress. After this Carter let the contract of October 22, 1892, for improving the Savannah Harbor. That is called the "big contract" of 1892. The amount involved in jetty work was about \$2,110,869.46. The Atlantic Contracting Company was the successful bidder. He also let to Anson M. Bangs the contract of November 15, 1894, involving \$170,000, and for the contract of October 8, 1896, involving \$1,050,000 for the improvement of Savannah Harbor, the Atlantic Contracting Company was also the successful bidder. On the same day he let to the same company a contract involving \$2,350,000 for the improvement of Cumberland Sound. In all of these contracts it will appear that the same three designs are specified in substantially the same language, save, perhaps, as to the width of the mattresses and the length of the fascines. It also appears that in all of these great contracts the three designs of mattresses were bid for at one price, and the option was reserved to the engineer officer to use any design he might select. While carefully preserving this option, it is noteworthy that in all the great contracts just enumerated the engineer selected the third design. Nor should it be forgotten that in view of much of the evidence it is contended by the government that this is the cheapest design.

There are certain important considerations to which at this stage it seems my duty to invite the attention of the jury. There is absolute unanimity among the engineer witnesses both for the government and for the defense, that the log and brush mattress, that is to say, the first design of these contracts, is not the most effective on an ocean bar or in a silt-bearing stream. The reason given for this is that it is not so flexible as a fascine mattress, and therefore does not adhere so closely to the bottom, that it is heavier, and there is greater sub-

sidence, nor does it so successfully catch the sand on an ocean bar or the silt of a tidal stream or interior river. Practically all of the engineer officers whose opinion was asked testified that, of the constructions for which specifications were made, it was the most costly. Gillette, as we have seen, says that it cost from 75 to 100 per cent. more than the third design. It is true that Mr. Nicholas, who made mattresses and fascines under several of the contractors, testified that he never saw any difference to speak of in the cost of log mattresses and brush mattresses; that the actual labor in making each averaged from 16 to 21 cents per square yard; that this was in addition to the cost of the logs and brush. Col. Quinn was asked if there was any material difference in the cost of designs Nos. 1, 2, and 3. He replied:

"Well, I couldn't say that. Of course there may be some slight difference. I should think a mat that contains more material would necessarily cost more than the lighter material, but the material is so little in price that the labor involved is of more importance, probably, than the quantity of material."

If the jury should find that the weight of the testimony is to this effect, and if their practical experience and the examination of the several models of mattress designs should corroborate the testimony of the engineer officers who spoke on this subject, and lead them to the conclusion that the first design was most expensive to the contractor, they may inquire, "Why was it," since Carter did not use it after about 1890, and since very few were used by him before that time, that this costly design was always inserted in the specifications, as one to which his express, but undisclosed option might extend? Was it with unlawful intent to prevent competition by calling on all possible contractors to bid in the dark at one price for the construction of either of three designs largely varying in cost to them? Were the defendants, as a part of this scheme, informed of his purpose to require bids for a costly design and to use a cheaper design? Did he intend in this way to deter uninformed bidders, and to control the contracts for the defendants and enable them to secure for the cheapest design, a price equal to the cost of that design which was the most expensive? These are questions for the jury, and must be determined from the evidence.

Was this conduct of the engineer officer done purposely to defraud the government, and for the illegal profits of the defendant on trial, and himself?

In this connection it is proper to charge you that if you find this conduct, charged by the government, to have been done by its engineer officer, was in fact done, it must be done with the guilty intent charged, and the proof must show this to the degree of satisfaction heretofore defined as requisite, before the jury will be justified in concluding that he is guilty, as charged. It is, besides, true that before the defendants on trial, or either of them, can be convicted, the proof must show likewise to the satisfaction of the jury, and to the degree heretofore defined, that they participated in the guilty purpose of the engineer officer. To determine the question of guilty intent and guilty participation involved, the jury must bear in mind the general rules I have given and all the evidence submitted for their consideration.

A convenient method of inquiry for the jury may be to inquire, in the first instance, whether the alleged fraudulent scheme or device described in the indictment, and illustrated by the evidence, as far as we have considered it, is one by which the government could be defrauded, and the alleged co-conspirators, including the defendants on trial, could be profited.

Much has been said about all of this work having been done within the appropriation, but, if the fraud and conspiracy was in fact present, as charged, the contention that no money was expended save that appropriated by Congress is no defense whatever to the charges made. The money, as we have seen, could not be taken from the treasury save by an appropriation. It is none the less the money of the people after it has been thus appropriated. The title to every dollar is in the government of the United States, which is but another name for the people of the United States. The act of appropriation imparts no share of that title to the contractors, until their work is honestly done in accordance with the specifications of their contracts. These funds are appropriated, not only for effective work, but for work reasonably permanent. Nor is it contemplated by Congress that all the money appropriated for particular work should be expended on that work, provided by honest methods it was competent to have the work done for a cost less than the sum total of the appropriation. The balance, after the work is properly done, is the people's money. Every individual who buys a suit of clothes, a pair of shoes, a blanket, an axe, a saw, a trace chain, a roll of barbed wire, a ball of binding twine, or any of the innumerable manufactured articles of civilized man, in the import tax or duty thereon, pays his share of the sums appropriated by Congress from the treasury of the United States. Should he purchase an alcoholic stimulant, he pays perhaps a greater share. If not collected in this way, the only other alternative would be by direct taxation. The loss of the government, then, is the loss of the people. These propositions are too obvious for elaboration.

In what manner, then, could the government lose by reason of the device charged, if the proof shows it to be true? It is the amount which is actually paid to the contractors through the alleged connivance of the engineer officer above that which would have been paid if the bidders had been given an opportunity to bid on the third design mattress. To determine the saving which might have been made on this ground alone, you should look to the testimony of witnesses as to the relative cost. Take the figures of Maj. Gillette, and the practically equivalent figures of other engineer officers and others as developed for the government. If a given number of square yards of the third, or cheapest, design mattress, after competition, cost the government \$1,000, the same number of square yards of the first design, according to Gillette, would cost the government \$1,750 to \$2,000, if the first design is 75 or 100 per cent. more costly than the third. If by the device described bidders were forced to make bids calculated on the necessity of furnishing the most expensive design, while the government actually received mattresses of the cheapest design, the loss to the government, by want of competition between the bidders

for the third design, would be the difference between the cost of the third design and the cost of the first design.

Let us suppose, then, that the government has appropriated a million dollars for the erection of a training wall in the Savannah river. Its engineer officer is its representative, not only to make a project of the improvement, but a project of the expenditure. His is a fiduciary position. His trust is as sacred as that of any other trustee—more sacred, perhaps, in that he has been selected from the people, educated, trained, and sworn for that precise duty. The honesty of the man, the stainless honor of the soldier, and the rare skill of the engineer in the performance of his duty, are the government's and the people's right. If, then, in the construction of this work by such a device as that described, by making specifications which would call for the expenditure of a million dollars, if the most costly design of mattress was used, and at the same time the engineer officer inserts in the specifications a design which he may use at his undisclosed option, if the mattress costs in the aggregate only \$500,000, the loss to the government is not only the inferiority and instability in construction of the work, but the difference between \$500,000 and \$1,000,000, which is \$500,000. In addition to this, suppose the third design is better adapted for its purpose than the first design. The loss to the government by compelling all bidders to offer prices equivalent to the value of the first design would have precisely the same effect to the government, for in this case the government would pay \$500,000 for the very same work and construction that it paid \$1,000,000 for in the other case.

To illustrate it in another way: Suppose the government wishes to erect a public building like that in which we are now convened, and calls for bids separately, for a structure of marble and one of brick. Let us suppose that the brick building is more substantial and valuable for the purposes of the government. The lowest bid for the marble is \$100,000, and the lowest bid for the brick building is \$50,000. The government can then select which building it will erect. If it erects the brick building, it gets the best building for \$50,000. Suppose, however, bidders are asked to bid at the same price on the two buildings; the representative of the government reserving the option to select, after the bids are received, which it will erect. Bidders may know that the brick building is the better, but they also know that the marble may be selected, and therefore make a bid based on the cost of constructing the marble building, that is, \$100,000. If, after the bids are received, the engineer decides to use the brick building, the contractors received \$100,000 for the same building they would have been glad to build for \$50,000, if allowed to bid separately.

In addition to the claim of injury to the government, resulting from the alleged device to defeat competition just disclosed, it is contended that by the substitution of the structure known as the "multiple mattress," or "multiple mat," for mattresses of the third design, a sum unlawfully and illegitimately great was secured from the government, and that this was divided between Greene, Gaynor, and Carter. It

is insisted that this multiple "mat" was of much cheaper construction than the third design before described, that it was wholly different from the specifications of the third design, upon which proposals were asked and bids let, that bidders had no opportunity to furnish such a structure.

Mr. Marshal, will you separate those models of fascines and mattresses there so that the jury can look at them as I go along?

The contention is that this was done, not only to secure contracts to Greene and Gaynor, but to secure for them and for Carter a large and unlawful profit.

Is this contention true? Let us first look to the contract of October 8, 1896, for Cumberland Sound. Here the contractor was the Atlantic Contracting Company. Here, also, is the stereotyped description of the three designs described in all the contracts since and including that of September 16, 1892. Here, also, was the stipulation that they were to be bid for at the same price, and to be used at the engineer's option. It is expressly stipulated that, at the option of the engineer officer in charge, the first design, the second design, and the third design may be used. The third design is prescribed in the precise language used for that design in the contract of September 16, 1892, which has just been read to the jury. Nothing whatever has been said in the specifications or the accompanying text of the contract with reference to the multiple mat, and the term "multiple mat" appears in none of the contracts which are in evidence. In the contract of October 8, 1896, and in all the contracts since January 16, 1892, there are certain general provisions which the jury will bear in mind descriptive of the mattresses and descriptive of the fascines. It appears from the testimony of Maj. Rees, who was sworn as a witness for the defense, that he was Carter's assistant from 1889 till the Spring of 1893. At first, he states, single mattresses were placed in the work and sunk with a load of stone, but in April, 1893, the use of multiple mattresses of about three courses began. The jury may be justified in inquiring if this was not the continuous mat described by Cooper, the assistant engineer who was sworn for the government. The latter testified that, when he returned to the district in August, 1893, work was going on under the 1892 contract for improving Savannah Harbor, and that the contractors were putting in the third design, to quote his language: "Three at a time in the form of continuous mats, tipping them off of the end of a lighter."

It was Greene, or some other witness, I am not sure which, who testified that the multiple mat was the result of an evolution, and Cooper states that, after the storm of 1893 had destroyed the plant of the contractors in the Savannah Harbor, they then built mattresses in "an entirely different manner." From and after the latter part of September mats were built on barges, and it appears that this construction was used in all the jetty contracts after that time. This also appears from the reports in the engineer's office, and from the payments made thereon. There is evidence to the effect that the multiple mats were not always uniform. Cooper testified that they varied greatly through the contract of 1892. Some of them, he said, had more poles

than others, some less, but the general average was to have a complete grillage on the bottom and then on top of the mattress. "On the top of the bottom grillage you would have a layer of bundles of brush. These bundles were in nearly all cases about 15 or 16 feet long, and, when the mats were longer than that, they would be placed end to end to make a tier across the mats." That is true of the contracts at Savannah in 1892 and 1896. As stated by this witness, his duties were performed on the Savannah contracts. A fuller description, as appears from the evidence, is, first, that there was a full grillage of poles such as that described for the third design, then a layer of bundles of brush or fascines, then a half grillage or one layer of poles, then another layer of bundles of brush or fascines, then another half grillage or one layer of poles, and so forth, until the top is reached, when there is a full grillage of poles, as in the third design. The several grillages and half grillages, of course, are wired or lashed together. In this way a multiple mat of several courses was built on a barge. This was towed to the works and slid off into the water. Stone from an adjacent barge was then thrown on top of the top course until the whole mattress was sunk. Sometimes there was what is known as a "step"; that is, several of the bottom courses were wider than the courses on top. Wherever this step occurred, it seems there was always placed a full grillage of poles.

It is further in evidence that each course of the multiple mattress was treated by Carter as a complete third design mattress and paid for by the square yard as such. This is not disputed or denied by the evidence. For instance, a multiple mat of eight mattresses of the third design, like that next to Mr. Reporter. The fact last stated, in connection with other evidence, is of first importance in the determination of the issues framed upon those indictments, if the jury find it to be true. Reference to the description of the third design mattress, specifications of which were to inform all bidders before their contracts were made, and to guide them thereafter, disclose a very different structure from this multiple mat, the use of which it is not disputed the engineer officer permitted.

Wherever clear and unambiguous, these contracts in writing or printing are matters for the construction of the court. If uncertain or ambiguous, proof may be offered to explain the ambiguity, and then the question falls within the province of the jury. No ambiguity has been pointed out, and none exists in these specifications. There is no contention on the part of the defendants that any ambiguity exists. It is true that evidence has been offered to the effect that these specifications permit the use of the multiple mats as described in the evidence; but, in view of the plain, explicit, and determinate character of the contract, the court is obliged to instruct you that, however sincere such witnesses may be, such evidence cannot be accepted by the jury to vary, change, or alter the terms of the written contract.

It is, moreover, true that even if it were true that the multiple mat was permissible under these specifications, if Carter continuously advertised for bids, specifying three other designs, one of which was of higher cost than the multiple mat, and did not mention the multiple

mat in his specifications, yet always, under the alleged fraudulent scheme described in the indictments, while publicly claiming his option to use the third design, actually used the cheaper structure for the benefit of particular contractors with whom he had an unlawful and corrupt agreement to make an illegitimate profit out of the government, it would make no difference so far as such joint action was concerned whether or not these witnesses were right in their view that it was permissible to use the multiple mat in lieu of the third design.

While it is true, and while you are bound to accept the instruction of the court as a matter of law that the multiple mat was not a compliance with the third design of the specifications, you are, however, at entire liberty to consider evidence on this subject to determine whether or not Carter and the defendants on trial in adopting the multiple mat acted with guilty intent as charged, and with the intention of diverting the funds with which he was intrusted to their joint personal gain. The presence or absence of guilty intent is the supreme test, the pivot upon which this case will turn.

Did Carter, then, without gain to himself, and not in collusion with the contractor, in good faith believe that he had the right to put in the multiple mat, that it was beneficial to the government, he could have done so without criminality on his part, although his construction of the contract and his estimate of the result might both have been erroneous, provided this was done without gain to himself or collusion or connivance to increase the gains of the contractors. So, too, a contractor without collusion might have consented to use the multiple mat under Carter's direction without criminality on his part. The crucial question, then, is in the use of the multiple mattress, not in name nor in fact described in the specifications—did Carter and the defendants on trial act without guilty intent, or were they prompted by the criminal purpose, and were they guilty of the criminal conduct with which they are charged?

At this point, gentlemen, apologizing to you for my somewhat lengthy observations, we will take a recess till half past 8 o'clock to-night.

Continuing after recess, the court further charged:

When we took a recess this afternoon, gentlemen, we had just discussed the necessity of proof of guilty intent on the part of the accused to support the charges of the indictment.

Of course, it is obvious to you that your determination of this vital matter cannot depend, alone, on any mere question of engineering, on any such matter as a departure from specifications. To determine it, you must look to the entire case. Contemplating the whole record, if you then find, on review of all the evidence, and particularly that evidence which relates to the enormous gains of the contractors, as conceded by the testimony of Greene himself, a profit so greatly above his expectations, according to his own testimony, that he was enabled to give to the father-in-law of the engineer, to secure his influence, or to borrow other money from him, nearly a half million dollars, and the other evidence which relates to the alleged division of these profits

between the defendants on trial and the engineer officer, that, in a word, the engineer officer was bought for a price, then every departure from correct engineering which the evidence may have proven, resulting in increased cost to the government, in inferiority of construction, in the use of cheaper material at a greater price, in the reduction of the quantity of stone to be used, in the construction of lengthy and unnecessary jetties of brush mattresses in localities where it was inevitable that it would be destroyed by the teredo, in the reduction of advertisements, in the suppression of opportunities for general bidding, in close intimacy between the alleged conspirators, all becomes of increasing importance. It is, however, true that you should by no means lose sight of the testimony relating to the engineering features of the work which you have heard. It is a part of the proof upon which the presence or absence of guilty intent is to be found. The clear language of the specifications provides that each mattress shall be constructed according to the design stated, carried to the work, and sunk singly with its complement of stone. It also provides that the mattress shall not be accepted and paid for until it is so sunken. From an examination of the third design mattress, is it not apparent, as a matter of fact, that the multiple mat described is a wide departure from its specifications? The third design has for its bottom a full grillage of poles, then a layer of closely compacted fascines, then on top another full grillage of poles, all, of course, wired or lashed together. If it was necessary to put in any number of these mattresses at any locality, with equal explicitness the specifications provide that they must be carried out and sunk separately, and on top of each mattress a layer of stone must be placed. It follows that the complete structure would contain, first, a full grillage of poles; then a layer of closely compacted fascines, then another full grillage of poles, a layer of stone, then another full grillage of poles, another layer of fascines and a top grillage of poles, with another layer of stone, another full grillage of poles, and so forth, until the number of mattresses required had been sunk. This is one picture. Now, let us look at the other. A multiple mattress of eight courses is built on a barge, and the whole structure is carried to the works, sunk at one time with stone thrown on top of the last course. Could Carter, Greene, or Gaynor doubt, as a matter of fact, that these structures, models of which are before you, were wholly different in character and construction? Besides, according to the evidence, there is only one layer of poles between the courses of this mat. About three-fourths of the poles required in eight mattresses of the third design sunk separately are left out of the multiple mat.

Now, to contend that this structure is better engineering, and more beneficial to the government, is utterly untenable, in view of the specifications and the contract, except in so far as it may, if the proof justifies it, illustrate the presence of good faith on the part of the defendants, and therefore the absence of guilty intent.

According to the testimony of Greene himself, by the use of this multiple mat, a sum in the neighborhood of more than \$500,000 was earned as profit. While it is true that Greene contends that he might have made the same amount of money by the use of the single mats

that he did by the use of the multiple mats, certain it is that he testified that he made far more than he had contemplated, and from his testimony it can readily be estimated that the gains of the Atlantic Contracting Company, all of whose stock was held by Greene and Gaynor except a few shares, were in the neighborhood of \$1,500,000 profit. This testimony, of course, relates to what is termed "the big contract" of 1892, for the improvement of the river and harbor at Savannah. As the profits, according to Greene's testimony, speaking in round numbers, were \$1,500,000, and the gross sum actually paid the contractors under the October 22, 1892, contract, as appears from an exhibit in evidence, was \$2,110,869.35, the percentage of profit on this contract was over 240 per cent. The amount paid the contractors is made up of the following principal items:

Square yards, mats 95 cents.....	\$1,295,393 74
Cubic yards fascines	332,899 26
	<hr/>
	\$1,628,393 00
Stone	376,904 60
Piles, timber, etc.,	105,571 93
	<hr/>
	\$2,110,869 53

The jury will be justified in inquiring if the greater proportion of profit was not made out of the brush mats and fascines rather than out of the stone, timber, piling, etc. These figures of the governmental expenditure are not questioned. They are taken from the files of the engineer office, and no attack has been made upon them.

The statement of profit in close approximation is the testimony of Greene himself. It is to be observed that he testified that he expected to make only \$300,000 or \$400,000. This, of course, was when he entered into the contract. At that time the multiple mats were not in use. This was in October, 1892, and not until September, 1893, were they adopted. If the testimony of the assistant engineer, Cooper, is accepted by the jury—and the court does not recall any material contradiction of it—he did not return to his work here until August, 1893. The multiple mat had not been used before his departure, and he testified that after his return nine-tenths of such mats were put in under his supervision. It is true, however, that at the time the contract was let the specifications stated that approximately only 350,000 square yards of mattress would be used. Greene testified that the increased profit was due to the increased amount of brush mattresses put in.

It is true Cooper, on cross-examination, testified that the multiple mats were of great advantage, that they enabled the work to be carried on with rapidity, and there was consequently less danger from storms and scour in front of the dam. Other witnesses testified that, in their opinion, from an engineering standpoint, the multiple mattress was well adapted for the purpose of constructing dams and jetties in sheltered water. This, however, is entirely aside from the real issue in this case, provided the corrupt design to defraud the government is shown as charged. In this connection the jury should determine, if they find the fraudulent scheme which is charged in the indictment, it makes no difference whether the profits of the co-conspirators re-

sulted from a change in the character of the mattress, or of the material used, or from the fact that the engineer officer permitted a far greater proportion of mattress to be used than had been intended when the bidding was made, and when the contracts were secured. Nor does it matter, in the presence of such a scheme, whether the profits came from one cause or the other, or from both causes combined.

At this point the jury should inquire to whom belonged the increment of value in the immense profits which Greene testified that he and his associates made. If, indeed, they were legitimate profits, why, obviously, as stated, to the government, and that is to say, to the people of the United States.

By a provision most specific in the contract itself, the government had attempted to guard its rights. Several times in the course of the argument counsel have let fall the expression that the government ought to be able to take care of itself. That is true. A government of the people, by the people, and for the people, ought to be able to take care of the rights and values secured by the Constitution and laws to the people. In the effort to take care of itself in all such cases, the government, through the representatives of the people, has enacted the statutes under which these indictments were brought. May it not be true that this case and this trial is an attempt on the part of the government to take care of itself? It attempted to take care of itself when the contracts were framed. There are two provisions of the contract by which the government sought to take care of itself. The first is this:

"The United States reserves the right to make such alterations in the details of construction, or in material, as may be deemed best during the progress of the work, providing that, should such alterations materially vary the cost of the mattress, the price to be paid shall be increased or diminished proportionally; such change of price being agreed upon before the alterations in the mattress are made."

This is in the specifications, which are a part of the contract. In the contract itself the government seeks to take care of itself by the following provision:

"If at any time during the prosecution of the work it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War; provided, that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred."

The argument, in effect, is that, if the government has been "taken in," why it may as well pay the bill and charge the result to the profit and loss account of the people; to take no means to redress their wrong, and by the processes of law to prevent its recurrence. This is to ignore the principles of criminal jurisprudence as administered by civilized people.

But if the jury is satisfied from the evidence that, after carefully guarding its rights in the phraseology of its contract, the government placed its agent here in the person of an army officer of the United States to see to it that the work was executed according to these contractual provisions by which it had attempted to take care of itself, that the agent was induced to betray his trust, and then a radical change is made either in the details of construction or in material, or in the character of the project itself, by which the contractors with the knowledge of the government's agent, and through fraudulent connivance with him, are permitted to make a profit of 240 per cent. at the expense of the people, then it is the duty of the jury also to determine if the government is not taking proper measures "to take care of itself" through the indictment and prosecution which it has brought. Whether its cause is righteous and its accusations are justified by the proof, the jury will determine in accordance with those general rules for the government of such trials which the court has already given in charge.

The court, however, is careful to again remind the jury that guilty intent on the part of the accused is an essential ingredient of the crime here charged. No amount of profit, however great, no departure from contractual or engineering specifications, however marked, will justify a verdict of guilty, unless the jury are satisfied to the degree required by law that the accused intended in the progress of their relations the corrupt and fraudulent scheme and conspiracy charged.

What, then, was the purpose of the engineer officer in calling for bids for the third design mattress? What was his motive in allowing the contractors to put in a structure which was not permissible under the specifications of the third design, or which, if he believed it to be permissible, was radically different, and, according to much of the evidence, much cheaper than the third design, as described in the specifications. The jury will also inquire if it was not much cheaper, or if the engineer did not permit an excessive amount of this construction to be used, when compared with the amount estimated in the contract the defendants made with him—whence was the source of their stupendous profits?

But the jury should bear in mind that, according to all the proof, they are dealing with men of a high order of intelligence. John F. Gaynor, it may be gathered from the evidence, was a contractor of long experience; also, according to Greene's letters, inferentially at least, a man of strong personal influence; according to the statement of his leading counsel, in his opening argument, a man of wit. According to Greene, Gaynor had traveled extensively. Throughout the examination he was termed "Colonel" Gaynor. Carter was, and Greene had been, engineer officers of distinction. Of Carter, Gillette testified he believed him to be a brilliant and attractive man, and an ornament to the engineer corps. The jury will consider the important fiduciary trust given him by the government. The engineer officer in charge of the improvements of our great and important state. Greene, himself, is a graduate of West Point, fourth in his class; was intrusted while in the service with work similar to that of Carter's,

and since then had large experience in engineering problems relating to such contracts as those described in the evidence. These men, as testified in effect by Col. Marshall, as I recall it, had enjoyed the opportunities of an education of the mind equal to that accorded to George F. Meade or Robert E. Lee.

The jury may therefore, if they think proper, conclude that these men knew what they were about. If the multiple mattress was cheaper to the contractor than the third design, if large sums could be saved by its use, the jury may, if they think proper, conclude from the evidence that the three defendants knew the fact. If the jury then conclude that it was used with knowledge on the part of these men that large profits were to result from its use, was this done solely for the benefit of the contractors, or did Carter, in obedience to his duty, report the change in construction and material, so that the government might share in the benefit? This is an important inquiry. It is also to be recalled that the third design was to be paid for by the square yard. Its description was so plainly set out in the contract that when a mattress was examined by the inspector, if it came up to the specifications, all he had to do was to measure the top surface.

How was it with the multiple mat? According to the testimony of Cooper, Carter prepared a table of heights, and the height of the mat determined how many theoretical third design mattresses composed it. This witness stated that the measurement was taken with a pole, with the feet and tenths marked on it, and the bottom of the pole placed to the bottom of the lower grillage pole, and the height measured up to the top of the top grillage pole, and then the reading would be on the pole in feet and tenths. According to this table, a one-course mat was to have a height of 2 feet; a two-course mat of $3\frac{1}{2}$ feet; a three-course mat, 5 feet; a four-course mat, 6 feet; a five-course mat, $7\frac{1}{2}$ feet; a six-course mat, 9 feet; a seven-course mat, 10 feet; and an eight-course mat, 12 feet. That is to say, a multiple mat, 12 feet high, would be paid for as eight complete third design mattresses, and the yardage calculated on the surface of each of the eight courses.

The witness Cooper, as stated, testified that he saw nine-tenths of the work put in under the 1892 "big contract," and that, shortly after the contract closed, he made an accurate estimate of the cost to the contractor of a square yard of mattress used in that contract, and that his estimate was 9 cents. For this the government was paying 95 cents. To illustrate: The mattress sunk July 13, 1894, No. 104, ten courses, total square yards counting each course as a mattress of the third design, had a total yardage of 4,122.22. The contract price paid by the government, calculated on the square yardage, was \$3,916.11, and according to Cooper's estimate the cost to the contractor was \$371. If this testimony is satisfactory to the jury, it will not be difficult for them to estimate how profits to the contractors would rapidly accumulate. Now, if this was permitted through the unlawful connivance charged of the engineer officer with the contractors, and if the jury are satisfied that the mat described was fairly typical of others which were constructed and paid for in substantially the same way, it might go far in the opinion of the jury to support the general tenor of the charge made in the indictment.

The jury will also inquire, if competitors had been given an opportunity for putting in multiple mats, would these particular contractors have enjoyed the uninterrupted opportunity of making such large profits? and would not competition for the opportunity to put in such mats have reduced the cost to the government?

The jury, in this connection, may also consider that in no specification made, or advertisement sent out, were bidders and contractors informed in any manner that multiple mats would be used. Is it not true that the engineer officer should have advised bidders that multiple mats might be used? or ought he not to have given them an opportunity to make a separate bid on such mats?

It is true that several engineer officers and civil engineers testified for the defense that the multiple mat was the best for the purposes of the work, except on ocean bars or in salt water; but I do not recall that any of these officers testified that they used the multiple mat and paid for each course by the square yard as though it was a separate mattress.

The jury will remember if some of them did not testify that it was paid for by the cubic yard, as for fascines; that is to say, for the actual brush material in it.

To sum up on this general subject, you are instructed that the reservations in the contract in behalf of the United States cannot be taken advantage of by the engineer officer to enable him to allow the contractors to substitute, for a designated mattress, a structure widely different in form and construction, in compactness, in material, and in cost. In this sense the engineer officer is not to be regarded as the United States. He is an officer of the United States with his duties clearly marked out. The contract indicates how such important changes shall be made, and how changes of projects shall be approved. These provisions are confirmed by the general law on the subject, and the regulations of the War Department. If, then, the engineer officer shall violate the terms and reservations of the contract and the reservations of the department, he would be amenable as a military officer for such conduct. If he did this in joint and corrupt combination and conspiracy with others, with intention to defraud the United States, he, like, any other citizen, would be indictable with his co-conspirators, and protection could be claimed for none of them, because of stipulations in the contract in behalf of the United States which the engineer officer had thus abused and disregarded.

The government also contends that not only did Carter allow the use of the multiple mat, but that the construction of these mats was cheap and inferior. This is denied on the part of the defense. There is much evidence submitted on both sides of this issue. Maj. Gillette gave testimony in detail as to the insufficiency of mattresses he saw on the barge anchored opposite the engineer office at Fernandina. He stated that the only complete grillage on this mattress was the grillage at the bottom and the grillage on top. "It was loose brush," he said, "I stepped on it and went down into it." He said he did not notice that the brush was put in in bundles or layers until the assistant engineer spoke of it as an eight-course mattress. He further states, when it was put into the water it did not have much flotation, a large percentage of

it was leaves, they threw rocks onto the mattress, and they went out of sight. The official reports of the yardage of that mattress reached the engineer's office. They appear on the tri-monthly report dated August 1, 1897, date July 29, 1896, Range No. 3, North Jetty, courses 9 to 16. This would indicate an eight-course mattress placed upon another eight-course mattress. Four courses of this mattress had a width of 70 feet, and four courses of 81 feet. A second mattress was brought in after Maj. Gillette's first visit, which Maj. Gillette gave the assistant engineer orders to hold, stating, "I wished to see what proportion of material was in these mattresses, as compared with what there would be if constructed under the same system, properly choked and a full supply of poles," that is, under the multiple system. The mattress next brought in was held by the inspector, and Mr. Gillette stated that it was a great deal better than the first: "I should think there was twice the material in it that there was in the first one." He said: "It was constructed more systematically. You could see it was made of bundles of brush. They were much better choked." He then caused an experimental mattress to be constructed for comparison. This had four courses, and had twice as much material as the second mattress brought in by the contractor, and that had twice as much material as the first he saw.

There is other evidence to the same effect. On the other hand, the defense has offered the testimony of a mattress maker, several foremen of brush camps and other witnesses, who testify that they were familiar with the construction of fascines and mattresses, and that they were properly constructed. They, of course, referred to the construction of the multiple mat. There is also evidence introduced in the shape of the reports of engineers, giving measurements of multiple mats upon which payment was based. The jury will recall that, by the table of heights prepared by Carter, an eight-course mat was to be 12 feet high in order to be paid for as eight third design mattresses. From the evidence submitted by the government, it appears that many mattresses, although recorded and paid for as a mat of a certain number of courses, did not come up to the height indicated by Carter as necessary to entitle the contractors to payment. For instance, Exhibit 369, mattress No. 20, sunk June 26th, eight courses; height measured on the barge nine feet. An eight-course mat according to the table of heights was to be 12 feet. In this eight-course mat, with one step, according to the evidence there would be counted the diameter of 12 grillage poles, $4\frac{1}{2}$ inches each, 54 inches; this leaves 54 inches for fascines, making each of the eight courses $6\frac{3}{4}$ inches.

Now, under the contract, all fascines were to be tightly choked to a diameter of nine inches. The jury should inquire if the fascines were properly made and choked. They may also inquire if Carter required the contractors to put in mattresses of the height he designated.

Referring to the same mattress, it appears from another exhibit in evidence showing the soundings before and after mattresses are sunk, loaded with stone, that this mattress after sinking was only six feet high, or a decrease of one-third. Deducting from the height of the mat, namely 72 inches, the height of the 12 poles, or 54 inches, it will

be seen that the thickness of the fascines or bundles of brush between the layers of poles will average $2\frac{1}{2}$ inches. The jury will bear in mind that this measurement is taken at the poles of the grillage, and would show the thickness of the fascines or brush bundles at that point. In the spaces between the poles, as the elasticity of the brush will cause some expansion, of course the thickness of the brush material would naturally be greater.

Referring to the same exhibit showing dimensions of mattresses used in Cumberland Sound contract of 1896, it appears that on June 28th the eight-course mattress is 9.4 feet high, instead of 12 feet. Another, June 30th, eight courses, height 8.9, instead of 12 feet. July 1st, eight-course mat, 8.8 feet, instead of twelve.

There is proof to the effect that during the months of May and June, 1897, thirty-eight eight-course mats were sunk in the Cumberland Sound, and, although according to the table of heights prepared by Carter, an eight-course mat should be 12 feet high in order to be paid for as eight third design mattresses, only one was as high as 11 feet, and the great majority were from 8 to 10 feet in height. These, as stated, were permitted to go in the work and be paid for as eight third design mattresses. Subsequently to this period, it was determined to superimpose stone jetties on the lines of Carter's jetties in Cumberland Sound. From the testimony of Gillette and others, the jury, if they think proper, can infer that but a portion of the Greene and Gaynor construction remained. How much, it may be difficult to determine. There is a conflict in the testimony upon this subject. Wisner and Ripley made their observations of these works and took their measurements in December, 1897, and January, 1898. This was done to obtain evidence to be used in behalf of Carter before the court-martial. You will recall the testimony of these witnesses as brought out in the direct and also the cross-examination. They measured cross-sections as they stated, and in some places stated that they found substantial portions of the jetties remaining. Sometimes they got off the jetties altogether. It is to be observed that their measurements were taken shortly after the work was stopped, possibly before the operation of the teredo had become destructive. It may be that a large part of this structure had disappeared through the constant action of the teredo. The jury will determine this possibility.

Other evidence discloses that much of the jetties had been washed away. One witness for the defense testifies that he found a complete mat quite a distance from the work, but it was his opinion that this was lost from a barge. This he said had come through the breakers on the Florida coast, and according to his statement was yet intact. The teredo doubtless was the most dangerous enemy to this structure. This form of marine life which is so destructive to wood in salt water is so fully set forth by the evidence and so clearly understood by the jury that it probably requires no further elucidation. Carter himself, in a letter to Gen. Craighill, dated May 22, 1888, which is in evidence, stated:

"In certain instances I think a small amount of log and brush mattress work properly constructed can be used as far up as the sand will flow, and

I have a small amount of this in my Savannah project, more as a basis of expense than as recommending its use, as I do not think it should be used at all when it can be helped, and in some localities, not under any circumstances. At Fernandina it cannot be safely used above the foundation course."

This is the language of Carter. In the foundation course it would be covered by the sand and protected from its enemy. Major Gillette testified, "In wood which is in sea water in this locality, the wood is very promptly honeycombed by a jellylike worm known as the teredo; destroys it very rapidly." The evidence is full upon this subject, and there seems nothing contradictory about the teredo and his mischievous operations.

As to the amount of the Cumberland Sound brush jetties which survived the onslaught of the ocean storms and the attack of the teredo, the jury may consider the testimony of the engineer officers for the government and for the defense. Bacon testified that in 1898, when he surveyed it, very little mattress work could be seen, and what was in evidence was very rotten. Where the water was deep its condition could not be so readily ascertained, but from the soundings taken it indicated that there was very little jetty there, especially at the end. What he found was rock, presumably used for sinking the multiple mats.

Of the south jetty, according to the same witness, for a distance of 7,000 or 8,000 feet from shore, it was in very good condition. Beyond that for 2,000 or 3,000 feet there was evidence of a jetty being there. But beginning at a point about 10,000 feet from the shore and out to a distance of 13,000 feet from shore there was no evidence of jetty at all. He testified that the teredo would destroy every part of loose brush material that had any heart in it in the course of a few months in the Summertime.

Gillette on this general subject testified that the project for improvements at Cumberland Sound, which ripened into the contract of 1896, provided for a foundation and apron course of brush mattresses 100 feet in width and laid with riprap stone. "Riprap," according to the Encyclopedia Americana, recently published by the Scientific American, "is a common name applied to broken stone used for beds, walls and foundations in building and construction." Riprap was to be used to sink the foundation mattresses. The jetty section which was provided should be based on this brush mattress with the stone hearting of small stone, covered with heavier stone. In going seaward the heavier stone should increase in weight from 1,000 pounds to five tons. Gillette testifies that Carter's project provides distinctly for a rock jetty with mattress foundation, and he also testifies that the jetty as far as it was constructed was a brush jetty.

In this connection you will recall the testimony of Greene to the effect that it was to be a stone jetty, and after a while he intended to put stone on it. In the same connection you should consider the evidence to the effect that while the contract was made in 1896, and while the work stopped in July, 1897, the amount of brush mattress which had been used, on a part of the work only, was more than twice as much as had been estimated by Carter for the entire contract.

It is also in evidence that, instead of putting in the foundation course and aprons provided for by the project, the contractors along the line of jetty had been permitted to put in multiple mats, each of many courses. Indeed, at the time Gillette visited the works he testified that they were placing on top of the first layer of mats other mats, thus bringing up the height in places to as much as 16 courses, or the height of two eight-course mats, which, if constructed according to Carter's table for measurement, would have been 24 feet.

It was contemplated by the original project and afterwards stipulated that the cost of the mattress to be used as the foundation on which the stone was to be superimposed should be estimated by the square yard of its surface. It appears from this testimony to which I have just adverted, if accepted by the jury, that the contractors were paid by Carter by the square yard of each course of the bottom and of the superimposed courses. In other words, where there were 16 courses, they were paid for by all the square yards of surface calculated on each of 16 third design mattresses, provided 16 such mattresses had been used in the work. If this is true, and it is record evidence, and, so far as I recall the testimony, is not contradicted in any manner, it is not difficult to ascertain why it was that prodigious profits were made by the contractors.

The jury should not ignore the fact that Carter was a skillful engineer; that he had disclosed his knowledge of the effect of the teredo; that the work in Cumberland Sound was in salt water, and in waters which, according to the testimony of at least one of the witnesses, were rife with the operations of this destructive enemy of submerged work. When the specifications called only for a foundation of brush mattress, what was the necessity of piling up course after course of brush mattresses on jetties, some of them paid for as if they were 24 feet in height, when it was known that in a few months that for all effective purposes they would be largely destroyed?

Mr. Wisner himself, one of the most intelligent witnesses, and the first for the defense, stated that he wished to go on record as opposed to the use of brush mattresses on an ocean bar, except when used as a foundation for a rock jetty. There is, however, much testimony to the effect that brush mattresses had been used largely on the South Atlantic and Gulf Coast. While this had been generally abandoned by engineers for work in salt water, this should be considered by the jury in passing on the question whether or not Carter and the defendants on trial acted without criminal intent.

These considerations, wherever they are deemed appropriate, the jury should also apply to the evidence relative to brush mattresses used at the Tybee breakwater, and wherever in salt water the teredo could destroy the work.

The stone jetties at Cumberland Sound were subsequently constructed. According to the testimony of Gillette, which on this subject is not in fair dispute, they were constructed over the lines and the remains of the Carter jetties. According to the testimony of Bacon and Gillette, after a survey, the controlling depth between Greene and Gaynor jetties, so far as they had been constructed when the survey

had been made, was less than six feet. It is but just to remember, however, that the jetties had not been finally completed. The stone jetties were built under the supervision of Gillette and Bacon, and by Christie, Lowe & Heyworth. The north jetty extended out something less than four miles from the shore. A substructure was placed on the old work, composed of small stone, and this built to a uniform height of five feet below mean low water. On top of that heavy blocks of stone were placed up to the average height of mean high water. It was in evidence at this time that the old work as far as it could be seen by the eye was either rock or sand—rock mostly—and there was some remains of the mattress work to be seen, not very much. There was a considerable amount of the old jetty under water. The south stone jetty extended a distance of 4,000 or 5,000 feet from shore, and was built up to five feet above mean low water. As the result of the building of these jetties, the channel was deepened across the bar from 6 feet to about 24 feet at low water, or from 10 feet to 34 feet at high water.

It is quite important for the jury to consider the difference in the cost of this permanent and effective structure when contrasted with the brush mattress which we have been discussing. The witness Bacon compares the cost as follows: He testifies that the record shows that a single multiple mat, No. 20, put in June 26, 1897, under contract of 1896, contained 4,240 square yards, at contract price, \$1.10, cost \$4,664; adding to that the cost of stone used for sinking, \$473.24, it made a total cost of \$5,137.24. Stone jetties having the same size as the eight-course referred to, using first and second-class stone, cost the government under the Christie, Lowe & Heyworth contract \$4,713.90; and with third-class stone it would have cost \$4,077.40. If the mattress compressed one-third, and there is much evidence on the subject of compression, Bacon says one-third should be taken off for that, making the stone jetty for an equivalent space cost the government \$3,142.60, as against the eight-course mattress, \$5,137.24, loaded with stone, or \$4,664 without the stone. The jury will inquire, then, if it does not appear that the finished stone jetty, effective in its operation and to a large extent enduring in character, did not actually cost less than the foundation brush mattresses put in by Carter and the defendants on trial.

For the brush work done in Cumberland Sound, the evidence discloses that Carter carried in person to New York and delivered one disbursing check which he had signed for \$345,000.

Notwithstanding the vast sums disbursed in connection with the improvements in the river and harbor of Savannah, it is not deemed essential to give elaborate instructions regarding that work. An important feature of the evidence is that offered to substantiate the charge that Carter, through connivance, permitted Greene and Gaynor, when they were interested in contracts let by him, to put in a much greater quantity of mattress material than he estimated would be required when specifications were made and bids invited. In this connection it is also proper to consider the evidence tending to show the disproportionate amount of mattresses used compared with dredging and when com-

pared with stone. I refer in this to the Greene and Gaynor contracts. This is a matter of record about which there does not appear to be fair dispute.

In the specifications for the contract of October 22, 1892, known as the "big contract" for the Savannah river and harbor improvements, it was stated that approximately 350,000 square yards of mattress would be used, and 7,000,000 cubic yards of dredging would be done. The Atlantic Contracting Company secured the contract for jetty work. Instead of the 350,000 square yards as specified, 1,363,572.26 square yards, or more than three times as much as the specifications called for, were used. For the entire work, including mattresses, stone, piles, fascines, and so forth, the government paid on that contract the sum of \$2,110,869.53, and yet the amount estimated when the bid was accepted was only \$1,686,500. Thus it will be seen that the excess of cost over the estimate in that contract alone was \$422,139.53. It is also true that the increased amount paid for jetty work decreased the amount paid for dredging, which was done by P. Sanford Ross. The decrease was nearly \$450,000. The amount of dredging was therefore a great deal less than the estimated amount. The estimated amount of stone was a great deal more than the stone actually used. It must be understood that the greater part of this large sum was diverted from the dredging contract, and from stone, and was paid for the excess over the estimates of multiple mats, and it was paid like that at Cumberland Sound, on bills presented for the square yards calculated on the several courses of the multiple mats used.

The jury should also remember, in this connection, that Gillette and other engineering witnesses testified strongly as to the great importance of dredging in maintaining the depth of the channel. Col. Quinn testified interestingly on this subject, and stated in effect that the time would come when that, while deepening the channel, much made land would be available for warehouses and the like, and would be created between here and the mouth of the river by dredging with the powerful pumps now in use in the bottom of the channel, and forcing it over the jetties on the marsh, when it would soon assume the form of land, possibly of dry land. The importance of work of this character is, however, sufficiently evidenced by the fact that in this one contract Carter specified for dredging to the extent of 7,000,000 cubic yards.

In the contract of September 16, 1892, at Cumberland Sound, the specifications placed the estimated quantity of mattress to be used at 50,000 square yards. In point of fact, the record evidence is that there were used 107,734.92 square yards. In the contract of November 5, 1894, the estimated quantity is 50,000 square yards of mattresses, and the record evidence shows that 213,334.11 square yards were used, or nearly four times as much. In the specifications for the contract of October 8, 1896, for the Savannah Harbor, it was estimated that 200,000 square yards of mattress would be used. The contract was not completed, but up to July 31, 1897, the evidence of the engineer's record is that 255,820.43 square yards had been used. In the contract of October 8, 1896, Cumberland Sound, the estimated quantity of mattresses was 200,000 square yards. The work was not completed;

but up to July 31, 1897, according to the same class of evidence, 446,-102.41 square yards had been used, or over twice as much as the estimate provided for. Of the five contracts above mentioned, in which this large excess above the estimate of multiple mats were used, the Atlantic Contracting Company obtained three, Edward H. Gaynor one, and John F. Gaynor one. It is not in dispute that Edward H. Gaynor was acting for the defendants on trial, and that Greene and Gaynor, the defendants on trial, were stockholders to a large amount in the Atlantic Contracting Company.

Of all the contracts let in the Georgia district during Carter's command in Georgia, one, a small contract on the upper river, was let to Albert J. Twiggs. With this the defendants had nothing to do. The quantity of fascines estimated in the specifications was 7,500 cubic yards. Here there was no excess of such construction. There were used only 9,232.04 cubic yards. In the same contract the necessary stone was estimated at 4,000 cubic yards, and the amount used was 6,742 cubic yards, or over 50 per cent. more than was estimated. It is proper for the jury to contrast the manner in which this contract was required to be executed, and all the other contracts in which Greene and Gaynor were the successful bidders, and determine after careful consideration of all the evidence whether there was collusion and fraudulent connivance, as charged in the indictment, to injure and shut off other contractors, to benefit the contractors on trial, and further fraudulent purpose to so carry out the contracts as to secure for the defendants on trial the greatest profits at the smallest cost to the contractors and the smallest benefit to the government. If all this was done in good faith, without the corrupt agreement and the corrupt conspiracy charged, there can be no conviction; but, if the evidence as an entirety satisfies the jury to the degree heretofore defined of the truth of the charges made, a conviction will be justified.

There is much conflict in the testimony as to the manner in which fascines for mattresses were constructed. This the jury should reconcile as far as possible, and, if it cannot be reconciled, ordinarily they should accept the testimony of that witness or those witnesses who have the best opportunity to know the facts to which they testify and the least inducement from interest or otherwise to testify falsely. The credibility of witnesses is to be always a question for the jury, and they may accord credit where under all the circumstances they think proper.

There are certain general features with regard to the fascines to which I will briefly advert.

It is further contended by the government that, in pursuance of the scheme alleged in the indictment, a change was made by Carter in the method of payment for fascine mattresses, the result of which was to greatly increase the cost to the government and to correspondingly increase the profits to be divided between the alleged conspirators. A reference to contracts prior to May 4, 1891, will disclose that in addition to the two designs of mattress, known as the "Gillmore design," which Carter continued to use, which were to be paid for by the square yard, that in many contracts fascines were to be furnished and

paid for by the government by the cubic yard. These fascines were sometimes placed in the work singly, and sometimes in the form of mattresses. A mattress of this description would, briefly stated, consist of a bottom grillage of poles, a layer of fascines, and a top grillage of poles; the top and bottom grillages being bound together with wire or rope. The object of the government was to place in the works fascines or brush material, and this, as stated, was paid for by the cubic yard. Gillette testified that the advantage derived by the contractor from putting in a large number of fascines at one time compensated him for the additional expense of making them into mattress form.

It is, moreover, contended that Carter's third design mattress is in all essential particulars the same construction as the fascine mattresses just described, which was paid for by the cubic yard of fascines in it. If this contention be true, and that is for the jury to determine, when Carter specified in the contract of September 16, 1892, his third design mattress, which was to contain one layer of fascines, and be paid for by the square yard of its top surface, the cost to the government of the fascine material in it was greatly increased. To illustrate, in the contract of November 5, 1890, the fascines, or fascine mattresses, were paid for by the cubic yard at \$1.40. The thickness of the mattresses were 12 inches. If put in the works in the form of mattresses, it would take three to make a yard in height, and the pay would remain \$1.40 per cubic yard. Now in the contract of October 22, 1892, the fascines were only nine inches, one layer was placed in the third design mattress, and the price per square yard was 95 cents. To make a cubic yard, four such mattresses must be used, and the price per cubic yard would be four times 95 cents, or \$3.80. That is to say, under the contract of November 5, 1890, the government paid for fascines in the form of mattresses therein described, \$1.40 a cubic yard. In the contract of October 22, 1892, the government paid for a cubic yard of fascine in the form of third design mattresses \$3.80.

The jury will also inquire if the significance of this contention is not greater when the fascine mattress used prior to 1891 and paid for by the cubic yard is compared with a "course" of the multiple mat paid for by the square yard of its surface. In making this comparison, the jury should bear in mind, however, that the third design mattresses and multiple mats were frequently of greater width, and it may be true that it would cost the contractor more to sink fascines when placed in such large mattresses than to sink them singly, and, in comparing the relative cost, this may be taken into consideration.

Again, in the contract of C. C. Ely, May 31, 1889, for the construction of a retaining wall in Brunswick Harbor, "with brush fascines or mattresses loaded with riprap stone," where the fascines were to be from 12 to 20 feet long, the contract price for fascines and fascine mattresses was \$1.34 per cubic yard. The fascine material in the Cumberland Sound contract, according to evidence which does not seem to be in dispute, cost the government—I mean the contract of October 8, 1896, cost the government—\$4.40 per cubic yard; a cubic yard in depth requiring four nine-inch mattresses. To put it the other way: If the mattresses put in under the Ely contract of 1889 had been paid

for by the square yard of the surface of each mattress, as the mattresses at Cumberland in 1896 were, the price estimated on the basis of \$1.34 per cubic yard would have amounted to only 44 to 56 cents, while the Cumberland mattresses were paid for at \$1.10 per cubic yard. There has been tendered in evidence a compilation, "Cost of fascines or brush mattresses under various contracts in Savannah district, from 1884 to 1897." This will be before the jury.

The practical inquiry is whether Carter, as a part of the fraudulent scheme alleged, by the use of the third design mattress and of the multiple mat, to be paid for by the square yard, in lieu of fascines and fascine mattresses to be bid for and paid for by the cubic yard, as it is insisted had formerly been done, largely increased the cost of such fascine mattresses to the government, and correspondingly increased the profits to the defendants on trial, and that this was done corruptly and for the purpose of effecting the fraudulent scheme described in the indictment. As stated heretofore in defining the conspiracy charged in this indictment, it is incumbent on the government not only to show that a conspiracy was formed, but that some act was done by some of the conspirators to effect the object of the conspiracy. Several overt acts are charged to have been committed as already described.

In indictment 322, the overt act charged in the second count is that on the 17th day of March, 1897, Michael A. Connolly, one of the defendants and alleged conspirators, but who is not on trial, in pursuance of the conspiracy charged, did assist Oberlin M. Carter in the preparation of a certain document purporting to be articles of agreement between Oberlin M. Carter, corps of engineers, United States army, and the Atlantic Contracting Company, and which purports to modify the contract made on the 8th of October, 1896, for work at Cumberland Sound; and which document purports to be signed by said Carter and by the Atlantic Contracting Company, John F. Gaynor, president, and by William T. Gaynor, secretary. It is charged that said Connolly forged the name "William T. Gaynor, Secretary." This document is before the jury and may be inspected by them. Mr. Sterly testifies that the name W. T. Gaynor is not in the handwriting of W. T. Gaynor. Mr. Gleason, who testifies that he has been connected with the Southern Bank of the State of Georgia for 23 years, and is now with the Citizens & Southern Bank also states that as receiving and paying teller he had large experience in the comparison of handwriting; that he knew Michael A. Connolly, had seen him write, and, after examining several genuine signatures, testified that the signature "Michael A. Connolly," as attesting witness, is the genuine handwriting of Connolly; and that the name "W. T. Gaynor" on this document, is in the handwriting of Connolly.

It is further charged that Connolly assisted Carter in the preparation of a document purporting to be dated on the 18th of March, 1897, and purporting to be the written consent of Anson M. Bangs and Eugene Hughes to the agreement; that Connolly forged the names of Bangs and Hughes; and that he also forged the signatures of James C. Bogart and Henry Smith as witnesses. Mr. Gleason testifies that

the signatures of Bangs, and another necessary signature, are in the handwriting of Connolly. There is no denial of this evidence. It is also charged that Carter did knowingly cause such documents thus fraudulently prepared to be forwarded to the War Department of the United States for approval. The jury will recall the letters written by Carter under date of March 17th; one to the chief of engineers, stating that he inclosed for approval the supplemental contract proposed; and another letter to John F. Gaynor, New York, asking him to sign the supplemental contract, and take it to the War Department. It is contended that Gaynor was in Washington at that time. They will further consider the letter from the chief of engineers, acknowledging that the proposed supplemental contract had been received, and stating that it could not be approved.

If the jury are satisfied that the conspiracy is proved, as charged, and that the facts just enumerated are true, they may, if they think proper, regard this evidence as proof of an overt act; that is to say, of an act on the part of one of the co-conspirators to carry the conspiracy into effect.

The same alleged overt act is set out as done to effect the object of the conspiracy charged in the first count of indictment No. 371, and also in the third count of this same indictment.

In the third count of indictment 322, it is charged, as an overt act done to effect the object of the conspiracy, that on the 1st day of July, 1897, the alleged co-conspirators, all of them, did cause to be presented to Oberlin M. Carter, an officer in the military service of the United States, a claim against the United States which they then and there well knew to be fraudulent. This is fully set out in the analysis of the indictment hereinbefore given. The claim is for \$32,811.42, and is for labor and material furnished during the months of January, 1897, under contract of October 8, 1896, on work of improving harbor at Savannah. It is evidence that while the work under this contract was in progress, no money was available from January 1st to July 1, 1897, and that on the last-named date claims were rendered to the Engineer Department for work done each month. The testimony is that the name, "Edward H. Gaynor," signed to the claim, is in the handwriting of Connolly. It appears that the claim was approved by Capt. Carter, and that it was paid in the check for \$230,749.90 early in July. There is no evidence to contradict the proof that the name Edward H. Gaynor was signed in the handwriting of Connolly. To determine whether this claim was fraudulent, and whether it was presented to Carter, in pursuance of the alleged conspiracy, the jury will look to all the evidence under the rules heretofore explained. The record of the engineer's office offers official evidence that it was in fact presented. The same overt act is charged as having been committed to effect the object of the conspiracy charged in the first count of indictment 371.

As an overt act in pursuance of the conspiracy charged in the first count of indictment No. 322, it is charged in the fourth count that Carter, on the 6th day of July, 1897, signed a check to the Atlantic Contracting Company, for \$345,000, and delivered it to John F. Gay-

nor, in payment of a claim for work said to have been done under the contract of October 8, 1896, for improving Cumberland Sound, which claim Carter knew to be fraudulent. Sterly testified that Carter left Savannah for Washington on June 30, 1897, and did not return to Savannah until July 7th. The alleged fraudulent claim of \$345,000 was paid by check No. 270,537, dated July 6, 1897, on the Assistant Treasurer of the United States, New York. The amount and number of the check was entered on the voucher by Sterly before Carter came back, and after Carter returned the date of the check was added. When Carter left Savannah he took two blank checks with him, one for \$345,000 filled out complete, except the date. The check was filled out by Carter, and Sterly made the entry on the voucher and on the stub. Mr. Marlor, Deputy Assistant Treasurer of the United States, testified to the payment of this check by the Subtreasury, and, as to the indorsement thereon, "Atlantic Contracting Company, John F. Gaynor, President," and "For Deposit, B. D. Greene." To determine whether this check was given in payment of a fraudulent claim, as charged, the jury will consider all the evidence.

In the eighth count of this indictment this is also charged as an overt act done in pursuance of the conspiracy charged in the sixth count of this indictment. The same overt act is charged as done to effect the object of the conspiracy charged in the second count of indictment No. 371. It is for the jury, if they are satisfied the conspiracy has been proven, to determine from the evidence whether the preparation and presentation of this check for the work at Cumberland Sound, in the manner described in the indictment, was an act done by one of the conspirators to carry the conspiracy into effect. The question is exclusively for the jury and should be determined in view of the general rules the court defined in the outset of these instructions.

The next overt act charged as done in pursuance of the conspiracy, set out in the first count of indictment No. 322, appears in the fifth count. It is there charged that Carter, as engineer officer, issued to the Atlantic Contracting Company a check for \$230,749.90, in payment of an alleged fraudulent claim, for work claimed to have been done by the Atlantic Contracting Company, under contract of October 8, 1896, for improving Savannah Harbor, and that Carter knew said claim to be false. This check is similar to the one for \$345,000 just referred to. It is dated July 6, 1897, and has been read to the jury heretofore. Sterly testifies that when Carter went to Washington on June 30, 1897, he carried two blank checks; one was for the purpose of paying this claim, but the amount of the monthly reports could not be ascertained when Carter left, and, according to the testimony of Sterly, the latter, under the instructions of Carter wired him at Washington on July 1st, the amount of the aggregate of the vouchers, or \$230,749.90. The vouchers were not marked approved by Carter until after he returned on July 7, 1897. Mr. Marlor testified that this check was paid through the Subtreasury, and that it was indorsed precisely as the check for \$345,000, just described. This, if true, connects all three of these alleged conspirators with

this check, and it is for the jury to determine whether the preparation, carrying, and deposit of the check, and the collection of the money thereon, were acts done by one or more, or all of the alleged conspirators to effect the object of the conspiracy, if they believe such conspiracy has, in fact, been proven.

The same overt act is charged as one to effect the object of the conspiracy alleged in the second count of indictment 371, and the instructions just given the jury may regard as appropriate to that also.

The seventh count charges as an overt act, done in pursuance of the conspiracy alleged in the sixth count of indictment No. 322, that the defendants, on the 1st day of July, 1897, caused to be presented to Carter, as engineer officer, for approval and payment, a claim against the United States for labor, material, and supplies claimed to have been furnished for work in improving Cumberland Sound, under contract of October 8, 1896; and that the defendants well knew the claim to be fraudulent. It is for the jury to determine whether this claim was fraudulent, and whether it was presented to Carter for approval and payment. The jury will recall the evidence on this subject relative to the approval of the claim, and the issuance of a check by Carter for \$375,000 to pay it.

The same overt act is charged in the third count of indictment No. 371.

As another overt act done to effect the object of the conspiracy charged in the fourth count of indictment 371, it is alleged that the defendants, on the 1st day of July, 1897, caused to be presented to Carter, as engineer officer, for approval and payment, a false and fraudulent claim. The particulars wherein said claim is alleged to be fraudulent are set out in the count. This claim is in evidence. It is for the jury to determine from all the evidence whether this claim was fraudulent, and whether it was presented to effect the object of the conspiracy charged, if they believe such conspiracy has been proven.

The fifth and sixth counts of this indictment have already been described. They do not charge conspiracy, but charge that the defendants caused to be presented to Carter, as engineer officer, for approval and payment certain fraudulent claims set out in the counts named. The particulars in which the claims are alleged to be false and fraudulent are enumerated. The jury will determine from all the evidence heretofore given under the rules whether the claim set out in either or both counts was false and fraudulent for approval and payment with the guilty intent charged in the counts.

The indictment for embezzlement has been analyzed and described by the court. The jury have heard the evidence relating thereto. Much of the evidence which the court has recounted applies to the charges made in this indictment.

The jury will remember the evidence about the issue and payment of the checks for \$345,000, and \$230,749.90, the proceeds of which it is charged have been embezzled. The court has called your attention heretofore to the testimony of Sterly, as to the manner in which the checks were made out, and as to Carter's leaving Savannah on June

30, 1897, with two blank checks. Attention has also been called to the testimony of Mr. Marlor as to the payment of the checks, and their indorsement. In addition to what I have already said as to the law upon this subject, in view of certain evidence, I will further state: It is not only the payment of the money by check, but the issue of the check and the application of the payment to the claim, which, according to the evidence was done in this district, which constitutes embezzlement provided the essentials of embezzlement are also shown. If the act was partly done in this district, and partly in another, it is prosecutable in this district as if committed wholly in this district. Embezzlement, when committed by a series of connected transactions from day to day, may be alleged as of a single day where the facts are shown in evidence. The application of the money to the claim, coupled with the payment and withdrawal of the funds by checks, constitutes embezzlement, if the facts otherwise show that it is embezzlement.

It is further insisted by the government that when the charges set forth in these indictments, substantially as stated, except the indictment for embezzlement which was returned afterwards, were made against the defendants on trial, that they took refuge in flight. This is urged as evidence of their guilt. Now, there is a popular conception that when a man runs away from a criminal charge that it is conclusive evidence of his guilt. This, however, is not the law. Before it can be considered as evidence, the jury must be satisfied that the defendants fled. To determine this you may look to all the evidence in the case, and to the evidence of Greene himself. These remarks relate to the departure of these parties to His Britannic Majesty's Dominion of Canada. It is always competent to prove the flight of the accused as having a tendency to establish guilt. It is, however, not conclusive. It is always a fact of importance to take into consideration, and combined with other facts may sometimes afford strong evidence of guilt. It does not, however, raise a legal presumption that the accused is guilty. It is merely a circumstance, tending, if not sufficiently explained, to increase the probability of the defendant's being the guilty person, which on sound principles is to be weighed by the jury like any other evidentiary circumstances. I think it justifiable to state, also, that, in each case where flight is relied on as evidence of guilt, it is competent for the jury to take all the circumstances into consideration. If, for instance, the person accused of crime is youthful, uninformed, helpless, without means or counsel to defend himself, these and similar facts are matters which the jury may consider and which might tend to reduce the evidentiary effect of flight under the circumstances to show guilt. In cases where the defendant is a man of experience, clear intelligence, and has ample means to make his defense, these facts also may be considered by the jury, and may, if in their judgment it is proper, increase in their minds the evidentiary effect of flight to show guilt. Each case depends upon its own circumstances, and, if there is any case of flight, any explanation of it consistent with the innocence of the accused, he is entitled to the benefit of that explanation. I may add that one indicted in a particular state, or in a particular national ju-

dicial district in that state, has no right to justify his flight, upon the ground that there are other localities in which he would prefer to be tried. The Constitution declares that he shall be tried in the district where the crime was committed, which shall have been previously ascertained by laws, and no man can justify his flight because he objects to a familiar principle of the Constitution of the United States.

We now approach the consideration of a topic which you are instructed, in my opinion, is to be largely considered as the crucial or determining evidence in the case which has engaged us for so long. It is the proof offered by the government to show that the engineer officer placed here to represent the interest of the government, as against the interest or wrongs of the contractors, had been bought by them and seduced from his duty to the government, or voluntarily betrayed it for the benefit of the contractors; that he devoted his acknowledged skill in engineering and the opportunities which had been trusted to him, with the purpose of accumulating through conspiracy with the defendants a fortune from funds to be unlawfully diverted from the appropriation placed to his credit for the purpose of the government work in this district. All of the evidence which I have heretofore recounted, while all material in itself, if accepted by you, as in accordance with the government's contention, is in the main subsidiary to the main question, and that was: Did the engineer officer secure, as charged, a share in the profits of the great improvements in Georgia, undertaken for the welfare of the American people?

The record contains a vast amount of evidence, some parts of it consisting of minute incidents, others apparently of larger scope and compass. Facts of great significance, in the opinion of the court, relate to the changes in the engineering plan, in the forms of construction, in the comparative volume of material used, in relative expensiveness to the government. Much of this and many other circumstances, I have referred to, and all of it, doubtless, is fresh in your memory, and all you should consider as offered for the prosecution or for the defense. Were the court and jury obliged to take many items of this evidence and consider them singly and alone, without due regard to the correlation in which all evidence must be considered, upon a charge of conspiracy, it would be a judicial duty to instruct you that the defendants were entitled to acquittal, and it would be your duty to acquit. While evidence of this general character is often thus considered and treated in the argument of counsel, this is not permitted to the jury and the court. On the contrary, to quote from an authority cited by General Barr:

"To hold that nothing but positive evidence is sufficient to establish a conspiracy would be to give immunity to one of the most dangerous crimes which infest society. Hence, in order to discover conspirators, we are forced to follow them through all the devious windings in which the natural necessity of avoiding detection teaches men so circumstanced to envelop themselves. It is from the circumstances attending a criminal, or a series of criminal acts, that we are able to become satisfied that they are the results, not merely of individuals, but the products of concerted and associated action."

We must consider it altogether, and if there is found in the great mass one cementing and cohesive force, which binds the evidence to-

gether, and calm and impartial consideration makes the finger of justice point unerringly to the guilt of the accused, it is the duty of the upright and conscientious to accord to such evidence the probative effect which the rational, conscientious, and patriotic mind will deem it deserves.

Such, it is insisted by the government, is the proof it offers to show that the engineer officer himself was bought, or sold himself, for a share in the profits in these contracts, made with the values of the people, and for the benefit of the people; that from the slender salary of a subaltern his income and expenditures soon rivaled the prodigal and golden youth who spend their substance in riotous living. With no other resources, his outlay from 1890 to 1897, covering the period of these contracts, and the alleged fraudulent scheme and conspiracy, increased from \$4,000 in the year 1890, to \$28,000 per annum in 1896; and from a condition when his means were so slender that he was compelled to borrow, his accumulations for the same period, invested in gilt-edged securities, to gather and receipt for as his own, in an account, quite if not nearly, a half million dollars. That is the contention of the government. If that is proven, in your opinion, it is evidence of the gravest consideration for the jury, and if they further find, as contended by the government, that this wealth was accumulated because they divided with him the profits of the contract it was his duty to supervise, and they are satisfied of these facts beyond a reasonable doubt, the government has proved its case. Finding these facts to exist in connection with all the other evidence I have recounted, the government has proved its case, and it is entitled to a verdict of conviction against the defendants on trial.

There is no denial that I recall of what may be deemed the astonishing increase in the personal expenditures of the engineer officer, Carter. You may conclude, therefore, that these are shown by incontestable proof. You will look to the evidence to ascertain the sources of the income which was so rapidly increased and so lavishly expended. It does not appear from the evidence that when he assumed command of the Savannah district he had any income in excess of his salary. This, with his commutation in 1890, amounted to \$2,208. This was his total income. His personal expenditures that year were \$4,306.60. In 1891, his salary and commutation was \$2,845.57, his total known income, \$2,970.57; his personal expenditures, \$5,897.83—or about twice his income. In 1892, his salary and commutation was \$3,032. There was now an additional income which the government insists accrued from dividends and interests on investments alleged to have been made with funds arising from the operation of the fraudulent scheme charged in the indictment. This amounted to \$1,012.50. His total known income was \$4,044.50. His personal expenditures were more than twice as much, namely, \$8,354.24. In 1893, his salary had not been increased, but dividends and interest had increased to \$6,720, and his total known income was therefore \$9,752; and his total expenditures, \$14,982.74. In 1894, his salary remained unchanged, his dividends and interest had in-

creased from \$6,720, to \$13,491, his total known income was \$15,523.17; his total expenditures now amount to \$14,410.88. In 1895, there was no increase in salary, but his dividends, interest, and rents aggregated \$27,363.34. His personal expenditures had also increased more than \$5,000, but they were now less by more than \$7,000 than his income. His outlay was \$20,113.92. In 1896 his salary and commutation had increased a little more than \$100. It was now about \$3,140.88. But this slender pay of an army officer, added to his other sources of income, amounted to \$31,458.85. Independent of his salary he now had an income of \$28,317.97, and he expended that year, \$28,611.67. For four months of 1897 his salary was \$1,077.32, his total income for the same period was \$10,610.68. At this rate it would have been over \$30,000 for the full year. His total expenditures for the four months were \$7,566.75. At this rate, had it continued, it would have exceeded the expenditure of the previous year, which was more than \$28,000. It will suffice, for the purposes of your duty, for the jury to understand that from 1890 to April, 1897, he had received as salary and commutation for his pay as an army officer a total sum of \$21,399.77. This was his pay as an officer. In 1891, his income from interest, dividends, and so forth, amounted to only \$125, according to the evidence submitted. To April, 1897, this source of income in the aggregate amounted to \$82,844.86. During the same period, his personal expenditures amounted to \$104,244.63, or an average for the entire period of about \$17,370.77. This estimate of increase in Carter's expenditures is not denied.

What is the probative effects of this evidence? The science of the law and the rules of evidence do not exclude from the province of the jury the power to make those deductions, which the triors, men of practical knowledge, experienced in the affairs of life, would reasonably or obviously make from facts like those just recounted. The obvious inquiry follows, whence came this rapid increase of income? The explanation afforded by the government which it asks the jury to accept, is based upon the following evidence:

When the connection of Carter was severed with the engineer office in Savannah, in an oaken case belonging to the government there was found a large mass of letter-press copy books showing his official and personal correspondence; many stub books, memoranda, and other indicia in the nature of evidence. This was taken charge of by the court-martial. Certain letters of a purely personal character were restored to Carter. The other evidence thus found was regarded as legitimately within the possession of the government to be used for the purposes of enforcing the law against those who, by its alleged violation, it is now insisted, have despoiled the public treasury of large sums. This evidence has been carefully preserved. In no respect is its authority questioned. It was kept under seal, and in the control of trusted officials of the government; brought to this city under like protection, and has been carefully guarded by the custodian appointed by the court for that purpose. It has been open to the inspection of the counsel for the prosecution and for the defense,

and all that seemed pertinent to either has been submitted for the consideration of the jury. It was evidence accumulated and left by Carter himself. In part, from indicia thus furnished, it is contended by the government that it has been enabled to trace the sums paid by the defendants on trial to Carter as his reward for the alleged betrayal of the government in their interest as the result of the conspiracy charged.

An expert accountant, Mr. Johnson, was commissioned by the Treasury Department for the purpose of tracing the public funds thus alleged to have been diverted. A large number of books of certain banks, brokers, and trust companies in New York were examined. They constitute an immense volume of evidence. They are before the court. The statements taken therefrom, and verified by the bank officers, officers of trust companies, and others having knowledge of the books for the purpose of convenience, have been offered in evidence and considered by the court, counsel, and the jury; but the original books and entries are all here and subject to inspection and verification by the parties concerned and their counsel, and by the members of the jury. The expert accountant charged with this important duty has carefully prepared and submitted for the consideration of the jury a series of tabular statements, 32 in number. By these, and by the evidence offered in support of each statement, in the form of checks, bank deposits, and the like, the government contends that it has traced the disbursing checks of the engineer officer, Carter, issued on all the contracts with which the defendants on trial were concerned from 1891, when it is alleged the scheme to defraud was formed, until the alleged final distribution of the alleged illegitimate profits in July, 1897. From the consideration of this evidence, thus tabulated for convenience and clearness of reason, it is also contended that the jury must draw the conclusion that such profits were divided between Benjamin D. Greene, John F. Gaynor, the defendants on trial, and Oberlin M. Carter. It is further contended by the government that the evidence shows that for most of this period the division was practically by thirds; one-third of the profits being paid to each of the accused just named. This exhibit is called 319. It would be unjustifiable for the court to attempt its complete recapitulation. Only one sheet will be read, in order to refresh the memory of the jury as to the manner in which the statement is framed. It will be borne in mind that these statements were spread on a large easel before the jury. The government expert, Mr. Johnson, who is also a bank examiner of the Treasury Department, called and pointed out to the jury each item of the account set forth by the sheet; and for each item positively stated in the entire 32 great sheets which were gone over before the jury with the intent to account for the payment, investment, and final distribution of the vast sum involved in this trial, astonishing as the statement may seem, he was enabled, with the prompt and capable assistance he received, almost instantly to produce the original evidence in the nature of a check, deposit slip, and the like, as each was needed, in verification thereof. None of the evidence thus produced is questioned. No one questioned the authen-

ticity of it. The deduction he makes, and the manner in which he arrived at the apparent results pointed out by him have been questioned and criticised by the evidence of an expert retained by the defense, a Mr. McPherson. The comparative correctiveness of the opposing statements is a matter exclusively for the determination of the jury. The statement which will be read is No. 9, and the jury will have it before them, and if they think proper may examine the blue print from which this is copied, and all the others explained by Mr. Johnson and criticised by Mr. McPherson, if they deem that this is essential to a proper understanding of the issues they are to determine. This is the sheet:

Description of Checks Divided.

Date of check: August 3, 1893.
Number of check: 224,449.
In whose favor: Atlantic Contracting Company.
On whom drawn: Assistant Treasurer of the United States, New York.
Amount of check: \$39,075.

How Deposited for Division.

Bank in which deposited: American Exchange National Bank, New York.
Date of deposit: August 7, 1893.
In whose account deposited: William T. Gaynor.
Exhibit showing deposit: No. 246.
Amount of deposit: \$39,075.
Less arbitrary allowance, trip Carter to New York, \$75.
Amount for division: \$39,000.

How Divided.

Carter's whereabouts: New York.
Exhibits showing same: Nos. 300 and 301.
Column of thirds: One-third, \$13,000; allowance, \$75.
Certain Checks Between the Parties at or About Corresponding Dates.
Drawer of check: William T. Gaynor.
Date paid: August 7, 1893, favor of unknown.
Exhibit number: 248.
Amount of check: \$13,075.

Certain Deposits at or About Corresponding Dates.

See testimony of Franklin Ford, pages 1902 and 1904.
Deposit in account of O. M. Carter with Reed & Flagg, subsequently transferred to the account of R. T. Westcott.
Date of deposit: August 9, 1893.
Exhibit number: 238½, 239.
Description of deposit: Currency.
Amount of deposit: \$13,000.

How Invested.

Date of purchase: August 10, 1893.
Through whom bought: Reed & Flagg.
In whose name: R. F. Westcott.
Exhibit number: 239.
Description of securities: 10 Delaware & Hudson, Pennsylvania Division, 7 per cent. bonds.
Numbers: 82, 83, 293, 528, 593, 840 to 842, 1648, 1649.
Par value: \$10,000.
Cost: \$12,825.

Paid for Viz.:

See testimony of Franklin Ford (record pages 1902-1904), that in connection with Carter's visit to the office of Reed & Flagg the following deposits were made:

August 9, 1893, currency.....	\$13,000
3 per cent. premium on sale of \$13,000, currency, check.....	390
Total	\$13,390
Less:	
August 10, 1893, Reed & Flagg, check: Deposit by O. M. Carter in the Union Trust Company, New York.....	565
	<hr/> \$12,825

Exhibits: 239, 238½, 239, 239, 238½, 239, 239, 251.

Disposition.

Description of securities: 10,000 Delaware & Hudson, Pennsylvania Division 7 per cent. bonds.

Numbers: 82, 83, 293, 528, 593, 840 to 842, 1648, 1649.

Par value: \$10,000.

Original cost: \$12,825.

Carter's receipt to Westcott, date: October 29, 1897.

Exhibit number: 272.

Coupons and Dividends.

Dates of deposit tickets, showing Carter's collection of coupons and dividends:

September 1, 1893.

March 2, 1896.

October 8, 1896.

March 6, 1897.

Exhibit number: 251.

The government undertakes to show a division of money between the defendants on trial from December, 1891, to July 6, 1897. The compilation just read brings into juxtaposition the evidence relating to what is termed by the expert, Mr. Johnson, the ninth "division." As stated, there are 32 so-called divisions, which he has illustrated by the same method. Of course the reference of this witness to "divisions," checks "divided," how "divided," etc., only relates to the method he has adopted to illustrate the evidence, and cannot be considered as his opinion that such divisions, if any, were the result of an alleged conspiracy; or that the money was unlawfully divided with Carter, if divided at all. It is for the jury to determine from all the evidence relating to this topic, whether or not there was the division of money charged in the indictment, whether this is the proper inference to be drawn from the evidence brought into juxtaposition by the compilation of Mr. Johnson, considered in connection with all the other evidence, particularly that of the expert accountant, Mr. McPherson, offered by the defense.

Under the head of "Division, January 3, 1893," also called the second division on Exhibit 319, four checks are considered. They were issued by Capt. Carter in December, 1892; three are payable to E. H. Gaynor, and one to the Atlantic Contracting Company. They aggregate \$65,632.62, which sum was deposited January 3, 1893, in the account of J. F. Gaynor. There appears on the exhibit referred to the following

entry: "Subtract valuation of working plant, Greene & Gaynor, Exhibit No. 265, \$26,932.50." Reference is made to the minutes of the Atlantic Contracting Company of August 5, 1892, to the effect that "the said John F. Gaynor and Benjamin D. Greene are willing to sell and transfer the whole of said property for the sum of \$26,932.50." It otherwise appears that Greene and Gaynor owned practically all the stock of the Atlantic Contracting Company; that it was organized in August, 1892, and secured some contracts soon thereafter, notably the contract of October 22, 1892. These checks, as appears from their face, were issued for work done in improving Savannah Harbor and Cumberland Sound, making the deduction stated under the heading, "Amount for division," is placed \$38,700.12, and under the column "one-third," \$12,900.04. Carter, according to the evidence, was in New York at this time, January 3, 1893. On the same day Gaynor apparently draws five checks, and Greene one; and on the 5th another check, and on the 17th another. On January 3d there was a deposit by Carter in the Union Trust Company, bills, \$3,550, deposit ticket being made out in Carter's handwriting; and on the same day there was a deposit by him with C. H. Van Deventer, a broker, currency, \$9,350—a total of \$12,900, or four cents less than the amount placed in the column of one-third of "amount to be divided."

On January 3d and 4th certain bonds were purchased by Carter in his own name, through Van Deventer. They are known as Erie, Reading, and Wabash bonds, and amount to \$14,437.50. According to the evidence, they were paid for in part by the sum of \$9,350 just alluded to, and it is claimed that the balance was derived from proceeds of Chesapeake & Ohio bonds which Carter had previously purchased, as shown in division 1; that is, \$3,981.25. The accounts, statements, checks, and so forth, referred to in the compilation, have been exhibited to the jury. According to this evidence, the bonds were delivered to Carter January 4th and February 10th. From the record of the Garfield Safe Deposit Company, it appears that Carter visited his safe deposit box on January 4th. From the deposit ticket it appears that on May 2, 1895, there was deposited to Carter's credit coupons on the five Wabash bonds amounting to \$125. These bonds, it further appears, were sold on May 19, 1897, and the proceeds dealt with in a later division known as Division No. 31, where the purchase of certain Orange, New Jersey, bonds is described. The Erie and Reading bonds were sold on April 18th and 19th, in the account of R. F. Westcott.

Following the method adopted by the expert accountant, Mr. Johnson, and considering the evidence he has grouped under "Division No. 3, of February 10, 1893," the checks dealt with are three disbursing checks and one check of Gaynor drawn on the Merchants' National Bank of Savannah, a depository of the United States. These aggregate \$48,000. This amount was deposited in the American Exchange National Bank, of New York, February 10, 1893, in the account of John F. Gaynor. One-third is \$16,000. Carter's whereabouts is put down as in New York, and a deposit ticket of February 10, 1893, is offered in evidence of that fact. On this day it appears from the

account of John F. Gaynor that he drew a check, the name of the payee not appearing on the account, for \$16,000. On February 10, 1893, there was deposited by Carter in the Union Trust Company, in bills; \$5,850, deposited by him with Van Deventer, in currency, \$5,000; and on the 11th, with Watson & Gibson, cash, \$5,000; making a total of \$16,850. The exhibits showing these transactions have been submitted to the jury.

On February 11, 1893, it appears that there was bought from Watson & Gibson for account of O. M. Carter 5,000 Chesapeake & Ohio bonds, and on February 11, 1893, there was bought through Watson & Gibson for account of O. M. Carter, 5,000 Erie bonds, and on February 13, 1893, there was purchased through Van Deventer in the name of O. M. Carter, 5,000 Wabash, Detroit, etc., bonds, and there was purchased on the same day 5,000 Chicago & East Illinois bonds; the total purchases amount to \$20,656.25. To pay for these bonds, checks of Carter on the Union Trust Company are submitted. These, together with the three deposits by Carter, aggregate \$20,656.25.

It is contended by the government that Carter did not always make an immediate investment of the money received by him in the manner charged, and that for this reason portions of such money are necessarily carried from one division to another; the money uninvested being in the meantime kept in a bank to his credit. In the transaction just referred to, it is insisted that the balance necessary to pay for the bonds was drawn from his account in the Union Trust Company. From exhibits which the jury have examined, it appears that the bonds were turned over to Carter on February 13 and March 16, 1893. It also appears from exhibits submitted that on May 2, 1893, Carter was given credit for five coupons on the bonds of Chesapeake & Ohio, \$125. This appears from deposit slip. It also appears from deposit slip, stated to be in the handwriting of Carter, that on May 10, 1897, coupons on the same bonds were credited to Carter's account.

As has been several times referred to in the evidence and arguments, on October 29, 1897, it is testified that Westcott delivered to Carter a great many bonds and other securities, taking Carter's receipt therefor. This is known as Exhibit 272. It appears from this receipt that the Chesapeake & Ohio bonds, the identical numbers being the same, were turned over to Carter. There is evidence as to the collection of coupons by Carter on the Wabash, and so forth, bonds, and they are also included in the bonds turned over by Westcott to Carter October 29, 1897. The Erie bonds, it appears, were sold on April 19th, in the name of R. F. Westcott. The proceeds, \$4,818.75, are considered later in connection with another alleged investment. The other bonds, 5,000 Chicago & East Illinois, it appears, were sold in the name of Westcott June 25, 1897, and the proceeds are considered in connection with Orange, New Jersey, property.

"Division 5, of April 14, 1895." Four disbursing checks drawn by Carter, one on Merchants' National Bank of Savannah, and three

on Assistant Treasurer, New York, amounting to \$62,154.34. This sum deposited in the American Exchange National Bank, New York, April 14th, in account of John F. Gaynor. Carter is in New York, as appears from deposit ticket in his handwriting. One-third is \$20,718.11. It appears from exhibits in evidence that on April 14, 1893, the American Exchange National Bank paid check of John F. Gaynor for \$27,387.23, which check it appears was deposited in the same bank to the credit of B. D. Greene. On the same day, it appears, check of Gaynor was paid by the same bank, in favor of person unknown, \$8,450, and that on the same day by same bank check of Greene for \$6,550. Four other checks in favor of unknown parties, dated within the next few days, are paid by the same bank and charged to Gaynor's account. On April 14, 1893, there was deposited by O. M. Carter in the Union Trust Company bills, \$400. Same day and bank, account of R. F. Westcott, bills, \$14,500, and deposited on April 15th, by Carter in same bank, bills, \$3,000. On April 11th and 14th, there was purchased through Van Deventer, in the name of Carter, 15,000 bonds at cost of \$19,756.25. A part payment on these bonds, it appears, was a check of Westcott on the Union Trust Company for \$14,500. The jury will recall this amount, in bills, was deposited by Westcott in that bank on the 14th of April. A letter is offered from Carter, dated April 11, 1893, to Van Deventer, requesting him to "buy for my account ten more gilt-edge bonds," etc. "I shall be in New York Monday night." According to the evidence, Carter collected coupons on these bonds. Fifteen of the bonds, it appears from the receipt, were turned over to Carter by Westcott on October 29, 1897. Five bonds were afterwards sold, others bought in Westcott's name, Carter collected interest coupons at certain periods, and these bonds were turned over to Carter on October 29, 1897.

In "Division July 6, 1897, No. 23," two checks drawn by Carter on the Assistant Treasurer of the United States, New York, in payment for work done under contracts of October 8, 1896, are considered. These checks aggregate \$575,749.90. It appears that during a large part of the period before July 1, 1897, there was no money available to pay contractors, and that they were paid by these checks in July. These checks have been referred to several times heretofore. On July 6, 1897, there was deposited in Knickerbocker Trust Company, to credit of Greene, \$575,749.90. From this is deducted a number of checks to W. T. Gaynor and E. H. Gaynor, as explained by the accountant. There is also deducted \$75, arbitrary allowance to Carter for trip to New York. There is another deduction, stated to be "stockholders' advancement made to carry on work, \$132,850." After giving a list of checks of Greene & Gaynor, a number of checks are enumerated as advances by Carter or by Westcott at Carter's request. The latter amount to \$50,000. The amount left, as stated by the accountant, is \$380,075. Greene testified, the jury will remember, that Westcott made a loan to him of \$50,000. Westcott testified that he turned the money over to Greene at Carter's request, that

Carter made it good, and that it was not his (Westcott's) transaction.

Referring to the exhibits, the accountant testifies:

"If Carter was entitled to one-third interest; Carter's advances, \$50,000; one-third as above, \$126,691.67, allowance, \$75, amount of Carter's interest, \$176,766.67."

Evidence is offered to show that the \$50,000 which Greene received from Westcott was in part derived from the sale of bonds which Carter had acquired previously, and in part of a check from Carter himself. The check for \$21,000, which Greene testified was a part payment of the loan of \$50,000 made Westcott, the government insists from the evidence was deposited to the credit of Westcott, but used to pay part of Carter's Orange, New Jersey, investment.

The jury will remember that Greene testified that he received about \$170,000, that John F. Gaynor received about the same, and that \$150,000 of bonds, costing \$172,500, were bought and were to be disposed of, and the proceeds were to be used in carrying on the work in Savannah; but that, the work being discontinued, the bonds were divided between him and Gaynor in November.

The government insists that the evidence shows that Carter made advances to carry the work on, and that he received the bonds purchased by Greene. The jury may inquire if these bonds were Carter's, and that he subsequently turned them over to Greene and Gaynor, and that Greene failed to turn over these bonds with those which Westcott testified he turned over to him, and for which Carter subsequently receipted.

They may further inquire if there was any reason, such as the pendency of investigation by the board of inquiry, which might cause them to adopt such a course as to these particular bonds.

The amount of disbursing checks issued, according to Mr. Johnson's compilation, commencing with 1892, and up to August 3, 1897, was \$3,176,908.86, and the total amount claimed to have been divided was \$2,172,309. From the same exhibit it appears that to May 12, 1896, there was an aggregate of "thirds" of \$611,836.35; an aggregate of cash, bills, and currency, deposited of \$570,499.86; and aggregate of investments claimed by the government to have been made by Carter, \$569,132.16. As stated, the accuracy of this accounting is entirely a question for the jury. It has been bitterly assailed by the defendant's counsel, and by the defendant's expert. The expert of the government has also been denounced in terms of bitterness. The invectives of counsel, however, do not and should not control the right determination of a cause, unless the conduct and testimony of the witness merit such severity. The question is: Is the exhibit true? Did Carter receive this money? Was it a share of the profits which he obtained as the result of fraudulent conspiracy?

In walking from this hall to your jury room, you traverse the corridor which the architect of this beautiful structure has laid with mosaic pavement. There are innumerable fragments of stone of different size incorporated in the smooth surface. Before the task was completed, the fragments were each as insignificant as pebbles

on Tybee's strand. In the sports of childhood they might have been thrown away and scattered by little hands. But when by the workmen's skill they are placed in juxtaposition and pressed down in the tenacious and enduring cement, they harden into a compact and enduring surface which may bear the hurrying footsteps of generations yet unborn. And so the evidence in this case. Much, if considered out of its relation, might possess little significance. If it appears that the incidents, which have been for so long and so sedulously placed together by one great controlling fact which demonstrates in the minds of those charged as joint offenders the existence and presence of those motives of self-aggrandizement and pecuniary greed with which courts have so often to deal, if considered with all the evidence it is explanatory, illustrative, satisfactory, decisive upon the issues formed on the indictment. This is a matter for the jury to determine in connection with these defendants. The jury will also determine whether or not it was strengthened and buttressed in every particular by the original evidence produced from the banks and trust companies, upon which the government relies. If this evidence taken as an entirety is deemed by the jury to be clear, convincing, and satisfactory, it is evidence of the first importance. If therefrom it is in the opinion of the jury satisfactorily proven that Carter shared in the large profits from the government contracts with Greene and Gaynor, which it was his duty to supervise, and that each of the other defendants on trial received a share of the profits accumulated in the manner charged in the indictment and otherwise described in the proof, they would be justified, in view of all the other evidence in the case, in returning a verdict of conviction on the appropriate indictments and the counts thereof as they may find. If, however, the evidence is deemed unsatisfactory, uncertain, and unreliable, after its close and just consideration, if the minds of the jury honestly and conscientiously hesitate as to whether or not they should accept these compilations, the deductions to which they point, and the other evidence oral and documentary in support thereof, and if the contentions of the government are not supported by other proof that a share of the profits did in fact go to Carter, they would be, in the opinion of the court, justified in returning a verdict of acquittal.

While it is contended by the government, generally speaking, that Carter received one-third of the profits of these contracts, it will support the charges of the indictment if the proof shows that as a result of the fraudulent conspiracy with Greene and Gaynor, while acting as engineer officer, he received anything of pecuniary gain whatever for assisting them in securing contracts and in making large profits from such contracts.

You will next inquire, gentlemen, whether there is evidence in this case corroborating the evidence classified and the deductions pointed out in the exhibits prepared by the expert accountant, Mr. Johnson, which I have just attempted to explain. In other words, is there satisfactory evidence to show that Carter really shared in the profits of the government contracts of which the evidence treats?

It may, in the opinion of the jury, be relevant to a consideration

whether Carter shared in the distribution of these profits to consider the following evidence in proof which is not denied: It relates to the circumstances of his visit to Washington, about the time of the large payment. He left Savannah June 30, 1897, according to the testimony of Sterly the day before the money was available. He took with him two blank checks, one filled out with the exception of the date, and the other blank, as to the amount. He directed Sterly to telegraph him the amount the following day. One check was for \$345,000, and the other \$230,947.90. He made requisition for money to be placed in the Treasury in New York. When he left, the claim for the last month's work for the Savannah Harbor, aggregating a large sum, had not been approved by him when the check was issued. These circumstances, like many others in this case, may in themselves be innocent enough; but in the light of the charges in the indictment, and the other evidence which I have in part recounted, the jury may consider whether they indicate that Carter had a personal interest in the proceeds of the checks. It is further in proof that Carter was in New York at the time, and in person turned over these checks to Gaynor.

It is insisted, however, for the defense, that Westcott, and not Carter, was the beneficiary of a large share of the profits on the government contracts of this district. Mr. Westcott was Carter's father-in-law. Carter's wife it appears had died in December, 1892. It appears from the evidence that Westcott was a man of large affairs. It is contended by the defense that he was the intimate associate of some of the first and most influential of the great financiers of this country. According to the testimony of his counsel, H. L. Stimson, of New York, he was a man of perfectly sound mind, of strong, dominating character. "I regarded him," said Mr. Stimson, "as a man who was to an exceptionally high degree a man of force and intelligence, one of the most so of his age that I have ever met." It otherwise appears from Mr. Stimson's testimony that Westcott was a man in vigorous health the day of his death, which resulted from an accident. It appears from the proof that Mr. Westcott had great confidence in Carter, and from the time of the latter's marriage with his daughter was sincerely attached to him. Westcott stated that he would have trusted Carter with his life. He received large sums of money which he testifies he kept for Carter. They had mutual investments. At times Carter deposited his own money in his attorney account for Westcott, but Westcott bitterly denies that he had any connection whatever with the Georgia contracts, or that he had any knowledge of, or was a participant.

As previously stated, by the humanity of the national law, Greene is permitted to be a witness in his own behalf. Under the law of this state he would not be permitted to do more than make a statement not under oath. Here he testifies as any other witness, and the weight of his testimony is entirely a matter for the jury. He denied all charges of collusion and conspiracy with Carter, and states that he did not see Carter much after 1890. He met Westcott at the University Club. Westcott had retired from active business in 1888.

He said that Westcott claimed to have great influence with influential people in New York, especially those connected with the New York Central Railroad. He said that Westcott said to him: "I kept William H. Vanderbilt out of jail once, what do you think of that?" He further stated that he and Gaynor were anxious to get established with one of the great railroads, such as the New York Central. He said that in the fall of 1892, at the Horse Show, Mr. Westcott spoke to him of the work at Savannah. I now use the language of the witness:

"He asked me how I would regard his having some interest in the profits here in this work, or these works. That didn't strike me as anything remarkable. He was doing a great deal for us, or trying to do a great deal, and it was a matter, perhaps of \$100,000. It strengthened us financially, and I told him I would consult with Col. Gaynor and see. As far as I was concerned, I thought we would do it. I felt favorably disposed towards it."

At that time the Atlantic Contracting Company had the contract known as the 1892 contract for the Savannah River and Harbor. Greene testified that his contemplated profits were \$400,000 to \$450,000. After that Greene testified that he visited Westcott several times. In one of these interviews he told him that Col. Gaynor agreed that he should have a share in the profits, an interest in the profits of these works here. In the following January, he stated, he began paying him a share of the profits, he did not know Carter in the transaction at all. He said: "I did not need him to help me in any way." The amount paid Westcott as profits on the 1892 contract was largely in excess of the amount anticipated. He had no written contract with Westcott. Consideration of his pay was "anticipation of future work, confidence, and expectation." He testified that he paid Westcott about \$450,000 or \$500,000 as his profits on his one-third interest. Westcott is now dead, but when in life he testified before Commissioner Shields in New York and denied positively that he had ever received a cent of profits on the Georgia contracts from Greene or any other person. The comparative credibility of these witnesses is a matter for the jury. Apply to it your intelligence as men of affairs. Is it probable that Greene would have paid in the neighborhood of half a million dollars to Westcott on the possible contingency of securing work for him and Gaynor thereafter? The jury must determine whether or not this story is, per se, credible.

The government seeks to impeach the testimony of Greene on this point. It is by proof of contradictory statements. This is one of the methods of impeaching a witness. It was proven that when Greene appeared before the board of inquiry in Carter's case he was asked this question:

Q. "Has R. F. Westcott, within your knowledge, ever derived any benefit from any government contract in which you were interested?"

A. "He has not, nor from any other contract in which I have been interested."

Greene testified, however, that when he was before the court of inquiry, that when the question was read he did not think he fully comprehended its scope. In rebuttal of this statement, Col. H. M.

Adams, an officer of the rank of colonel, engineer corps, United States army, testified that he was a member of the board of inquiry, and that:

"The questions were written out, the questions were in writing, and were read to Capt. Greene deliberately and clearly, and he took time to consider them. He answered them positively, as stated in that record."

Greene further stated before the same board:

"I will demonstrate to the satisfaction of the board, if Capt. Carter's defense depends upon it, that neither he nor Mr. Westcott ever received a dollar of this money."

Greene testified before the court-martial. He was now under oath. He spoke of the profits of the Atlantic Contracting Company and said: "Nobody but Col. Gaynor and myself to pay it to, it didn't require much notice."

Westcott testified that he met Carter at his house in New York City, 33 West 53d street, a day or two after Carter's return from London in 1897. This was pending investigation of the charges against Carter which were acted upon by the court-martial and which were subsequently presented by the indictment now under consideration. Westcott testified that some time afterward he went to Washington in response to a telegram from Carter. He stated that Carter "wanted me for company. He had the blues, or something of that kind." They returned to New York. Westcott says Carter stated he expected to be arrested when he got back from London, and immediately went to the safe deposit company and took out all his securities and took them up to Mr. Greene and Gaynor at the Hoffman House; that he said he was sorry he had done so, sort of premature, and wanted to know if I would take charge of the bonds. "After much persuasion," he says, "I consented to do it, and he told me that Mr. Greene or Gaynor, or both of them, would bring these bonds up to me the next day at 10 o'clock." They did not bring them, Westcott stated, and he telephoned, and "they said they had changed their minds and wasn't going to bring them." Mr. Gaynor said that. The next day at 10 o'clock, Mr. Greene put in an appearance with the bonds. He brought them to 33 West 53d street, my house. He says:

"Of course, I took possession of them, and I got Greene to go down with us. I was very much surprised at the quantity. I got Greene to go down to the safe deposit because I was afraid I might lose them, until I looked them up. I did not check them up or anything, but from the bulk of them I should think there was a large amount of bonds."

They were put in Box 142 Broadway, New York Safe Deposit Company.

Westcott further testified that when Carter wanted him to go before the board of inquiry and testify that Westcott had furnished him all the money he had spent for the last six or seven years, he replied: "Well, I told him I couldn't do it, because I didn't care to go down there and lie, or swear to a lie, either one." He testified that Greene visited him at Richfield Springs. In the conversation, Greene stated Westcott was a partner, but that later "he admitted that I was not."

He further testified that "Mr. Greene asked me to turn over some bonds to Capt. Carter." This was done, and a receipt taken dated October 11, 1897. Shortly after that he testified he turned over the balance of the bonds to Carter, because, as Westcott states, he (Westcott) was going to leave the country. This was October 29, 1897. He checked them up in the presence of Westcott's counsel, H. L. Stimson, and Mr. Solley, and Carter gave a receipt in evidence. He testified that Carter claimed the bonds.

As we have seen, the testimony of Greene is contradictory in several respects to this statement of Mr. Westcott. This is particularly true with regard to the delivery of bonds to Westcott by Greene, and also with regard to the interview between Greene and Westcott at Richfield Springs, where Westcott stated that Greene admitted that Westcott was not a partner with him. Rose, one of the counsel for Carter, and another lawyer named Thacher, were present at this interview. Greene testifies that both of these men are living, but neither of them was produced as a witness. H. L. Stimson, of New York, came before the jury and testified in person. Mr. Meldrim referred to this gentleman in his argument as a distinguished lawyer, a partner of that other distinguished lawyer, the present Secretary of State. Whether this is true or not, certainly his testimony is uncontradicted.

I have recounted a portion of his testimony as to the characteristics of Westcott. He stated he was present in October when Westcott turned the securities in question over to Carter. It was at Mr. Stimson's office. He testified that Solley, Westcott, and Carter were there. He said Dr. Solley and Mr. Westcott made out a list of securities which they brought in. "I personally did not check it over. They made up such a list from which this receipt was made, as a copy by my stenographer. Carter took the receipt as prepared, went over the securities with it, said it was all right and went away with the securities." And he further states, to use his language:

"After Mr. Carter had taken these securities, and had gathered them up, and was putting them into a bag, I think that he had there, I remember that he took some of them in his hand and said, substantially, 'Daddy, I wish you would take these,' words to that effect; and that Mr. Westcott either said, 'No, no,' or made some gesture of repudiation of the offer made by Carter."

I feel it, gentlemen, my duty to instruct you that if you believe from this evidence that Solley and Westcott brought the securities there, that Carter was also there, that Solley, the son-in-law of Westcott, and Westcott, counted the securities and checked them over and turned them over to Carter, that a receipt was made to be signed by Carter; that Carter, after checking the securities, signed the receipt and offered to give a portion of them to his father-in-law, and, when this offer was rejected, put the securities in a bag and took them off; that, in the absence of proof overcoming the presumption, it would be a lawful conclusion that the title of the securities was in Carter.

If, then, you further believe from the evidence that these securities in whole or in part were the identical securities traced to Carter on

which he collected the interest coupons as stated in Exhibit 319, and otherwise by the evidence offered in support of said certificate, and according to Exhibit 319, all these securities were purchased with funds traced to Carter, the execution of the receipt and the delivery of the securities, in the absence of satisfactory proof to the contrary, may be regarded as a closing and settlement of any accounting which may have existed between Westcott and Carter before that time.

It is insisted for the defendants that the prosecution against them is barred by the statute of limitations. This will require a brief inquiry at your hands. The law is as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial or punishment for any offense barred by the provisions of existing laws."

Section 1046 provides:

"Nothing in the two preceding sections shall extend to any person fleeing from justice."

The several conspiracy counts in indictments Nos. 322 and 371 charge that the defendants on trial and the alleged co-conspirators confederated and agreed together on or about January 1, 1897, to defraud the government in the manner set out in the several counts of the said indictments. Some evidence has been submitted on the part of the United States tending to show that there was a new meeting of minds on or about January 1, 1897, brought about by the necessity of providing funds for the execution of the contracts of October 8, 1896, for Cumberland Sound and Savannah Harbor; that about one-third of the money used in the execution of these contracts was supplied by Westcott or Carter, as the case may be, to Greene, and this two-thirds was put into the local banks for use in the construction of the works; and that about another third was supplied by John F. Gaynor in the name of the younger Gaynors, which went towards the execution of work done on these contracts during the period running from January 1, 1897, to June 30, 1897. If the jury believe from the evidence that a corrupt scheme to defraud, such as is averred in the conspiracy counts of the indictments, had been in operation by and between the defendants for several years, and that there was a new meeting of minds between the said defendants to the indictments on or about January 1, 1897, looking to the fraudulent execution of the work under these 1896 contracts, they might infer that there was a renewal of the conspiracy on or about January 1, 1897.

Again, it is charged in these conspiracy counts that certain overt acts were done after January 1, 1897, in pursuance of the conspiracy charged, such, for instance, as the acts charged in relation to the supplemental contract with forged signatures, charged to have been forwarded to Washington by Carter on March 17, 1897, and which is set out as an overt act under some of the conspiracy counts, such as the presentation of certain false claims or accounts on or about July 1,

1897, and the issue of Carter's disbursing checks on or about July 1st, 1897. If the jury believe that these overt acts were committed in pursuance of the conspiracy under which they are charged, and that these acts were done through the co-operation of these defendants, it would amount in law to a renewal of the conspiracy at the date of the conclusion of the overt acts charged, and the statute of limitations would not commence to run until the last overt act charged under such conspiracy be counted and proven.

This is a well-established rule. It has been held:

"But, as each new overt act in furtherance of a common purpose becomes in law a new conspiracy, the time of the conspiracy may be laid within the period of the statute of limitations if the overt act was within that period; the prior combination, if established, and the later overt act being evidence from which a jury might infer the conspiracy."

Such is the language of the Supreme Court of the United States.

If the jury, therefore, should come to the conclusion that there was a corrupt agreement and conspiracy as charged in the several counts of the indictments, and that such conspiracy was kept alive and renewed by overt acts committed as late as July 1 or July 6, 1897, the defendants could not avail themselves of the three-year statute of limitations before July 1 or July 6, 1900, and could not avail themselves of it then, if, prior to July 1 or July 6, 1900, as the case may be, the defendants had become persons fleeing from justice, within the meaning of section 1045 of the Revised Statutes of the United States, which takes away from persons fleeing from justice the right to plead the statute of limitations.

The government has put in evidence indictment No. 322, which shows that the grand jury of this court returned into court on December 8, 1899, indictment No. 322 against these defendants, naming them, in which conspiracy to defraud and presenting false accounts were charged. As this indictment was found within a less period than the expiration of three years after the overt acts charged: If the jury believe from the evidence that the conspiracy is proven, and that the overt acts charged were proven to have been committed at the times charged, the defendants would not be entitled to any exemption on account of the statute of limitations in regard to that indictment.

The government has also put in evidence a complaint made before Commissioner Shields in New York, charging the defendants with having committed within the Southern district of Georgia the same offenses which were charged in indictment No. 322, and to which complaint a certified copy of that indictment was attached. And, also, the government has introduced the entry on the said complaint made by the commissioner, showing that the defendants were arrested and brought before the commissioner on said complaint on or about the 14th day of December, 1899, for the purpose of their removal to the Southern district of Georgia, to answer to the charges set out in said indictment and in said complaint. It also appears from the said proceeding before the commissioner, in evidence, that the defendants, Benjamin D. Greene and John F. Gaynor, demanded examination, and by the adoption of various dilatory proceedings in the

court succeeded in successfully avoiding submitting themselves to the jurisdiction and processes of the courts in the Southern district of Georgia for over two years, although they were fully apprised of the pending charges against them in the Southern district of Georgia. It further appears from the documentary evidence in the case that the defendants fought the removal proceedings instituted against them, after the commissioner had decided the case against them, before the District Judge in New York, before the Circuit Court of the United States in New York, and before the Supreme Court of the United States, and would not submit themselves to the jurisdiction and processes of the courts in the Southern district of Georgia until they had finally lost in all the proceedings instituted by them for the purpose of preventing their removal to the Southern district of Georgia.

If the jury believe from the evidence that the defendants, Benjamin D. Greene and John F. Gaynor, were from and after December 14, 1899, avoiding the jurisdiction and processes of the United States Court for the Southern District of Georgia, it would make no difference that when they originally left Georgia they had no intent to flee. It is sufficient that, having committed a crime in the Southern district of Georgia, they are found in the Southern district of New York, and when found that they resisted their removal to the Southern district of Georgia, with intent to avoid the jurisdiction and processes of the court in the Southern district of Georgia. It would make no difference that through bad legal advice they thought that such resistance might be legally effective. It is the intent to avoid the jurisdiction and processes of the courts in the judicial district in which the crime is charged to have been committed which takes away from the person charged the privilege of pleading the statute of limitations. It would be abhorrent to the principles of justice that these defendants, for instance, could through the adoption of dilatory proceedings in the courts of New York resist for two or three years removal to Georgia, so that the statute of limitations could run in their favor, and then, for some technical defect, have the court rule on demurrer, as it did in this case, that two of the counts of the old indictments were bad, and then to hold that the government could not supply these counts or obtain additional indictments which the dilatory tactics adopted may render appropriate. If these defendants became persons fleeing from justice on or about December 14, 1899, they lost from that time the right to plead the statute of limitations, and their status as such persons fleeing from justice would not have been altered until they entered into the recognizances given by them on January 20, 1902, in the sum of \$40,000 each, to submit to the jurisdiction of the court in the Southern district of Georgia. If the jury find from the evidence that these defendants were resisting submission to the processes and jurisdiction of the United States District Court for the Southern District of Georgia from December 14, 1899, to January 20, 1902, they cannot avail themselves of the plea of the statutes of limitations under indictment 371, which was returned by the grand jury into this court on February 28, 1902, provided the jury believe

from the evidence that the conspiracies charged in indictment No. 371 are proven, and that the concerted overt acts charged under said conspiracy in said indictment as having been committed in March, 1897, and on July 1 or July 6, 1897, as the case may be, were actually committed. This follows because the time during which a defendant is a person fleeing from justice cannot be counted in his favor in reckoning the three years' exemption.

What has been stated in this respect in regard to the conspiracy count applies with equal force to the counts for presenting fraudulent claims, and also to the later indictment for embezzlement, although that indictment was not returned until after the defendants were extradited from Canada. If a defendant is a fugitive from justice because of one charge pending against him, he forfeits his privilege of pleading the statute of limitations to any and all charges which might be made against him, even though no indictment be pending against him for such other charges. Indeed, the Supreme Court of the United States in the case of *Streep*, 160 U. S. 128, 16 Sup. Ct. 244, 40 L. Ed. 365, has held that, if a defendant flees from a prosecution in the state courts, he forfeits the privilege of pleading the statute of limitations in a federal court in the same district.

The jury have before them certain evidence tending to show that the defendants after entering into the recognizances on January 20, 1902, to appear before this court at the February term, 1902, did appear at the February term, 1902, and after interposing certain pleas and demurrers to indictment 322, and after the court had decided in their favor, sustaining the demurrer to two counts in the indictment, and after being informed of the new indictment, No. 371, fled to Canada and forfeited their recognizances on March 7, 1902. The defendant Greene has testified that he considered himself a fugitive from justice at that time. However, the facts are all before the jury, and if the jury believe that the defendants on or about March 7, 1902, fled to Canada for the purpose of avoiding the jurisdiction and processes of the court for the Southern district of Georgia, they became persons fleeing from justice, and forfeited whatever right they had to have counted in their favor from and after their flight to Canada, the time which elapsed after that date.

It is true that, under the treaty between the United States and Great Britain, it is provided that extradition from the Dominion of Canada shall be had in accordance with the laws of Canada, and that the laws of Canada provide that the defendants have a right to oppose by legal proceeding their extradition; and that under these laws the defendants, as it appears, did adopt dilatory proceeding which delayed their extradition for about three years. Although the treaty, which is a law of the United States ranking next to the Constitution of the United States, recognized the right of the defendants when in Canada to take all legal proceedings which the laws of Canada provided they might take, the court charges you that the time consumed by the defendants by such dilatory proceedings, with intent to avoid their submission to the processes and jurisdiction of the United States court for the Southern district, cannot be counted in their favor on the question of the

statute of limitations. And for precisely the same reason the court charges you that the time consumed by the defendants on dilatory proceedings had in the courts of New York, and on the appeals taken therefrom, if you find that such proceedings were adopted by the defendants to avoid the processes and jurisdiction of this court, cannot be counted in favor of the defendants. Indeed, the rule is established that, where a defendant has acquired the status of a person fleeing from justice, he has forfeited his privilege of pleading the statute of limitations, and he can only regain that privilege by submitting himself to the jurisdiction of the court, and continue his submission so that he would at least have been subject to the jurisdiction of the court for full three years after the crime is committed.

An exceedingly bitter assault has been made in behalf of the prisoners upon three of the witnesses for the government. These are Mr. Johnson, the expert accountant, who testified for the government, Mr. Westcott, the aged father-in-law of Carter, and Maj. Gillette, the successor of Carter, as the result of whose discoveries the investigation which culminated in these indictments was brought.

The jury will pass upon the question whether this treatment of these witnesses is justified by the evidence before the court. They will look carefully to the evidence to ascertain if there is any sort of justification for criticism so severe. It is true it was stated that Mr. Johnson and Mr. Erwin, the District Attorney, were rivals for the honors of this prosecution. I recall no evidence of that character. It was asserted that Mr. Johnson had strong motives to desire the conviction of the accused. If he had such motives, I recall no proof to disclose them. As to the accuracy of his compilation, the jury must determine. An attorney from LaCrosse, Mich., who, according to his testimony, at times devotes himself to the labors of an accountant, criticised the Exhibit 319 as prepared by Mr. Johnson, and insisted that the proof did not support his deductions. But experts may differ in accounting as in every other branch of science without imputing perjury and moral turpitude to either. In the enormous financial operations which the government of the United States is compelled to supervise and at times to investigate, the official services of men of Mr. Johnson's qualifications and training are indispensable. That he has been detailed to this work indicates no prejudice on his part. He was acting under his superiors. It is not true, as stated, that he is the prosecutor in this case. The prosecutor is the United States of America. His testimony, in the opinion of the court, should be weighed by the jury like the testimony of any other witness, and, unless it is supported by proof, with but little regard to the invective of which he has been made the object.

The aged father-in-law of Carter, Mr. Westcott, has passed beyond the reach of such language as was directed at his memory. It falls unheeded on the dull, cold ear of death. It will be proper, however, for the jury in estimating the weight of the testimony of Mr. Westcott to determine what motives he could have had to have falsified and perjured himself in the testimony taken in the examination in New York, and which was admitted in evidence here. If

the testimony of Greene is true, and Westcott was afraid of prosecution himself, how would it have strengthened him to surrender to his son-in-law in the presence of witnesses a half million of values which if guilty he might readily have used for his defense? If, as insisted, he was seeking to get rid of the evidence of his guilt, would he likely have done this in the presence of a high-minded lawyer, and of his two sons-in-law, and would he have taken a receipt which made a record in detail of the transaction?

But it is said his action was cowardly, that it was injurious to Carter. How could it have been injurious? But how was it possible for Westcott to compel Carter to accept these securities if the latter did not choose to do so? According to the testimony of Mr. Stimson and the evidence of the receipt, he received them, offered to give a portion of them to his aged father-in-law, and, when this was refused, took them away with him. There was no protest on his part, in the presence of Stimson, that the securities were not Carter's, but were the property of Westcott. If they were evidences of guilt, Carter, if innocent, knew he was under investigation then, and was under no obligation to accept them in the presence of witnesses and to give his receipt therefor and to take them away. Therefore, if Westcott was guilty, the surrender of the securities could not help him. If Carter was innocent, the acceptance of the securities with guilty knowledge on his part that Westcott was a party to the alleged conspiracy and these were the fruits, would make him the receiver of property embezzled, if you consider for the sake of this statement that they were embezzled as charged by the government, and would make him a participant in the crime. The jury will inquire what motive, then, did Westcott have for turning over the securities, worth in the neighborhood of a half million dollars, if in point of fact he did not know that they belonged to Carter, and what motive did Carter have to receive them if he did not know and recognize that they were his own. These are matters for close and careful inquiry by the jury. There can be no doubt of the facts as to the checking, the delivery, and the taking off, for the receipt is in evidence signed by Carter, and Mr. Stimson, of whose character Mr. Meldrim speaks in the highest terms, testified to those facts.

What, then, was the situation? The jury will recall Stimson's testimony, that as he was leaving, Carter took a bundle of the securities in his hand and offered them to his father-in-law, and said: "Daddy, you will at least take these." The old man said, "No, no," or made a gesture of repudiation. Was that the conduct of a guilty man, or was it the conduct of an aged financier, a man of affairs who knew the value of honor and integrity, a man who had discovered that the once loved husband of his beloved daughter, now dead, was involved in charges of crime, of character the most serious, and who had used him (Westcott) as the receiver and custodian of enormous values unlawfully acquired?

Indeed, the defense themselves have introduced an exhibit which has close relation to this particular issue. It appears from this evidence that Carter went to Europe about two months before the date of this

interview with Westcott, Solley, and Stimson, in Stimson's office, and that prior to his departure for Europe he collected all the coupons and dividends upon the entire batch of securities for which he gave Westcott the receipt just mentioned, and deposited the same in his individual account. From this the jury may, if they think proper, presume that Carter had possession of these securities before he went to Europe.

The court does not state that these were the conditions, but, in view of the charges made against the witness Westcott, suggests them, as it is his right, for the consideration and determination of the jury. And the jury will inquire if there is evidence to justify the unsparing assault upon the character and conduct of Maj. Cassius E. Gillette. If Gillette discovered when he succeeded Carter that the circumstances surrounding these important government contracts, the vast sums expended in their execution, and the condition of the office of which he was now to become responsible, not only was it his duty to report it at once for investigation; but if, with the knowledge of the facts, he had suppressed them and gone forward with the work without notifying his superior officers, he himself would have become responsible and would have been himself liable had they been subsequently discovered. Was an investigation demanded? The head and front of his offending was that he caused an investigation to be made. If it be true, as stated by Rees, that Gillette felt himself responsible officially, personally, and socially for the truth of the charges which were presently investigated by the court of inquiry, was it unnatural that he should fight for his own character and for his status in the army? It being obligatory upon him to make the charges, was it not then obligatory upon him to repel unjustifiable assaults made upon him?

Aside from the question of guilt or innocence of the prisoners on trial, was an investigation needed? To hold otherwise is to condemn the court of inquiry, the court-martial, the District Court of the United States for the Southern District of New York, the Circuit Court of the United States where Judge Lacombe presided, three grand juries of the Southern District of Georgia, the Supreme Court of the United States, all the Canadian courts as in successive applications their action was sought, and the great Privy Council of England, a body of advisers of the Sovereign holding office for life, whose judicial functions are performed by a committee headed by the Lord Chief Justice and composed of the most eminent judges and lawyers of the British Empire. None of these tribunals pronounced these defendants guilty, but the action of all is corroborative of the fact that an investigation here was essential, and to bring this about in discharge of his duty was what Gillette did.

It was declared by the prisoners' counsel in the presence of the jury that Savannah had ostracised Gillette. I recall no testimony of that fact, except perhaps an indignant expression by Gillette himself. "Ostracised"—the word has no place in the vocabulary of American jurisprudence. It is derived from the Greek word "ostrakon," a shell, and, when the fickle populace of Athens desired to get rid even of their

bravest and best, they voted with the ostrakon, and expelled him from the borders of the city of the violet crown. It is related of Aristides, that great Athenian statesman and one of the noble generals who fought against the countless hordes of the Persians,

"Where the mountains look on Marathon,
And Marathon looks on the sea,"

—that a jealous rival was attempting to procure his banishment by ostracism. A rustic citizen happened to be near Aristides himself in the public assembly which was about to decree his banishment, and turning to him, without knowing who he was, asked him how to write the name Aristides upon the shell with which he was going to vote. "Has Aristides injured thee?" inquired the great Athenian. "No," answered the voter, "but I am tired of hearing him called 'Aristides the Just.'" And Aristides was ostracised. But on fuller knowledge of his character his fellow citizens reversed the decree of banishment.

You have been several times told by counsel for the defense during the progress of the argument, that a verdict at your hands against the accused would be equivalent to imprisonment for life. This statement is unwarranted either by law or by the facts, and the matter of punishment is for the court.

I am aware that these observations are somewhat unusual, but such assaults upon witnesses are also unusual in these courts, and what I have said I have said from a sense of duty. The credit of each and all of these witnesses is, however, exclusively for the jury. They must determine upon their veracity and the weight and value to be attached to the testimony. The case, and the whole case, is clearly within the province of this jury. In the long and weary months of labor and solicitude I have appreciated the fact that, as I needed all the light of which the case was capable, you might need all the help the court could give you; but as I said in the beginning, so I say in the end, it is offered to aid and assist you, and not to control you, for I yield to no man in my respect and admiration for the time-honored right and privilege of trial by jury which is embedded in our Constitution, and which, ever protected by fearless hearts and if need be by the blood of the brave, has come down to us from the time whereof the memory of man runneth not to the contrary.

A great deal has been said in the arguments of counsel about the comparative strength of the government when contrasted with the weakness of the accused. Such suggestions are fallacious and misleading in their effect. It is obviously true that in a certain sense a government like ours where the people have of their own volition concentrated their united power in the three great co-ordinate departments, legislative, executive, and judicial, is stronger than any individual. Was this not true the motive which have induced men from the earliest times of which history gives an account to form themselves into governments, would be a fraud, a delusion, and a snare. But, while our government is strong, it is not strong in an oppressive sense. Our people enjoy the largest share of liberty, consistent with safety, of any other known to man. It is the embodiment of justice and humanity to those who are accused of crime. They

are informed of the nature of the accusation against them. They are given a speedy and impartial trial, by an impartial jury, in the district wherein the crime is committed. They are given compulsory process to obtain the presence and testimony of their witnesses, and, if unable to pay the expense of securing their attendance, the government will pay it for them. They are given the privilege of counsel. They cannot be deprived of life, liberty, or property without due process of law, and due process of law comprehends in cases like this not only a rigid compliance with all of those rights which are secured by the Constitution, but the right, in case error is committed in a court of original trial, to appeal to courts whose jurisdiction is appellate and corrective, and in cases of peculiar importance to that tribunal, the Supreme Court of the United States, which concentrates in its jurisdiction the loftiest juridical power of any court on earth. The prisoner is at no disadvantage. He may challenge the array of the grand jury. While the government has three peremptory challenges, he is accorded ten. While he has appeal, the government has none. The verdict of a jury against the government in criminal cases is final. The verdict of a jury against the accused may be readily set aside if it is contrary to law or evidence, or if in the conduct of the trial reversible error has been committed by the court.

Nor are the sentences imposed by the national law unmerciful, nor are the national courts unmerciful. Indeed, both are infinitely more humane and tolerant to the frailties of mankind than any other laws, or any other courts, of which I have knowledge. You should not, therefore, gentlemen, be guided or influenced by such considerations. Let the evidence be your guide, and the law, which has for its foundation the very basis of civilized government; the law which "has for its throne the bosom of God, and for its voice the harmonies of the world;" the law which, if we accept the teachings of the old time religion our fathers and mothers loved, amid the thunders of Sinai, was given to man by the hand of Omnipotence Himself.

With brief instructions as to the form of your verdict as you may find, to-morrow morning at the opening hour, the case will be committed to your hands. The court will be at recess until 10 o'clock to-morrow morning.

Court met pursuant to adjournment.

I have now, gentlemen, the remaining duties to advise you as to the form of your verdict. If you find generally for the government on each and all of the indictments which are now before you, your verdict will be: We, the jury, find the defendants, Benjamin D. Greene, and John F. Gaynor, guilty as charged, and write this verdict on each indictment, and your foreman will sign it.

If you find the defendants guilty on one or more indictments, and not guilty on another or other indictments, you will write your verdict accordingly; writing the appropriate verdict of guilty or not guilty on each indictment as you may find, and your foreman will sign it.

If you find the defendants guilty on one count of either indictment, and not guilty on another or other counts of that indictment, the

form of your verdict will be: We, the jury, find the defendants guilty on ——— count, filling in the number, and you will supply the number; and not guilty on ——— count or counts, supplying the number or numbers, and this verdict will be written on the indictment to which the finding may apply.

If you find generally that the defendants on trial are not guilty, you will write your verdict as follows: We, the jury, find the defendants, Benjamin D. Greene and John F. Gaynor, not guilty, and write this verdict on each indictment as you may find.

There is another finding which you can, if you think proper under the evidence and the instructions of the court, as I have given you, express by your verdict. A conspiracy is charged in certain indictments before you. If only two men are charged with conspiracy, both must be convicted, if at all, because, from the nature of the offense, at least two are essential to its commission. To acquit one, when only two are indicted, is to acquit the other also, although the jury may deem him guilty. In this case, however, other persons not on trial are indicted as joint conspirators with the defendants on trial. These persons are Oberlin M. Carter, W. T. Gaynor, E. H. Gaynor, and Michael A. Connolly. Now, it is competent for you, if you think the proof justifies it, to find either one of these defendants now on trial, namely, Benjamin D. Greene and John F. Gaynor, guilty, and the other not guilty, provided you find that the conspiracy as charged existed between him and either or all of the other alleged conspirators, although they are not on trial; and, likewise, you may, if you think proper from the evidence, acquit the other defendant on trial.

There are two counts in indictment No. 371 for presenting false claims. On one or both of these counts you may, if you think proper from the evidence, convict both of the defendants, even though you may not think them guilty of conspiracy; and you may also, on one or both of these counts, convict one and acquit the other.

There is also an indictment for embezzlement. This is No. 476. This is not necessarily a joint offense, and even though you may find that the defendants have not been proven guilty of conspiracy, if you find that they were parties to Carter's embezzlement, if he was guilty of embezzlement, you may yet find them, or either of them, if you think from the evidence, in view of the instructions I have given you in charge, guilty of embezzlement; and upon the same conditions you may convict one and acquit the other of this charge.

The jury retired.

April 12, 1906, at 1:45 p. m., the jury returned the following verdicts:

"Indictment 322. For conspiracy. We, the jury, find the defendants, Benjamin D. Greene and John F. Gaynor, guilty as charged.

"Hope Thomas, Foreman."

"Indictment 371. Conspiracy, presenting false claims, etc. We, the jury, find the defendants, Benjamin D. Greene and John F. Gaynor, guilty as charged.

"Hope Thomas, Foreman."

"Indictment 476. For embezzlement. We, the jury, find the defendants, Benjamin D. Greene and John F. Gaynor, guilty as charged.

"Hope Thomas, Foreman."

Court adjourned until 10 o'clock a. m., Friday, April 13, 1906.

Court met pursuant to adjournment. In imposing sentence, Judge SPEER said:

The most painful judicial duty is the imposition of a sentence to penal servitude. This is peculiarly true when those convicted are men of fine intelligence, men of affairs, men who have had the opportunities of education, or who have been trained by the teachings of experience. Peculiarly painful is that duty when the convicted have filled positions of responsibility, of honor, and of trust. All of these conditions are present in the duty before me. One of the prisoners has been distinguished by his state; has been an important official of one of its great political parties; a man of large acquaintance, perhaps with multitudes of earnest friends. The other is a graduate of distinction of our great military academy at West Point, and he was, at one time, a captain of that famous corps of engineers whose roster bears such names as Robert E. Lee, and George Gordon Meade—a corps whose record was stainless before the occurrences which have been developed in evidence here.

I am told that it has been cynically said by a famous New Yorker that no man who has a million dollars can be convicted of a crime in America. The verdict of this jury, of plain, clear-sighted, honest Americans has falsified such pessimism. Of that jury it may be said that there is perhaps not a man who cannot trace his ancestry to a patriot of the Revolution which established American independence. It is true, as I have often declared, that to the homogeneous Americanism of these Southern States, when the jurors are plainly shown their duty, our country may ever look with confidence for the enforcement of its laws and for the maintenance of its institutions. Nor can it be questioned that those institutions are in jeopardy if such flagrant spoliation of the public Treasury, as proven in this case, could go unwhipped of justice. The settled policy of our national Legislature to appropriate large sums for the improvement of the avenues of interstate and foreign commerce, which are under the express control of that body, makes it supremely important that such appropriations should be honestly expended and guarded with that rigid fidelity with which our government has ever defended the moneys of the people gathered into the coffers of the Treasury by the exercise of the taxing power of the Constitution. The successful and unpunished spoliation of the public treasury is perhaps the surest sign of national decadence.

For your personal suffering, merited as it is, you have my earnest sympathy. To some, no doubt, who are imbued with the belief that all they can get from the government is "honest graft," your conviction may excite indignation, astonishment, and, perhaps, not a little alarm. It seems indeed that the public should awaken to the prevalence of this dangerous inclination. In this case itself, I am sure, without serious reflection, an exception has been noted by counsel to remarks made by the court to the jury to the effect that the people should have the same concern for the security of the money in the Treasury at Washington, or appropriated by Congress, as for the funds collected

by county taxation in a particular state. The sentiment which prompts such exception seems distinctly provincial. The magnificent contributions from the national Treasury, made by Congress for the welfare of the people, for the erection of public buildings, for the construction of a great navy, for defensive works at assailable points, for great reservoirs and canals for the irrigation of arid lands, for such projects as the improvement of the noble harbor here, and our other fine harbors, the deepening of the channel of great rivers, making them available for cheap transportation, the construction of the interoceanic canal and many similar projects, all imperatively call for a lesson, in thunder tones, to faithless, conniving, unprincipled representatives of the government and to unscrupulous contractors or other persons who would conspire to plunder the public Treasury. Most unhappily for you, but most happily for the country and our future as a law-respecting people, that lesson has come in the verdict of the honest men who gave three months of dutiful and arduous labor to the mighty record which has established your guilt.

Nor should the lesson of our government's conduct in this great case go unheeded. No necessary expense has been spared, no necessary exertion avoided. To bring to the bar of public justice those charged with the spoliation of the Treasury, the Supreme Court of the United States and the Privy Council of England—the loftiest tribunals of the English-speaking race—have contributed their solemn judgments. It is pardonable if I add that these great tribunals have approved the first and only declaration or opinion expressed by the presiding judge of this court anterior to this trial, namely, that the accused must be brought to trial at the bar of the court having jurisdiction of their offenses.

Let the evil-disposed then learn that no land, however distant, no administration of obstructive technicalities, wherever found, will deter the government of our country from asking the justice of its courts against those who have violated its laws. It will be well also for our governmental authorities to reflect that unless the obstructive construction placed upon our removal statutes which delayed this case so long, shall be avoided, as recommended by the President and the Attorney-General, it will be wholly impossible to have the speedy trial of criminal cases. The greater the crime and the more powerful and richer the accused, the greater will be the difficulty of bringing him to trial. Ours is a country already consisting of 45 distinct states, without taking account of the territories and insular possessions. If, then, the government must take its witnesses to each district in which persons, indicted for conspiracy or other joint crime, may seek refuge, and be compelled to ignore the efficacy of the indictment and to make out the case anew, it will result in a paralysis in the administration of criminal justice. Though lawless combinations in restraint of trade may have reduced the people to beggary, though conspirators have designed the assassination of the Chief Magistrate himself, if the indictments of grand juries, and the bench warrants of courts having jurisdiction are to count for nothing, how incomparable is the advantage of a criminal who can choose his own forum, and seek his own city of refuge. Had the

assassination of President McKinley been the result of conspiracy, and had many conspirators each taken refuge in different states, how powerless, in view of that construction of the law, would have been the bench and bar of the country to have won the honor and the gratitude so richly bestowed upon them by the people of the United States for the swiftness, dignity, and moderation of the memorable trial which brought Czolgosz to justice.

Notwithstanding the gravity of your offense, it is not deemed necessary to impose upon you the extreme penalty of the law by cumulative sentences. Such sentences might aggregate 17 years' imprisonment at hard labor, and \$595,749.90 fines. On the contrary, believing that it is the certainty and not the severity of punishment which deters criminals, I will attempt to approximate, in measuring your term, that imposed by his brother officers upon Carter, the late engineer officer, without whose aid and connivance the crimes in this case would have been impossible.

I recognize that you have been in jail for more than a year, that both of you are elderly men, both of you are educated men, accustomed to a life of comparative luxury, and to the comforts of home. Any sentence to you, therefore, is far more severe than a much greater sentence if imposed upon those who commit offenses which demonstrate their savagery and that they are brutes without discourse of reason.

Your terms of imprisonment will aggregate, as expressed technically in the sentence, four years in the United States penitentiary at Atlanta, Ga.

In view of your conviction for embezzlement I deem it my duty, in obedience to the statute relating to that crime, to impose on you a fine equivalent to the amount embezzled. This will be, on each, \$575,-749.90.

I may add, however great your mortification now, your case is by no means hopeless. The sanitary conditions and food secured by the humane management of that great prison, will be far better than that to which you are accustomed. In each year you will have about three months diminution of your sentence for good behavior. In the aggregate this will amount to a year. So it depends upon yourselves whether the sentence is for three or four years.

I trust that you will come from your imprisonment restored in health and in strength, and that for the rest of your lives you will recall the words and cherish the teachings of the psalmist:

"The little that the righteous man hath is better than the riches of many wicked."

AMALGAMATED GUM CO. v. CASEIN CO. OF AMERICA.

(Circuit Court, N. D. New York, July 24, 1906.)

SALES—CONTRACTS—CONSTRUCTION.

Plaintiff, a manufacturer of a patented paper coating under a secret process for the purpose of marketing the same, agreed to sell to defendant as its sole customer on condition that defendant should accept specified quantities of the product, but that if defendant should not accept such

quantities, then plaintiff should be at liberty to sell to others. The agreement then required plaintiff to sell further quantities "if asked for" and due notice given by defendant, the last clause of the agreement being that it was understood and agreed that in certain contingencies or the happening of unforeseen events impairing the ability of either party to perform the conditions of the contract as to the "furnishing or using" of the quantity of products previously provided for, then the parties should be relieved during the period of such disability from "furnishing or taking" such products, otherwise than the capacity and ability of the parties to "supply or use" the amount required. The contract also provided for payment for amounts "taken" by defendant. *Held*, that the contract did not contain any covenant or obligation binding defendant to accept or take the product in the amounts specified, and that no such covenant could be implied.

At Law. Action on contract to recover damages in the sum of \$30,000 which complainant alleges it has sustained by reason of alleged breach of contract. The case was tried before the court, a jury being waived.

John T. Norton, for plaintiff.

George J. Gillespie (T. E. Hancock, of counsel), for defendant.

RAY, District Judge. On the 3d day of September, 1903, the parties in this action entered into a written contract whereby, in consideration of \$1 and of the covenants and agreements in the contract contained, the plaintiff agreed with the defendant as follows:

"The said party of the first part agrees to sell its entire output of its paper coating products for the paper coating trade of the United States and Canada, covering all the products now made by it or which may be made in the future for the paper coating trade and any and all improvements thereon, unto the said party of the second part, upon condition that the said party of the second part shall accept from the said party of the first part for the year beginning January 1, 1904, three hundred and thirteen tons of the said paper coating products and for the year beginning January 1, 1905, six hundred and twenty-six tons of the said products, and for the year beginning January 1, 1906, twelve hundred and fifty-two tons of the said products and for each of the two years beginning January 1, 1907 and January 1, 1908, fifteen hundred and sixty-five tons of said products upon the terms and conditions hereinafter set forth; but in case the said party of the second part shall not accept from the said party of the first part the quantity of said products hereinbefore set forth in any of the years above described, then, and in that case, it is understood and agreed that the said party of the first part shall be and is at liberty to sell its paper coating products in the United States and Canada without reference to the said party of the second part except to protect the said party of the second part with such customers of the party of the second part as shall be supplied with said products of the said party of the first part direct by the said party of the second part. The said party of the first part further agrees to supply the said party of the second part with reasonable quantities of said product within the manufacturing capacity of said party of the first part beyond the quantities above specified provided the said party of the second part shall give due and timely notice of such excess quantities required. The said party of the first part further agrees not to sell any of its paper coating products to the paper coating trade in the United States and Canada, either directly or indirectly, so long as the said party of the second part shall accept from the said party of the first part in the times above specified the quantities of said products above specified and that if any of said products shall reach any of the paper coating trade in the United States and Canada indirectly from the said party of the first part, the said party of the first part will immediately upon notice to that effect, cause its

said products to be withdrawn from such trade and from all persons, firms and corporations who shall furnish said products indirectly to such trade and that the said party of the first part will do everything within its power to protect the trade, rights, and interest of the said party of the second part under this agreement. The said party of the first part hereby guarantees to furnish unto the said party of the second part goods of a quality at least as good as the carload of its said products shipped to the said party of the second part at Bellows Falls last previous to the date of this agreement; a sample of which is to be preserved by both parties as a standard."

The defendant agreed with the plaintiff as follows:

"The said party of the second part agrees to pay for the said paper coating products to be furnished to it by said party of the first part the sum of five and one-half cents per pound f. o. b. cars Troy, N. Y., in carload lots, less freight to any point east of the Mississippi river, sixty days net or cash less 4 per centum per annum for unexpired time as a discount."

The contract contained other clauses material to this controversy hereafter quoted or referred to.

A carload of the plaintiff's paper coating product had been shipped to and received by the defendant, and a sample was preserved by defendant as a standard for future deliveries and a barrel thereof sent to plaintiff as a standard. Deliveries under the contract commenced October 27, 1903, when 150 bags of 275 pounds each, or 41,250 pounds, were delivered. November 4th, 150 bags of 275 pounds, or 41,250 pounds were delivered. In all 82,500 pounds. These goods were accepted and paid for finally, but not without complaint as to quality that same were not of the quality of the sample and not as good as contracted for and agreed to be delivered. Complaint was also made that delivery was not being made according to the terms of the contract. The defendant refused to take and pay for more, but the plaintiff continued to manufacture and store the product, notifying defendant it was on hand and awaiting delivery subject to the defendant's order. The plaintiff made a test as to quality by comparison and made the product not taken by defendant of the same materials and by the same process used in making the carload from which the sample was taken and retained under the agreement. The plaintiff described the test of the material as follows:

"Yes. We test our raw material first, to know when we start that the materials are all right. And then at the finish we test it by boiling it up, allowing it to stand, put it alongside of the previous lot which has been made, and treated in the same way. And decide for ourselves that it is up to the standard."

The witness, then, under objection, gave his opinion the product not taken by defendant was as good as the sample. There was no pretense of a test by use. After the contract was made plaintiff enlarged its plant and facilities for making, so as to comply with its demands, at an expense of about \$40,000. At the time the agreement was entered into the plaintiff had contracts with other parties. During 1904, and after the defendant refused to accept more of this product, which is made by a secret process not disclosed, the plaintiff tendered and has kept and has in store ready for delivery to defendant, 540,500 pounds of the value of \$29,727.50, at the price named in

the contract. The interest on this sum from January 1, 1905, to the day of the trial is \$2,407.92; total, \$32,135.42. While the agreement bears date September 3, 1903, it was not actually executed until October 5, 1903. The plaintiff is a corporation organized to make this special product under its secret processes, some of which are patented, and the plaintiff also knew when the contract was made the purpose for which defendant desired and intended to use it, and as an inducement to the making thereof, stated it was suitable and proper for the use and purpose intended. The defendant had also purchased of plaintiff, tested, and used for this purpose, quite a quantity of this material or product, and such tests had been satisfactory. The plaintiff on the trial elected under his complaint to stand on the proposition that under the proper construction of this contract the plaintiff had agreed and contracted to make and sell to defendant the several amounts of the product specified in the agreement, and that the defendant had contracted and agreed to take at or within the times mentioned such respective quantities, and that the plaintiff had an election of remedies and had elected to offer the product made, and, defendant refusing to take it, store and keep it in tender for the defendant and sue for the contract price. That this was its form of action, and that it was under no obligation to sell or reduce damages by selling and disposing of the product and bring action for the difference. The plaintiff also contends that as to the goods or product accepted by the defendant there was no warranty as to quality that survived acceptance, and that, however inferior in quality and worthless, defendant cannot counterclaim his damages on account thereof. The plaintiff also contends there was no market value for this product.

The defendant contends the contrary of this last proposition and evidence of the market value of the product of plaintiff mentioned in the agreement was admitted. The words, "The said party of the first part hereby guaranties to furnish unto the said party of the second part goods of a quality at least as good as the car load of its said products shipped to the said party of the second part at Bellows Falls last previous to the date of this agreement," are not words of description, but are express guaranty of the quality. October 29, 1903, the defendant wrote plaintiff as follows:

"We shall have to ask you to withhold shipments for the present, and until advised. The delay in shipments has caused us a great deal of trouble. We started out using your material on a large scale, and on your assurance that you could ship a carload a week. You were able, however, to ship only about half that amount, which compelled us to change off of it on some orders, and it is now impossible for us to resume its use as our customers are disgusted. We have also just received very adverse reports from one customer to whom we were sending the largest amounts, and with whom it had seemed to work satisfactorily on the initial trials; but later on developed objections, which he claims are very serious, and he has countermanded his orders, and will take nothing in the future but straight casein. We are investigating the matter, and shall try to overcome the difficulty, and hope for success. I do sincerely hope that we can soon ask you to resume shipments, but until we can get some of these people better satisfied, it is impossible."

January 1, 1904, defendant wrote the plaintiff as follows, by Mr. Charles:

"We have on hand several carloads of your material, and our use for it at the present time is very limited, for the reason that it has not given satisfaction. The concerns to whom we expected to supply it largely have turned it down. We are still working on them, but, so far, without satisfactory results. We are using a small amount, but, at the present rate, it will take us several months to use up one-half the amount we have. Mr. Hall told the writer that you recently said that you were glad that we had no orders at the present time as you were far behind on your orders, and were able to dispose of your entire product at better prices and that you were far behind even at that. Therefore, it occurred to me that you might be very willing to take back, say, two carloads of the stock and which we would like to get rid of, or else, leave it here on consignment until we can dispose of it. It certainly does not give the satisfaction represented. We would like to use it, and it would help us very much if we could, as we are short of casein, but we have had so many complaints we do not dare to take the chances."

Also another by its President, W. A. Hall, viz:

"Replying to your favor of December 29th. We will not care for any shipments during the month of January, as we have a number of carloads of your material on hand now, and do not know what disposition to make of it. Sorry that we have met with such poor success. As soon as I return to New York I want to take up the question of the special customer with you, and see if we can bring any trade from that direction. Although we are very short of casein, we are using only a few hundred pounds a week of your material, as we have had trouble wherever we have put it out. We are working, however, to overcome the difficulties and try to get it into better shape for the purpose."

January 2, 1904, the plaintiff made reply as follows:

"New York, N. Y., Jan. 2d, 1904.

"Casein Co. of America, Bellows Falls, Vt.—Gentlemen: Your esteemed favor of the 1st at hand, contents carefully noted, and with our increased manufacturing capacity, we are now fully up to our orders, and in fact have written to your New York office on the 29th ult., that we could spare one or two carloads for shipment the early part of this month. Thus we are not for the present in need of any of our Paper Coating. We are however, anxious to know if you intend to push our product with the Paper Coating Manufacturers, for if not, we would like to do so ourselves, knowing quite well that the goods we are now turning out will give good satisfaction for that purpose.

"We are gentlemen, always with pleasure to your favors,

"Yours very truly,

Amalgamated Gum Co."

January 6, 1904, Mr. Hall, President, replied as follows:

"Amalgamated Gum Company, Troy, N. Y.—Gentlemen: Replying to yours of the 2d inst., which has been referred to me from Bellows Falls office. You ask if we intend to push your paper coating product, and if not you will do so yourselves, and I note you say that you know that the goods you are now turning out will give good satisfaction for the purpose. I would like to see a sample of the goods which you are now turning out. Judging from your letter, these must be an improvement on those which we have had. We are certainly prepared, and only too glad, to push the goods provided they will give our customers satisfaction. So far, they have utterly failed in that respect, but we have not been fully satisfied that all the adverse reports sent us were due to the quality, and we are still working on the customers who turned them down. We lost considerable trade because you were unable to fill the orders in accordance with your promise. The reasons which you gave for your inability in that direction were satisfactory, but that did not help us or our customers. I fully explained this to you in letters written at the time. We commenced to use your goods on several orders and then, not receiving any more at the time promised, we were compelled to fill our

orders without its use. Changing from one to the other and back again caused much dissatisfaction on the part of our customers, who declined to make any more experiments, and who insisted upon no further changes. I fully explained to both Mr. Connors and Mr. Ducas the 'special customer' matter,—that we had been relying upon a large consumption from this concern, and who suddenly turned down the article, claiming all sorts of inferiority for the goods which were produced with it. We are still working on this customer on the lines outlined by me to Mr. Ducas, and if you wish us to continue we will be glad to do so. As it is, we have on hand some 4 or 5 carloads of your material, for which we have at present time but little use, and through no fault of ours. We would like to return these goods to you, or we will be willing to store them for you without expense and work them off to the best of our ability. If we could get the trade of this 'special customer' we could move the entire amount very soon. We have delayed paying for the goods for the reason that they did not do the work which you claimed for them, and, as above stated, because your failure to ship as promised caused us the loss of much of the trade that we did obtain.

"Yours very truly,

Wm. A. Hall, A. W. P."

And March 24, 1904, again:

"We are willing to release you from the contract if you will take off our hands a portion of the gum which we bought of you. We have been working it off very slowly and can, I think, work it all off in time, but it would be much more difficult for us to dispose of it if you were released from the contract, and were enabled to sell against us. Therefore we should not care to release you unless you relieved us of a certain amount of this material. We do not ask you to take it all. We are willing to limit the amount to three carloads. You have insisted that this article which you have sold to us was your first quality and that it was sold to us at a low price. Therefore, if you are very anxious to be relieved of this contract, we should not think that the requirement to take back so small an amount would stand as any very great obstacle."

And April 12, 1904, as follows:

"Gentlemen: I understand from Mr. Showerin that either you or Mr. Ducas told him that you could readily sell your product to the Champion Coated Paper Co. of Hamilton, Ohio. I would state that we will give you permission to do so, and will assist you in any way that is in our power, provided you will utilize for that purpose the material which we have on hand, which we purchased from you? If that concern can use it at all, they can use very many carloads, and the three or four cars that we have, and would like to dispose of would go very quickly. Furthermore, if you succeed in getting their trade and will take off from our hands the few cars which we have, we will release you from the contract which you have with us and you can then sell the material to coating mills where you choose, as long as it does not interfere with any of our patented processes."

And September 29, 1904, again, as follows:

"The Amalgamated Gum Company, Troy, N. Y.—Gentlemen: Referring to the conversation that I had with Mr. Connors several months ago, I would state that we have since that time consistently exerted ourselves toward the establishment of a demand for your paper coating adhesive, but with very little success, and practically no encouragement, which leaves on our hands a very considerable stock of your goods which we have bought and paid for, which we would be very glad to sell to you at a reduced price. We are informed that you have offered your goods to the coating mills direct, notwithstanding the contract which we have with you to the contrary. We, however, will make no issue on this point, and as we are unable to do anything with it, we herewith release you from any obligation

on your part not to sell or offer for sale the same to the paper coating trade, excepting as such might be in the infringement of any of our patents.

"Yours truly, Casein Co. of America, William A. Hall, President."

October 7, 1904, the plaintiff made reply as follows:

"The Casein Mfg. Co., Hanover Bank Bldg., Pine & Nassau Sts., New York City.—Gentlemen: Upon the receipt of your letter of date the 29th ult. we submitted it together with a copy of the contract, to our attorney for his advice. We are advised that the product which we have manufactured for you and concerning which we have given you repeated notifications and request for shipping orders you are required to take under the terms of the contract. It would be a strange construction of the contract that we should be compelled to go out of business for a year upon your refusal to take goods up to the last moment and then hand us an order for the entire output during the year. We do not believe that any such construction can be placed upon the contract and certainly it was not the intention when it was made. The fact is that we have nine months of our product ready for you which we have been holding at considerable expense to ourselves and which you were required to take under the terms of the contract made. We cannot release you from your obligation to take that product for otherwise it would be necessary for us to admit that the contract gives you the privilege of practically keeping us out of the market and out of business for a period of nine months without any redress. If, however, you are willing to liquidate the damages which have been done or to take the product which we have manufactured for you, then we will consider your proposition of cancelling the contract as of the first of October. Whatever we do, however, in the course of negotiations upon that subject must be strictly understood not to interfere with our rights under the contract or your obligation as we view it to take the full quantity of our out-put up to the end of the first year of the contract. If you are disposed to either take the goods or negotiate an adjustment for the losses which you have imposed upon us in case you do not take the goods and pay for them, we will be glad to enter upon such negotiations with you.

"Yours very truly, Amalgamated Gum Co., William Connors, Treas."

October 11, 1904, the defendant replied as follows:

"The Amalgamated Gum Co., Troy, N. Y.—Gentlemen: Replying to yours of the 7th, there is apparently little that we can say on this subject that has not already been said. We have diligently endeavored to push the sale of your goods and dispose of not only the large quantity which we had on hand (and still have on hand) and which we had paid you for, but also to find a market for further quantities of your material which you stated you were ready and able to furnish, and it is much to our regret that we have found it impossible to accomplish this. We never have made any contract with you to take any specified amount of goods. We did start off taking large quantities, but it did not give satisfaction. We notified you immediately that our customer reported the goods did not answer the requirements, and that they did not do what you represented they would. We gave you permission to sell direct to the coating trade a long time ago provided you would first draw on the material of your manufacture which we had on hand, and which we had paid for, and for which we had no use. Therefore we have not debarred you from selling your product. If you had any demand for it you could have easily disposed of the amount we had, and could have then drawn on your own freshly made goods. We did not hang you up in any way. We notified you also months and months ago that we did not care for any more of this material until either you or we could make it work successfully, and neither you nor we have been able to do this. We are perfectly satisfied with our position, and which has been very clearly outlined to you.

"Yours truly,

William A. Hall, President."

To this October 20, 1904, the plaintiff made reply as follows:

"The Casein Manufacturing Co., Hanover Bank Building, New York City.—Gentlemen: Your letter of date the 11th inst. is received and contents noted. We cannot agree with your interpretation of our contract. It is perfectly plain to us that by that contract you agreed to take certain quantities of our product in each of the years referred to in the contract and your failure to comply with those provisions will be a breach of the contract on your part. We have lived up to the contract in every respect and have been prepared to supply your orders up to the limit of the contract requirements. It is no answer to our position for you to say that you have given us permission to dispose of our product to the trade provided we would dispose of the material which you have on hand and which we delivered to you. That would be a peculiar state of affairs if it should be for a moment seriously considered as a business proposition. You are certainly well aware that we never accepted any such unbusiness-like suggestion, never acted upon it and would not, as very likely you expected that we would not. So that there may be no misapprehension on your part and no misunderstanding between us, we desire again to call your attention to the terms of the contract between our companies and to notify you that the contract must be lived up to to its fullest extent and that we have not done and have not intended to do and will not do and do not intend to do anything to release you from the terms and requirements of that contract in any respect.

"Yours very truly, Amalgamated Gum Co., William Connors, Treas."

It should be remarked that the uncontradicted evidence in the case establishes that this product sent to defendant and received and finally paid for by it was, mostly, worthless for the purpose for which intended and was not saleable in the market. From this correspondence it is evident that the defendant claimed from the very beginning that it had not agreed to take and pay for any amount of this product unless specially ordered; that it could stop taking or dealing in it at any time. That its obligation was to pay for what it did take; that this was a joint agreement or undertaking of the parties by which the plaintiff was to make the product and in effect make the defendant, with slight exception, its sole customer and salesman to push the same in the market and in the paper trade and in consideration thereof defendant was to have control of its sale in the United States and Canada. That defendant undertook on its part to push its sale and use in the paper trade, and to pay for all it did accept or take a certain specified price, and, as a condition of this undertaking on its part, was to have the entire output of plaintiff in case it took the quantities specified in each year named, but not otherwise, so as to have exclusive control of its sale. This construction and interpretation was not for a long time, months, controverted by plaintiff, but it finally did take the ground, as appears from the recited correspondence, that defendant had absolutely agreed to take, accept, and pay for the quantities specified in the contract. But this would seem to have been after the product had proved a failure for the use intended. It is not established that the parties changed the contract in its main features in any respect material here or that any particular construction by conduct of the parties was placed upon it, although the long acquiescence in, or failure of the plaintiff to dispute defendant's construction, is entitled to its due weight in the case. The only material change that bears on its interpretation will be noted later.

The first clause or paragraph provides:

"The said party of the first part agrees to sell * * * unto the said party of the second part, upon condition that the said party of the second part shall accept from the party of the first part * * * but in case the said party of the second part shall not accept from the said party of the first part the quantity of said products hereinbefore set forth in any of the years above described, then and in that case it is understood and agreed that the said party of the first part shall be and is at liberty to sell its paper coating products in the United States and Canada without reference to the said party of the second part except to protect the said party of the second part with such customers of the party of the second part as shall be supplied with said products of the said party of the first part direct by the party of the second part."

I fail to discover any good and sufficient reason for the insertion of this language if there was or was supposed to be an outright and absolute agreement on the part of defendant to take the product in the amounts specified. It seems to me to be a provision that demonstrates the plaintiff did not understand defendant was binding itself to take the product. Then comes an agreement to supply further quantities if asked for and due notice given. If a special amount in excess of that named was ordered by defendant, it of course became obligated to accept or take it. Hence the use of that word in the last clause of the contract hereafter referred to. Then, "The said party of the first part further agrees not to sell any of its paper coating products to the paper coating trade in the United States or Canada, either directly or indirectly, so long as the said party of the second part shall accept from the said party of the first part in the times specified the quantities of said products above specified," and also language that imposes an obligation to withdraw the product from the market so that none of same shall reach parties in the United States or Canada in competition with the defendant. The idea seems to be to encourage the defendant to build up and establish a trade and consumption of this article in the United States and Canada and protect it in so doing. The undertaking of defendant to do this might prove beneficial to it depending on the extent of its trade and the prices it should obtain. To build up such a trade and a demand for this new product of plaintiff made under secret processes would be beneficial to it. The second party is to control the market of this product in the United States and Canada if it takes the specified quantities in the years named, not otherwise.

The last clause of the agreement is in these words:

"It is hereby understood and agreed by and between the parties to this agreement that in case of fire, strikes, labor troubles, or the happening of other unforeseen events which shall impair the ability of either party to keep and perform the provisions of this agreement as to the furnishing or using of the quantity of products hereinbefore provided, then, and in that case, the said parties are relieved during the period of such disability from furnishing or taking said products in the quantities hereinbefore provided or otherwise than the capacity and ability of the said parties to supply or use the amounts referred."

It will be noted that there is an absence of any covenant or agreement on the part of defendant to buy, purchase, take or accept any of this product whatever. Plaintiff's agreement to sell to defendant is

"upon condition" that it "shall accept" the quantities specified in certain years, and "in case the said party of the second part shall not accept" then the party of the first part is fully relieved from its obligation, except in one instance, which is, that it will protect any customer of defendant to which it may be supplying the product direct. That is, if defendant has obtained a customer or customers for this product the plaintiff will continue to supply him or them. Plaintiff's agreement to sell the whole of its output to defendant is based on the willingness and ability of defendant to accept and take a certain amount thereof, specified, in each of the years named, and if it fails to take such amounts then plaintiff's obligation in that respect ceases, and the entire market is open to it. Can an agreement to take the product be implied from the language of the entire contract? Clearly not from any clause preceding the last one. In fact the language, until we come to that clause, negatives the idea of any agreement or obligation to purchase, take, or accept the product or any of it unless specially ordered. The agreement to sell is on condition that defendant does certain things, and, as defendant does not agree to do that thing or those things, it is clearly optional with it to do the act or acts or not to do them. But when we come to the last clause, the one last quoted, and which relates to fires, strikes, etc., we find this language referring to fires, etc., viz.: "which impair the ability of either party to keep and perform the provisions of this agreement as to the furnishing or using of the quantity of products thereinbefore provided, then, and in that case, the said parties are relieved during the period of such disability from furnishing or taking said products in the quantities hereinbefore provided, or otherwise, than the capacity and ability of the said parties to supply or use the amounts referred." Nowhere do we find any use of the words "purchase or buy," and even in this clause, instead of using the words "furnishing or purchasing" or "furnishing or accepting" or "furnishing or buying," as expressing or reciting the mutual obligations and mutual agreements, we find the parties saying "keep and perform the provisions of this agreement as to the furnishing or using," etc., not "accepting." But a little later they say, in a certain contingency, strike, etc., "the said parties are relieved during the period of such disability from furnishing or taking said products," etc. The word "taking" here implies an obligation as to taking if not to take; that is, receive or accept, and, if so, what was that obligation? Was it to take or accept and pay for the quantities specified in the first clause each year named? If so, why was a clause imposing such obligation omitted? Why were words clearly importing a purchase or an obligation and an agreement to purchase, or take, or accept such quantities omitted? The parties evidently had the particular matter or subject in mind, but in place of language plainly implying an agreement to purchase, take, and accept and pay for the amount of the product specified deliberately selected words indicating the contrary purpose. As seen, there was a clause in the contract imposing on the plaintiff the obligation to accept and pay for any extra amount or quantity it might order, and construing the words "the said parties are relieved during the period of such disability from

furnishing or taking such products," etc., so far as the word "taking" is concerned, to refer to this obligation, there is no ambiguity or conflict.

There is, in this agreement, a clause relating to a special customer, which, in substance, is this: The first party agrees to furnish the second party a limited quantity of such product at five cents per pound for one person, known as a "specified customer" and "the amount taken by such specified customer is to be considered as a part of the before mentioned amounts which it is necessary for the party of the second part to take from party of the first part in order to maintain an exclusive control." It seems to me that these words refer not only to the amounts specified in the first clause of the contract, but, in fact, explain and make clear the intention of the parties, viz.: That the arrangement was that defendant should build up the trade in this product, and, if it took the quantities specified in each of the years named, it was to have exclusive control of all sales in the United States and Canada, otherwise not; and in case defendant did not take such quantities then the market of the world was open to plaintiff with the one slight qualification named. In short they expressly refer to the quantities of the product mentioned in the first clause of the agreement as the amounts which it is necessary for the party of the second part to take from the party of the first part in order to maintain an exclusive control, not as the amounts the party of the second part had agreed to purchase and accept from the first party as they naturally would have done had there been any agreement to accept such quantities. Later, and December 3, 1903, a supplemental agreement as to this "specified customer" was made in which it is recited:

"In consideration of the efforts of the Casein Company of America to obtain for us the trade of the especial customer mentioned in the contract of September 3, 1903, we agree as follows:"

Here follow six covenants in the fifth, of which it is provided that the shipments are to be made under the name selected by Wm. A. Hall, the president of the Casein Company, and that such company is to be credited on such sales with the difference between the net selling price and \$4.85 per hundred f. o. b. Troy, N. Y. And the 6th is as follows:

"It is further understood that the Casein Company of America will guaranty the payment of this account at the 4.85 price, and will see that full payments are made at such price to us within sixty (60) days of delivery."

Taking this agreement and its recitations in connection with the first agreement, it seems clear that the general intention of the parties was that defendant was to build up a trade in this product if it could, and, in consideration thereof was to have the entire control of its sale in the United States and Canada in case it succeeded in disposing of certain specified quantities which plaintiff agreed to furnish and sell to it, but that defendant did not agree and was not required to agree to take or accept such quantities or any quantity whatever. The absence of any agreement in words to purchase or accept or of any equivalent expression is very significant. Again, the parties have expressly

agreed on what the consequences shall be if defendant does not accept the quantities of the product specified, and, under the authorities, where this is the case no further covenant or agreement on that subject will be implied. *Hawkins v. United States*, 96 U. S. 689-697, 24 L. Ed. 607-610. Also, see numerous cases cited 15 Am. & Eng. Encyc. of Law, 1078.

In construing and interpreting an agreement it is to be taken as a whole, and all its provisions read together. Distinct and special provisions are to be considered when they have any relevancy to the main ones. The intent of the parties is to be ascertained, if possible, and carried out. In case of ambiguity the surrounding circumstances and the conduct of the parties, or practical construction or interpretation put upon it, are to be considered. Sometimes conduct will show the abandonment of the old written agreement and the substitution of another oral agreement. Here the surrounding circumstances, the situation of the parties, the nature of the business in which they were engaged and the character of the product, its being a new article and the result of the operation of secret processes of plaintiff's unknown to defendant, have all been considered at the insistence of the plaintiff and against the objection and protest of defendant. I think the well considered cases compel the conclusion at which I have arrived. *Hale v. Finch*, 104 U. S. 261-263, 266, 267, 26 L. Ed. 732; *Zorkowski v. Astor*, 156 N. Y. 393, 397, 50 N. E. 983; *Hudson Canal Company v. Pennsylvania Coal Company*, 8 Wall. (U. S.) 276, 288, 19 L. Ed. 349; *Bruce et al. Executors v. The Fulton National Bank of the City of N. Y.*, 79 N. Y. 154, 35 Am. Rep. 505; *Barker v. Pullman Company*, 134 Fed. 70, 67 C. C. A. 196; *Wing v. Ansonia Clock Co.*, 102 N. Y., 531, 7 N. E. 621; *Newell v. Wheeler*, 36 N. Y. 244; *Arthur v. Baron de Hirsch Fund*, 121 Fed. 791-795, 58 C. C. A. 67; *Green v. American Cotton Company (C. C.)* 112 Fed. 743-744; *Hawkins v. U. S.*, 96 U. S. 689, 697, 24 L. Ed. 607-610. Many other cases might be cited, but it seems unnecessary.

In *Hale v. Finch*, 104 U. S. 261-263, 26 L. Ed. 732, one Hale sold to Finch a steamboat, and gave a bill of sale, consideration \$5,000, covenanting, first, to warrant and defend title, and then the following:

"And it is understood and agreed that this sale is upon this express condition, that said steamboat or vessel is not within 10 years from the 1st day of May, 1867, to be run upon any of the routes of travel on the rivers, bays, or waters of the state of California, or the Columbia river or its tributaries, and that during the same period last aforesaid the machinery of the said steamboat shall not be run, or be employed in running any steamboat or vessel or craft upon any of the routes of travel on the rivers, bays, or waters of the state of California, or the Columbia river and its tributaries."

It was held no agreement not to use such steamer on the waters, etc., of California or Columbia river could be implied. Mr. Justice Harlan, in giving the opinion of the court, in which all concurred, said:

"There is, in terms, a covenant by Hale to Finch to defend the title to the boat and its machinery against all persons whomsoever. This is immediately followed by language implying an agreement that the sale was

upon the express condition that neither the boat nor its machinery should be used within a prescribed time upon certain waters. It is the case of a bare, naked condition, unaccompanied by words implying an agreement, engagement, or promise by the vendee that he would personally perform, or become personally responsible for its performance. The vendee took the property subject to the right which the law reserved to the vendor of recovering it upon breach of the condition specified. The vendee was willing, as the words in their natural and ordinary sense indicate, to risk the loss of the steamboat when such breach occurred, but not to incur the personal liability which would attach to a covenant or agreement upon his part, that he would not use, and should not permit others to use, the boat or its machinery upon the waters, and within the period named. If this be not so, then every condition in a deed or other instrument, however bald that instrument might be of language implying an agreement, could be turned, by mere construction and against the apparent intention of the parties, into a covenant involving personal responsibility. The vendor having expressly, and the vendee impliedly, agreed that the sale was upon an express condition—stated in such form as to preclude the idea of personal responsibility upon the part of the vendee—we should give effect to their intention, thus distinctly declared."

In *Bruce v. Fulton National Bank*, 79 N. Y. 154, 35 Am. Rep. 505, it was held:

"From the words of an express covenant, an additional or correlative covenant may be implied, if the language used shows that such covenant was intended; but such implication cannot be permitted where it is apparent from the contract that the parties had the subject in mind, and either one has withheld a promise in regard to it. A lease under seal, drawn technically in form, and with obvious attention to details, contained various covenants, some binding the parties mutually, some the lessor only, others the lessee. It contained a covenant, on the part of the lessor, to the effect that if the lessee should pay the rents, and perform all the covenants on his part, that the lessee 'shall and will at the end or expiration of the term,' grant to the lessee a new lease for a further term specified, at a rent to be adjusted by appraisers, but not less than that for the first term. In an action to compel the lessee to accept a new lease, held, that this was a covenant, on the part of the lessor only, from which no covenant, on the part of the lessee, to take a new lease, could be implied; and that it was optional with him, whether or not, to take a new lease."

In *Zorkowski v. Astor*, 156 N. Y. 393, 50 N. E. 983, it was held:

"A covenant will not be implied unless it clearly appears from the words used that one was intended. When it is apparent that the parties to a written agreement had the subject in question in mind, and either has withheld an express promise in regard to it, one will not be implied. Where a lease of land by the owner thereof to the owner of the building thereon, so far as it relates to the subject of renewal, contains mutual covenants for an appraisal and a separate covenant by the lessor that if he does not elect to pay for the building he will grant a renewal, without any provision concerning the acceptance, by the lessee, of a renewal, but with an absolute covenant by him to surrender possession at the end of the term, a covenant by the lessee to accept, corresponding to the lessor's covenant to grant a renewal, will not be implied; and, hence, on the lessor's electing not to take the building, but to renew the lease, the lessee cannot be compelled to accept and execute the renewal lease, unless he elects so to do."

This case was cited and approved by the Circuit Court of Appeals, Second Circuit, *Arthur v. Baron de Hirsch Fund*, 121 Fed. 791-795, 58 C. C. A. 67, where it was held:

"Defendant, in order to aid the poorer class of Hebrews in settling in the country, executed a written contract with plaintiff by which it agreed to

loan plaintiff a certain sum to be used in the erection of houses on land belonging to plaintiff in the country, on which plaintiff agreed to give a mortgage to secure the loan. It was further stipulated that plaintiff should sell the houses to such purchasers as defendant should name, provided the purchaser would assume the payment of the mortgage to defendant, pay 10 per cent. of the price in cash, and execute a second mortgage to the plaintiff for the balance. Plaintiff was entitled to fix the prices for the houses and the terms of payment, and left free, unless the purchasers complied with such conditions, to sell to whom he chose. *Held* that, since the contract in terms did not obligate defendant to furnish purchasers or require that the purchasers named by it should comply with plaintiff's conditions, and the contract being otherwise beneficial to plaintiff, an agreement by defendant to furnish such purchasers would not be implied."

In *Barker v. Pullman Company*, 134 Fed. 70, 67 C. C. A. 196, the Circuit Court of Appeals, Second Circuit, held:

"Where a contract between an insurance company and a palace car company provided that the insurance company agreed, on the expiration of the palace car company's policies, to renew the same for three years at a specified rate, which agreement was signed by both parties, it constituted a mere option, which did not bind the car company to take the insurance."

In that case the agreement was as follows:

"That in consideration of one dollar and other valuable considerations, the Agricultural Insurance Company agrees, on the expiration of the present insurance policy of the Wagner Palace Car Company, to renew the same for three years for the rate of 29 17/100 annual premium, payable in nine equal installments, one each in September, October, and November, respectively of each year. The Agricultural Insurance Company agrees to give substantially the same companies comprising the syndicate now on the risk. In witness whereof the parties hereto have hereunto appended their signatures and seals the day and year first above-written.

"The Wagner Palace Car Company,

"By W. S. Webb, President.

"The Agricultural Insurance Co.,

"By _____.

"Witness: F. G. Smith."

If parties have left out some covenant by mistake the remedy is to reform the instrument. Courts have no right or license to put into a contract by implication a stipulation not found there on the ground that it would be a more fair and equitable contract so to do. The covenant sought to be implied must arise by necessary implication from the language used or by implication of law. As was said by Judge Wallace in *Arthur v. Baron de Hirsch Fund*, *supra*, page 796 of 121 Fed. page 72 of 58 C. C. A.:

"Where parties have entered into written engagements which industriously express the obligations which each is to assume, the Courts should be reluctant to enlarge them by implication as to important matters. The presumption is that, having expressed some, they have expressed all of the conditions by which they intended to be bound."

The plaintiff here having agreed to sell this special product of a composition unknown to the defendant to defendant only, on condition that it should accept certain specified amounts in years named, and that, if it did, the defendant should have the exclusive market for it in the United States and Canada, and, having provided that in case the defendant should not accept same (implying fairly it had the right

not to accept) that then it should go in and occupy the market in the territory named, and it also appearing that the agreement was beneficial to the plaintiff in the absence of any agreement to accept and take and pay for the product in any event, and the obligations of the defendant assumed by it being fully and carefully expressed, it would be making a new contract for the parties and importing into it a covenant and obligation not contained therein by either necessary or fair implication to hold that defendant has agreed to accept or take the product in the amounts specified. This is not of that class of cases where the one party orders of another certain goods to be manufactured by him, and that other agrees so to do, and nothing is said about acceptance or payment. In such a case the law would imply a promise both to accept and pay for the articles when made.

Findings of fact and conclusions of law in accordance with this opinion will be prepared and submitted for signature.

The complaint will be dismissed on the merits.

UNITED STATES SHIPPING CO. v. UNITED STATES.

(Circuit Court, D. New Jersey. July 11, 1906.)

1. ADMIRALTY—JURISDICTION—SUIT AGAINST UNITED STATES.

Admiralty jurisdiction in a suit in personam is not dependent on a right to proceed in rem, but upon the subject-matter of the suit, and a suit against the United States, brought under the provisions of Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], and based upon a maritime contract of affreightment, is within the admiralty jurisdiction of the Circuit or District Court.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Admiralty, §§ 131-149, 185-190.]

2. SHIPPING—CONSTRUCTION OF BILL OF LADING—TIME FOR DISCHARGING.

A provision of a bill of lading that the cargo shall be "received by the consignee immediately the vessel is ready to discharge, and continuously at all such hours as the customhouse or port authorities may give permission for the ship to work," means only that the discharge shall be reasonably continuous, considering the time, place, and circumstances, the nature of the cargo, the situation of the vessel, and prevailing conditions generally.

3. SAME—DEMURRAGE.

Libellant contracted with a naval officer of the United States to carry ammunition and naval stores from the Brooklyn Navy Yard to the naval station at Cavite, Philippine Islands, to be there received, and immediately and continuously discharged by the consignee. A state of war prevailed in the Islands at the time, Cavite was not a port of entry, but merely a naval and military station, and owing to the nature of the cargo and the prevailing conditions the regulations required it to be discharged only in the daytime by means of government lighters, and that no more should be discharged in a day than could be deposited in the arsenal on shore the same day. *Held*, that all such conditions which were known to the parties rendered the regulations reasonable, and must be presumed to have been contemplated by the parties; that the United States was not liable for demurrage because of delay in discharging, in so far as it was carried on with reasonable dispatch under such regulations, but that it was liable for delay due to the failure to keep all of the lighters engaged in the work in use during

such hours as they might have been, and transferred their cargoes to the arsenal before night.

[Ed. Note.—Demurrage, see notes to *Harrison v. Smith*, 14 C. C. A. 657; *Randall v. Sprague*, 21 C. C. A. 337; *Hagerman v. Norton*, 46 C. C. A. 4.]

4. SAME—MEASURE OF RECOVERY.

In the absence of contract, the charter price per day of a vessel under a time charter is not the measure of demurrage recoverable for delay in discharging cargo taken by the charterer for another, but rather the probable net earnings of the vessel during the time lost in the usual course of its employment.

[Ed. Note.—For cases in point, see vol. 44, Cent. Dig. Shipping, § 593.]

Wing, Putnam & Burlingham and Henry E. Mattison, for petitioner.

John B. Vreeland, U. S. Dist. Atty., and H. P. Lindabury, Asst. U. S. Dist. Atty.

CROSS, District Judge. The petitioner, a time charterer of the steamer *Trunkby*, has filed a petition against the United States of America to recover demurrage of the amount of \$1,702.75, which is alleged to have been caused by the detention of said vessel at Cavite, Philippine Islands, by the respondent in the month of June, 1900. The petitioner is a corporation organized under the laws of the state of New Jersey, and in bringing this suit is taking advantage of the jurisdiction conferred upon this court by the act of March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752]. The action is in the nature of a suit in admiralty, and the petitioner prays that the cause may be proceeded with according to the rules of admiralty.

By the act I am required to file a written opinion in the cause, setting forth a specific finding of the facts therein, and also my conclusions upon questions of law involved.

Finding of Facts by the Court.

The *Trunkby* was owned by R. Ropner & Co., and was under a time charter to the petitioner. The vessel was 200 feet long, 45 feet broad, and 20 feet deep; her tonnage was 1668 net, and a dead weight capacity of 4,065 tons. She had six hatches—four large and two small—besides engine-room space. Each large hatch was 24x12 feet. She was also provided with steam derrick and hoisting apparatus, working on either side of the vessel, but there was only room for two lighters to work on each side. The *Trunkby* first went to Baltimore, where she loaded 2,300 tons of steel rails for Vladivostock, distributed between holds No. 2 and No. 3, and about 100 tons more in holds Nos. 3 and 4. These rails were for railroad use, of the usual length and weight, and were stowed in the bottom of the holds. The vessel then proceeded to New York, where she loaded a little over 3,000 bales of cotton, weighing 600 or 700 pounds each, for Yokohama. Three hundred and fifty bales were stowed in hold No. 4 and the balance in No. 2. The ammunition and naval stores were placed in holds Nos. 1, 3, and 4. This space was engaged March 21, 1900, by Ed-

win Putman, storekeeper of the New York Navy Yard, for and on behalf of the naval department. He entered into a contract with the petitioner through John R. Livermore, a freight broker of New York, for carriage on board the Trunkby from New York to Manila, or port or ports, from 300 to 400 tons of ammunition and from 600 to 700 tons of naval stores. The agreement provided for the use of the regular Eastern form of bill of lading. On March 31st, under this agreement, there was loaded at New York 1,108,347 pounds of stores and 760,921 pounds of ammunition to be delivered to the general storekeeper at the naval station of Cavite, Philippine Islands, as per bills of lading. These bills of lading provided as follows:

"(G) Also, that the goods are to be received by the consignee immediately the vessel is ready to discharge, and continuously at all such hours as the customhouse or port authorities may give permission for the ship to work, if necessary, to discharge into lighters at the risk and expense of the consignee. And it is expressly understood that the articles named in this bill of lading shall be at the risk of the owner, shipper, or consignee thereof as soon as delivered from the tackles of such steamer at her port of destination, and they shall be received by the consignee package by package, as so delivered, and, if not taken away the same day by him, they may, at the option of the vessel's agent, be sent to store or warehouse, or permitted to lie where landed, at the expense and risk of the aforesaid owner, shipper, or consignee, and be subject to rent."

And in another paragraph it was provided "that the carrier shall have liberty to convey goods in lighters to and from the ship at the risk of the owners of the goods."

The Trunkby arrived at Manila June 4, 1900, and reported its arrival to the naval officials, and received orders to proceed to Cavite, whither the vessel proceeded, and anchored at 2:30 p. m. June 5, 1900, the master reported the readiness of the vessel to discharge cargo, and obtained permission therefor from the customhouse officials, who placed an officer on board to permit the discharge of cargo at all hours. The master engaged stevedores before leaving Manila. The master, from Cavite by military telegram, ordered the stevedores sent for. The telegram went through the following day. The stevedores consisted of four gangs and a foreman, 34 to 40 men in all. They were furnished by Robinson & McCondray. The stevedores went on board the Trunkby June 6th at evening, and began to discharge cargo June 7th. It was the custom to discharge the ammunition and naval stores from the steamer into government lighters. These lighters were under military guard. The lighters were towed out to the ship, which owing to shallow water was anchored at about one mile from the shore, and when loaded were towed ashore. Other than government lighters were not permitted to be used in the discharge of the cargo. This was by general regulation. An oral request to permit the steamer to employ other lighters was made, but it does not appear to whom, and was refused. Cavite was not a port of entry. All the freight consigned there at this time and for some time previously was for government use. There were no written or printed regulations existing as to the manner of unloading ammunition and naval stores, but, owing to the condition of war and insurrection then

existing, such freight could only be unloaded under government direction, in government lighters, and no more could be taken ashore on any one day than could be stored away in the arsenals at night. When such freight was taken from the lighters to the shore it had to be carried by hand some 200 yards to the arsenal. The discharge of the Trunkby proceeded as follows: June 7th four lighters came to the vessel. Work was stopped at 11:30 a. m., owing to the breaking down of the donkey feed pump. June 8th three lighters came to the ship. The work at No. 1 hatch stopped at 2 p. m., and at Nos. 3 and 4 at 4 p. m., after which no more lighters came out that day. On June 9th work was resumed at 8 a. m. in holds Nos. 1, 3, and 4. One lighter at each hatch. Lighter at No. 3 was loaded at 11:30 a. m., No. 1 at noon, and No. 4 at 2:15 p. m., after which no more lighters came out that day. June 10th, Sunday. June 11th work began with one lighter for each hold at 7 a. m. Lighters at Nos. 1 and 4 hatches were loaded at noon, and the lighter at No. 3 at 3 p. m., after which no more lighters came to the vessel that day. June 12th work was resumed at 6 a. m. in No. 1. Ammunition in that hold finished at 11:30. At 7 a. m. lighter was obtained for ammunition in No. 3 hold, and it was loaded at noon. Another ammunition lighter came out at 4 p. m. Work ceased at 5 p. m. The lighters all went ashore. June 13th work resumed at 7:30 a. m. Two lighters began loading with ammunition from No. 3 hold, and finished at 12:30. Two lighters loaded with naval stores from No. 1 hatch at 2 p. m. Another lighter came at 2 p. m. to take naval stores from No. 3 hold, and work ceased at 4:45 p. m. June 14th two lighters came for ammunition at 7:30 a. m.; loaded at 3:30 p. m. One lighter loaded with naval stores from No. 3 hold at 5 p. m., and two lighters were loaded with naval stores from No. 1 hold at 4:30 p. m. June 15th two lighters came alongside 7 a. m., one for ammunition at No. 3 hold, and one for naval stores at No. 1. The ammunition lighter was loaded at 10:15 a. m.; another, which arrived at noon, was loaded at 4 p. m. All the ammunition was then out, and another lighter was loaded with naval stores until 5 p. m. Two lighters alongside of No. 1 hatch were loaded with naval stores from 7 a. m. to 4 p. m. On June 16th two lighters came alongside at 7:45 a. m., took naval stores from hatches Nos. 1 and 3. At 11 a. m. two more lighters came, and at noon another; work stopped at 4:30 p. m. June 17th, Sunday. June 18th two lighters worked at hatches Nos. 1 and 3. At 10 a. m. two more lighters came, and another at 2 p. m.; finished No. 3 hold at 4 p. m.; stopped work at 4:30 p. m. On the 19th the cargo was entirely discharged at 8:30 a. m. The master of the Trunkby endeavored to accelerate the discharge, but was answered by the paymaster at the station that he was sorry, but could not do anything. The master protested against the delay. June 16th master noted a protest before the British consul of the delay in removing the cargo from ship, and on same day made claim on the commandant for four and one-half days demurrage, at £50 sterling per day. June 18th the master sent a letter to the ship's agents, claiming demurrage for seven days, and requesting the agents to make claim for that time. Accordingly, on June 19th, a claim was made upon the commandant through the

agents for two and one-half days additional demurrage, or seven days in all, making a total amount of demurrage claimed £350 sterling. The Trunkby sailed as soon as discharge was completed. June 23d Lieutenant Commander Irwin sent a letter to the agents, stating that delay was due to faulty storage, and that the claim for demurrage was considered unwarranted, but would be referred to Navy Department at Washington. June 29th the commandant sent a letter to Messrs. Kerr & Co., the agents, in which he referred to the master's letter of June 16th, and then stated that, as the delay in discharging was due to faulty storage of the cargo, and the stormy weather prevailing during the last few days of the discharge, there appeared to be no ground for the claim for demurrage. The last three days of the discharge, 16th, 17th, and 18th of June, were very rainy and windy, and very little work, if any, could be done; otherwise than as above, the weather was good. The stevedores remained on board the vessel all the time, but were unable to work at night. There was nothing on the part of the customhouse officials, stevedores, or crew that prevented work in discharging cargo during the daytime. The excuse made on the part of the government and set up in the answer, that the delay in discharging the vessel was caused by stormy weather and faulty storage of the cargo, is not sustained by the evidence, except that it was very stormy the last three days of the time, as above stated, and that consequently little work could be done on those days. Under ordinary conditions, it would have taken from four to five days to discharge the cargo. The captain says that it would have taken only four days to unload at Manila; that it required a much longer time to unload at Cavite than at Manila; that was the general experience among shipping people; that cargo that could be unloaded at Manila in four days would take about three times as long to unload at Cavite; and further, that if he had cargo that he could unload at Manila in four days, it would take twelve days to unload the same cargo at Cavite; that this difference was not due to anything in the anchorage or facilities at Cavite, but simply because the cargo was naval stores. During the discharge of the cargo, the captain was told that the reason for not discharging the cargo in the afternoons was because the officials didn't want the powder to stay in the lighter at night; they were afraid of its getting damp; and also because it was war time, and they were afraid the Filipinos might see the lighters loading, watch them leave the vessel, and try to set fire to the lighters during the night. No general merchandise whatever was discharged at Cavite during this period; all that was discharged there was for the government. The captain also testifies in answer to the question, "Why didn't you unload the material yourself, at your own risk?" That it was impossible; it was not allowed. And in answer to the question, "Did you try to unload it yourself?" answered, "No, sir; I didn't try; I never thought of it; I knew it was not allowed"; and says that he never thought of it because it could not be done. At the time of the discharge war prevailed, and precautions were taken by the government to prevent the destruction of the cargo by the enemy or injury from the weather, and it was these

conditions which prevented the discharge within the time requisite under ordinary conditions. The government regulations in the above respects were strict, and the discharge of the ammunition was the chief cause of the delay, since the government officials would not receive more from the steamer than could be stored in the magazine or arsenal the same afternoon. The general regulations in force required ammunition to be discharged between 6 a. m. and 5 p. m., and it had to be handled carefully and by daylight. A verbal request made to the authorities to allow lighters other than the government's to aid in the discharge was refused. A negative answer was brought back by the stevedores employed in the discharge, but it does not appear who received the request or gave the reply. This is the only direct testimony upon the point. There are several witnesses who assumed that the government, following its general custom, would not permit it, upon which reliance was placed, and not upon positive refusal. The party with whom the contract was made by the master for stevedores testified (and his testimony is uncontradicted) that he discharged many vessels at Cavite, and that he always acted under the direct instructions of the commandant of the naval station in making such discharge.

Conclusions of the Court upon the Questions of Law Involved.

The respondent claims that, inasmuch as the petitioner has proceeded in this cause in personam and not in rem, the admiralty jurisdiction conferred by the statute cannot be invoked, and the petitioner must proceed as at common law. Under the act no decree in rem could be entered against the United States, and any judgment or decree entered must necessarily, therefore, be a personal one. The whole proceeding is controlled by the statute. It is not necessary that a maritime lien should exist giving a right to proceed in rem in order to confer admiralty jurisdiction. The existence of admiralty jurisdiction in a suit in personam is not dependent upon the existence of a right to proceed in rem, for jurisdiction depends, not upon the existence of a maritime lien, but upon the subject-matter of the contract. *Boutin v. Rudd*, 82 Fed. 685, 27 C. C. A. 526. The rule is well settled that the test of admiralty jurisdiction in contract cases is their nature and subject-matter. *Insurance Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90. The contract in this case is one of affreightment; this is not disputed. Contracts of this character are matters of admiralty jurisdiction. *Lands v. Cargo of Coal* (D. C.) 4 Fed. 478; *The Monte A.* (D. C.) 12 Fed. 331; *The San Fernando v. Jackson* (C. C.) 12 Fed. 341; *Dunbar v. Weston* (D. C.) 93 Fed. 472; *Insurance Co. v. Dunham*, supra. The statute above referred to directs the Circuit Courts to follow the rules of courts having admiralty jurisdiction. The petition sets forth a maritime contract, and one over which an admiralty court would have had undoubted jurisdiction if the United States were not a party; but, as the United States is a party, it became necessary to invoke the aid of the statute, and the jurisdiction thereby conferred upon this court to proceed after the manner of admiralty. The action can therefore be maintained under the statute.

It will be observed that there is nothing in the bills of lading stipulating as to lay days or demurrage. The only stipulation relating to the discharge of the freight is that it is to be "received by the consignee immediately the vessel is ready to discharge, and continuously at all such hours as the customhouse or port authorities may give permission for the ship to work, if necessary, to discharge into lighters at the risk and expense of the consignee." It is obvious that the word "continuously" is not to be considered as synonymous with incessantly or uninterruptedly. It would be impossible that the cargo should be discharged from the hold of the vessel over its sides into lighters without cessation, as a stream of water can be made to flow from an open faucet. No such construction was put upon the word by the parties at the time, much less by the petitioner. Such a construction would have required the work to proceed by night and by day; but it appears by the petitioner's own testimony that the stevedores who were employed by the master of the vessel could not work at night. The clause means no more, then, than that the discharge should be reasonably continuous, considering the time, place, and circumstances, the nature and character of the cargo, the situation of the vessel, and prevailing conditions generally. In the absence of express agreement as to the time for unloading, actions of this character are maintained upon the theory that there is an implied contract to discharge the cargo in a reasonable time, and what constitutes reasonable time depends upon the circumstances of the particular case, the facilities for discharge at the port where the discharge is to be made, the nature of the cargo, the weather, etc. In the case of *Empire Transportation Co. et al. v. Philadelphia & R. Coal & Iron Co.* (C. C. A.) 77 Fed. 919, 925, 23 C. C. A. 564, 35 L. R. A. 623, the court lays down certain propositions as follows:

"(1) Where the charter of a ship is silent as to the time of unloading and discharge, there is no implied agreement that the charterer will unload or discharge her in the customary time at the port of delivery, regardless of all extraordinary circumstances and unforeseen obstacles.

"(2) The implied contract is to unload and discharge her in such time as is reasonable, in view of all the existing facts and circumstances, ordinary and extraordinary, legitimately bearing upon that question at the time of her arrival and discharge.

"(3) This implied contract to discharge the vessel in a reasonable time is, in effect, a contract to discharge her with reasonable diligence.

"(4) The burden is on him who seeks to recover damages for the delay of a vessel under such a contract to prove that the charterer did not exercise reasonable diligence to discharge her, under the actual circumstances of the particular case.

"(5) Proof that the vessel was delayed in unloading beyond the customary time for unloading such cargoes at the port of her delivery throws upon the charterer the burden of excusing the delay by proof of the actual circumstances of the delivery and his reasonable diligence thereunder."

See, also, *Uren v. Hager* (D. C.) 95 Fed. 493; *Fish v. One Hundred and Fifty Tons of Brown Stone* (D. C.) 20 Fed. 201; *Morgan v. Garfield, etc., Co.* (D. C.) 113 Fed. 520; *Donnell v. Amoskeag Manfg. Co.*, 118 Fed. 10, 55 C. C. A. 178; *Burrill et al. v. Crossman et al.*, 130 Fed. 763, 65 C. C. A. 189; *Merritt & Chapman Derrick & Wrecking Co. v. Vogeman* (D. C.) 143 Fed. 142.

The bills of lading in this case called for a shipment of naval stores and ammunition; the latter consisting of fuses, powder, shells, etc., from the Navy Yard at New York to Cavite, Philippine Islands. Cavite was not a port of entry, but was a naval and military station, in the possession and control of the respondent. A state of war and insurrection existed in the Islands at the time. There were no written or printed regulations existing when the vessel arrived at Cavite as to the discharge of ammunition and naval stores, but certain well understood regulations were nevertheless in force, among which were that the discharge was to be made into government lighters only, between certain hours of the day, and that no more of such cargo would be received from the vessel on any one day than could be deposited in the arsenal or magazine on shore the same day. These precautions were considered necessary in view of the state of war and insurrection then and there existing. That they were, under the circumstances, reasonable and necessary, scarcely admits of question, but, conceding this, were they in any degree binding upon the petitioner? It was matter of common knowledge at the time that the Philippine Islands were in a state of insurrection, and that Cavite was not a port of entry, but only a naval station; furthermore, the petitioner knew of the character of the cargo, that it was being shipped from one naval post to another, and from certain naval officials of the government to certain other like officials. These facts were undoubtedly in the minds of the parties, and were given consideration when the contract of affreightment was made, and might properly, for that reason, be given some consideration in its interpretation; but, aside from that, they must be given weight in determining whether either party was in default in its execution. They are a part of the facts, circumstances, and conditions which show or tend to show whether or not the discharge of the vessel was accomplished with reasonable expedition. The cargo to be unladen from the *Trunkby* was no ordinary cargo, which could be thrown or dumped out in any haphazard way, anywhere, in any kind of weather, by day or by night, and regardless of whether the consignee or any person representing him was present to receive it. It must be guarded, cared for, and kept from the enemy at all hazards, and all reasonably necessary precautions in this direction had to be taken, and so long as they were reasonably necessary and reasonably carried out they bound the petitioner. The bills of lading and the whole transaction must be construed with direct reference to the considerations above presented. If, in the absence of contract, what constitutes reasonable time in the discharge of a cargo is ordinarily determinable by the circumstances of the particular case, the nature of the cargo, and the conditions and customs prevailing at the port of discharge, then this more so. The sixth paragraph of the petition is as follows:

"The custom of discharge of ammunition and naval stores was to take the goods from the steamer into government lighters or barges, which were always under military guards, who maintained close custody of the same till those lighters had been towed ashore, whence the ammunition and stores were disembarked from the lighters into the government arsenal."

The petition then goes on to complain that the government officials did not have sufficient men or lighters to discharge the cargo with good dispatch, and that the few lighters that they had were not sent out promptly. The custom of the government with respect to the discharge of military supplies is here recognized. The evidence shows that the military regulations pertaining thereto were known to the agents of the petitioner at Cavite, and to the other witnesses residing or stationed there. Under the circumstances, I think the regulations were reasonably necessary, and were reasonably to be anticipated by the petitioner. Notwithstanding this, it plainly appears that the government lighters were not kept so steadily at work or for so many hours daily as the regulations permitted. The facts above appearing relating to the discharge of the vessel, the number of lighters daily engaged therein, and the hours they were severally occupied, are taken from the log-book, fortified by the testimony of the master of the *Trunkby*, and, in the absence of other testimony, must be accepted as fairly accurate. A consideration of this testimony satisfies me that, everything considered, the discharge of cargo was not made as expeditiously as it reasonably might have been. An analysis of the testimony shows that the work seldom began as early in the day or continued as late as it might under the regulations, nor were all of the government lighters kept busy. The log shows that on two or three of the days five lighters came out, and on others a less number. What was accomplished on some days is a fair indication of what might apparently have been accomplished on other days, since the weather was fine except during the last three days of the discharge. There is practically no testimony submitted on the part of the government. Commander Cowles was sworn on its behalf, but his testimony shows that he had very little personal knowledge of the transaction. He did say, however, that the regulations in force at the time required ammunition to be discharged between 6 a. m. and 5 p. m., and that it had to be handled carefully and by daylight. In view of the case made by the petitioner, it was incumbent upon the respondent to show that it discharged the cargo as fast as it reasonably could, under the circumstances, conditions, and regulations existing. This has not been done, and the defenses particularly set up in the answer are not supported by any evidence. Considering the case as presented, I think that damages in the nature of demurrage should be allowed; not, however, for seven days, as claimed, but for a period of three days.

I have reviewed the testimony carefully, and in my opinion it does not disclose—certainly not with definiteness—that the discharge could have been completed, under the circumstances, more than three days sooner than it was. It is true witnesses say that it might have been completed under ordinary conditions in four or five days. On the other hand, the captain says that it would have taken three times as long to discharge the cargo at Cavite as at Manila, but his testimony must, in fairness, evidently be restricted to the discharge of this particular cargo, since he had never been at Manila or Cavite before. Damages by way of demurrage for three days will be allowed, and such allowance will cover, in my judgment, all that the petitioner can

reasonably ask. Damages have been claimed for each day's delay equal to the charter price of the vessel per day. This, however, does not seem to be the true measure of damages. It should rather be the probable net earnings of the vessel during the period of delay. This can be ascertained by finding the gross freight which it would under ordinary circumstances, in the usual course of its employment, have earned, and deducting therefrom what it would have expended in earning it. *Sheppard et al. v. Philadelphia Butchers' Ice Co.*, Fed. Cas. No. 12,757. There is nothing to show that the vessel would have earned anything if free.

A reference will be made to a commissioner to ascertain and report the amount of damages which should be allowed the petitioner for the period above mentioned.

IN RE SMITH.

(District Court, D. Rhode Island. July 18, 1906.)

No. 574.

1. BANKRUPTCY—PROVABLE CLAIMS—CONSTRUCTION OF ACT.

The several subdivisions of Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], are not to be regarded as an enumeration of a group of characteristics all of which are essential to a provable claim, but as a classification, each specifying a separate class of provable claims independently of the others, and the provision of subdivision 1, limiting the claims provable thereunder to those which were a fixed liability absolutely owing at the time of the filing of the petition, does not impose the same limitation upon claims within other classes.

2. SAME—CONTINGENT LIABILITIES—INDORSER OF COMMERCIAL PAPER.

The liability of a bankrupt indorser on commercial paper which did not become absolute until after the filing of the petition is a debt founded upon a contract within Bankr. Act July 1, 1898, c. 541, § 63a (4), 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], and provable in bankruptcy thereunder after such liability has become fixed and within the time limited for proving claims.

In Bankruptcy. On petition for review of order of referee disallowing the claim of the Union Trust Company.

Bassett & Raymond, for Union Trust Company.

BROWN, District Judge. The Union Trust Company held trade paper which had been endorsed by the bankrupt, and discounted for the bankrupt by the Union Trust Company before the adjudication. The notes did not become due until after the date of adjudication. At the date of proof, however, the notes had all matured, and the liability of the bankrupt as indorser had been duly fixed by default of the maker and protest. The date of filing the petition and of adjudication was February 16, 1906. The date of filing the proof of claim was May 22, 1906. The referee found that none of the notes was provable against the bankrupt's estate, on the ground that the liability was not fixed, and the claim not absolutely due and owing at the

date of adjudication. His opinion cites the opinions of referees in Chambers, Calder & Co., 2 Nat. Bankr. N., 864; In re Marks & Garson, 6 Am. Bankr. Rep., 641, and In re Dunnigan, 2 Nat. Bankr. N. 755, as stating the true construction of the law.

I am of the opinion that the weight of judicial authority is to the contrary, and that the above cited decisions proceed upon an erroneous interpretation of Section 63, Bankr. Act of July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447]. This section reads as follows:

"Sec. 63. Debts which may be Proved.—(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate or interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied; and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

The claims in question are clearly within the terms of subdivision 4. This was the view of the learned judge in *Re Gerson* (D. C.) 105 Fed. 891, affirmed by the Circuit Court of Appeals for the Third Circuit in *Moch v. Market Street National Bank*, 107 Fed. 897, 47 C. C. A. 49. The latter case was cited in the opinion of the Supreme Court in *Dunbar v. Dunbar*, 190 U. S. 340, 350, 351, 23 Sup. Ct. 757, 47 L. Ed. 1084. While *Moch v. Market Street National Bank* was neither approved nor disapproved, the opinion of the Supreme Court points out the precise point decided; i. e., that under section 63a, subd. 4, the creditor might prove against the estate of the bankrupt after the liability had become fixed. Moreover, it may be fair to say that the course of reasoning, wherein distinctions are made between classes of contingent claims, would hardly have been necessary had the Supreme Court been of the opinion that, upon a proper construction of section 63, all claims which had been contingent at the time of filing the petition were excluded from allowance, though no longer contingent at the date of proof. See, also, *In re Rothenberg* (D. C.) 140 Fed. 798; *Collier on Bankruptcy* (5th Ed.) pp. 484, 489.

But, aside from authority, and upon an independent reading of section 63, I am of the opinion that neither grammatical nor logical reasons require that subdivision 4 shall be limited by subdivision 1. It is very clear that subdivisions 1, 2, 3, 4, and 5 are not to be regarded as an enumeration of a group of characteristics, all of which are

essential to a provable claim. On the contrary, the subdivisions specify separate classes of provable claims. It is a classification.

In *Wetmore v. Markoe*, 196 U. S. 68, 72, 25 Sup. Ct. 172, 49 L. Ed. 390, it was said:

"While this section enumerates under separate paragraphs, the kind and character of claims to be proved and allowed in bankruptcy, the classification is only a means of describing debts of the bankrupt which may be proved and allowed against his estate."

It is argued that, because subdivision 1 specifies a fixed liability absolutely owing, it excludes all liabilities which were contingent at the time of filing the petition from proof under other subdivisions. The logical fault is obvious. While contingent liabilities are excluded from class 1 (defined by subdivision 1), it does not at all follow that liabilities now or formerly contingent are excluded from other distinct classes. The specification of certain characteristics for class 1, is no indication that cases comprehended in other classes may not have entirely different characteristics. Assuming that, so long as it is uncertain whether a contract or engagement will ever give rise to an actual liability, and that so long as the demand is contingent, it is not provable, it by no means follows that a demand which has ceased to be contingent before proof should be rejected because it had been contingent before the date of filing the petition. While the language, "Debts of the bankrupt * * * which are * * * founded upon an open account, or upon a contract express or implied" may not include contingent obligations, it does include obligations no longer contingent, though they were contingent at the date of filing the petition.

In the opinion in *Re Marks & Garson*, 6 Am. Bankr. Rep. 641, 644, it is suggested that the bankruptcy acts of 1867, 1841, and 1800 contained special provisions concerning contingent liabilities, and that the present act contains no similar provisions, and is entirely silent upon that subject. It is argued, from the assumed omission, that it was intended to exclude altogether, contingent liabilities. This argument, as it seems to me, loses sight of the fact that in subdivision 4 express language is used which is broad enough to comprehend liabilities which mature by the happening of a contingency after the date of adjudication. Looking to the substance of the matter, there seems to be no reason why, when the liability has been fixed by default and by protest, so that it no longer remains uncertain, the creditor should not have his share of the assets, and the bankrupt be relieved from further liability.

It has been argued that the only reasonable construction which can be given to subdivision 4 of section 63 is that it refers to claims upon which a right of action has accrued at the time of the filing of the petition, and that to construe it as permitting proof of contingent claims is to make subdivision 1 superfluous and useless. It is to be observed, however, that the claims here in question, when proved, were no longer contingent; they had become present liabilities through the fact of non-payment and protest. There is no necessary inconsistency between a class which includes and provides for liabilities absolutely owing at the time of filing the petition, whether then payable or not, and a class

of liabilities which includes debts which mature after the time of filing the petition. It does not follow, because contingent liabilities are excluded from the first group of the classification, that liabilities founded upon express contracts, and which are no longer contingent at the date of proof of such liabilities, are not included within subdivision 4. It does not involve logical inconsistency to hold that subdivision 4 comprehends claims which are expressly excluded from subdivision 1, or even to hold that subdivision 4 includes claims contained within subdivision 1, as well as many others. A series of broadening classes is not unusual, and inclusion of a smaller class in a broader class is not inconsistency.

The Circuit Court of Appeals, in *Moch v. Market Street National Bank*, supra, was of the opinion that reasonable effect can be given to both subdivisions by treating them as separate, independent clauses. The possibility that some inconsistency or confusion may arise from a conflict between the classifications of section 63a does not seem a sufficient reason for excluding claims which are fixed liabilities of the bankrupt at the date of proof, and which are presented for proof within the time fixed by statute. The proceeds of the paper discounted may have become a part of the bankrupt estate. It would certainly be a hardship if a bankrupt were permitted to discount paper at a bank, go into bankruptcy, and distribute the proceeds of the discount to creditors whose claims are no more meritorious than that of the bank which had discounted the trade paper upon the faith of the endorser.

I am of the opinion that, both upon authority and upon a fair view of the subject-matter, the act should receive such a construction as permits the proof of claims of this character, and a discharge of the bankrupt from liability upon such claims. It is true that to wait for the happening of a contingency may result in some delay in the distribution of dividends; but the period within which proof can be made is limited by statute to one year, and the great bulk of trade paper is short time paper. Probably less hardship will result from allowing claims of this class than from disallowing them; but, however that may be, I am of the opinion that there is no proper rule of construction by which the limitations of subdivision 1 can be transferred to subdivision 4.

The order of the referee, disallowing the claim of the Union Trust Company, is reversed, and said claim may be allowed.

McMILLAN et al. v. NOYES et al.

(Circuit Court, D. New Hampshire. July 12, 1906.)

No. 350.

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY—JOINT SUIT FOR INJUNCTION.

In a suit to enjoin the destruction of a water privilege by diverting water from a stream, the complainant may properly join as defendants the persons who are undertaking such diversion, and one with whom they have contracted to do the work, and ask for a common injunction

against all, and in such case there is no separable controversy which entitles the former to remove the cause when the contractor could not.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 95-99.]

Separable controversy as ground for removal of cause to federal court, see notes to *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Mecke v. Valleytown Mineral Co.*, 35 C. C. A. 155.]

In Equity on Motion to Remand to State Court.

Drew, Jordan, Shurtleff and Morris, for complainants.

Anthoine & Talbot and Edmund Sullivan, for defendants.

PUTNAM, Circuit Judge. This is a bill in equity brought originally in a court of the state of New Hampshire. The complainants are citizens of New Hampshire, and two of the respondents, Edward A. Noyes and the Berlin Electric Light Company, are citizens of Maine. The citizenship of the remaining respondents, constituting the firm of Ward Bros. & Co., is not shown. Noyes and the Berlin Electric Light Company claim that there is a separable controversy so far as they are concerned, and they thereupon removed the proceedings to this court; and now the complainants have asked that the case be remanded to the state court.

With reference to determining questions whether there are separable controversies, certain general rules are now established beyond doubt; one to the effect that the courts are controlled absolutely by the proponent's pleadings as shown on the face of his declaration at law or of his bill in equity, except so far as matters are alleged which are plainly contradictory, irrelevant or immaterial, or unless the party desiring the removal submits evidence that a joinder was made for the express purpose of defeating the jurisdiction of the federal courts. This record presents no such evidence, and the case is submitted to us on the complainants' pleadings.

The gravamen of the bill is that Noyes and the Berlin Electric Light Company are preparing to unlawfully flow out a water privilege belonging to the complainants, situate on the Androscoggin river, and that these two respondents have already, in pursuance thereof, done an overt act in the way of building a coffer dam. It is also alleged that they have contracted with Ward Brothers & Co. for the erection by the latter of a permanent dam which, if erected, will constitute the permanent illegal structure which the bill seeks to avert by a proper prayer for an injunction. The bill does not allege that Ward Bros. & Co. have done any overt act, except so far as the execution of the contract for the construction of the permanent dam may be regarded as such. Under these circumstances, the respondents Noyes and the Berlin Electric Light Company apparently maintain that no relief can be granted against Ward Bros. & Co., and therefore, that, on the face of the pleadings, their joinder is immaterial in all particulars.

The bill, however, prays that Ward Bros. & Co., as well as Noyes and the Berlin Electric Light Company, be enjoined from erecting the dam referred to. Certainly the prevention of the erection of struc-

tures which will flow out a water privilege, and thus create a technical nuisance, is a suitable and meritorious basis for jurisdiction in equity; and also, if, as alleged by the bill, and as we, therefore, must assume for present purposes to be true, Ward Bros. & Co. have entered into a contract with the other respondents for the erection of a dam which the other respondents have no legal right to erect, it is specially meritorious and proper that Ward Bros. & Co. should be joined as respondents and a common injunction issue against all. If this were not done, or, in other words, if the complainants had not promptly proceeded to obtain an injunction against Ward Bros. & Co., and if it should transpire that Ward Bros. & Co. were not advised that the proposed dam would be illegal, and had, therefore, innocently made extensive preparations for the carrying out of their contract, the complainants might have found themselves chargeable with laches and unable to obtain relief. The fact that Noyes and the Berlin Electric Light Company may have been chargeable with knowledge of conditions which should have put them on their guard, while Ward Bros. & Co. may have been entirely innocent, would not deprive the complainants of the right to join all the respondents named in the bill. Under the circumstances, in view of the fact that Noyes and the Berlin Electric Light Company have already committed an overt act as alleged in the bill, relief in addition to a merely preventive injunction may be necessary so far as they are concerned; but this fact does not change the nature of the proceeding. The respondents who removed the case apparently overlook the fact that in equity the mere circumstance that further relief may be demanded against some respondents which is not required as to all respondents, thus to a certain extent contemplating separable relief, does not involve a separable controversy. We are of the opinion that it was suitable, and, perhaps, necessary, to join all the respondents who are named in this bill, and that the gravamen of the proceeding is joint in its nature.

Ordered and decreed that the cause be remanded to the court from which it was removed, and that the complainants recover their costs.

ANDERSON v. MESSINGER.

(Circuit Court of Appeals, Sixth Circuit. June 5, 1906.)

No. 1,479.

1. TRIAL—FINDINGS—CONSTRUCTION.

Where the facts material to the judgment were agreed on, a recital that the court finds the issues of the case with the defendant should be construed to refer to the issues of law.

2. SAME.

Where the facts are agreed on, they are the equivalent of facts found by the court.

[Ed. Note.—For cases in point, see vol. 46, Cent. Dig. Trial, § 880.]

3. MORTGAGES—ASSIGNMENT—FORECLOSURE.

Where a mortgagee assigned the mortgage with other property as collateral for debt owing by the mortgagee, and the assignee thereafter caused the mortgage to be foreclosed and purchased the property at a sale under a foreclosure decree, he held the mortgagor's title, in the absence of agreement to the contrary, for his own benefit, and not as trustee for the assignor.

[Ed. Note.—For cases in point, see vol. 35, Cent. Dig. Mortgages, §§ 605, 1552-1556.]

4. JUDICIAL SALES—WHO MAY PURCHASE—PURCHASE BY PLEDGEE.

The rule that a pledgee who is a trustee cannot become the purchaser at his own sale of the pledge is inapplicable to a judicial sale conducted by an officer of the law.

[Ed. Note.—For cases in point, see vol. 31, Cent. Dig. Judicial Sales, § 40.]

5. WILLS—CONSTRUCTION—REMAINDERS.

Testator declared that if either of his two sons died without lineal descendants, the survivor should take his estate, and if the survivor died without lineal descendants, then one-half both of the decedent's original portion as well as one-half of the portion taken by survivorship should go to testator's brother P., and the other half to such of testator's brothers and sisters as might be living at the time of the death of the surviving son. *Held*, that the sons thereby acquired a life estate in a moiety of the property with a remainder to the survivor of the one first dying, in the event he died without lineal descendants, the survivor then taking a life estate in both moieties, with remainder to his lineal descendants living at his death, otherwise to testator's collateral relatives.

[Ed. Note.—For cases in point, see vol. 49, Cent. Dig. Wills, §§ 1440-1444.]

6. TRUSTS—DURATION—LIMITATION.

Where testator directed that his trustees should deliver a settlement of their trust to each of his two sons on their reaching the age of 21 years, respectively, and then put them in possession of one-half of the property, except that there might be a reservation of a fraction of the moiety until the sons should, respectively, arrive at the age of 25 years, when the remaining part should be delivered to them, the trustees' authority as such expired by limitation on the arrival of the youngest son at 25 years of age.

[Ed. Note.—For cases in point, see vol. 47, Cent. Dig. Trusts, § 82.]

7. EXECUTORS—SALE OF LAND—AUTHORITY—PROBATE ORDER.

Executors not expressly authorized by the will cannot convey lands to pay debts except under the authority of an order of the probate court entered after notice to the parties interested.

[Ed. Note.—For cases in point, see vol. 22, Cent. Dig. Executors and Administrators, §§ 533-536, 538.]

8. TRUSTS—TRUSTEES—DEEDS.

Deeds by testamentary trustees, not delivered until after their authority as trustees had expired by limitation, were void.

9. LIFE ESTATES—LIFE TENANTS—CONVEYANCE IN TRUST—REMAINDERMEN.

Where, by testator's will, an estate in remainder after the death of his surviving son was given to his lineal descendants, it was beyond the power of the tenants for life to defeat or prejudice the remaindermen by an attempted declaration of trust of the property.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

R. P. Carey and C. H. Trimble, for plaintiff in error.

C. W. Everett and H. E. King, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

SEVERENS, Circuit Judge. This is an action of ejectment brought by Anderson, the plaintiff in error, to recover the possession of certain lots in the city of Toledo, Ohio, described in his petition, of which he claims the legal title, and the possession of which, he says, is wrongfully withheld by the defendant. The answer denies the alleged title of the plaintiff, and denies the plaintiff's right to the possession. A stipulation was filed waiving a trial by jury, and consenting to a trial by the court. Upon the trial, proof of all the material facts was made by mutual stipulations which are incorporated in the bill of exceptions. The court rendered judgment for the defendant, the entry reciting that the court "does find the issues of the cause with the defendant." As the facts material to the judgment were agreed, this must mean that the court found the issues of law for the defendant. *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486; *Hulitt v. Ohio Valley Nat. Bank*, 137 Fed. 461, 465, 69 C. C. A. 609. When the facts are agreed, they are the equivalent of facts found by the court, and the question of the propriety of the judgment is, in each case, the same. *Supervisors v. Kennicott*, 103 U. S. 554, 26 L. Ed. 486; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; *St. Louis v. Telegraph Co.*, 148 U. S. 92, 13 Sup. Ct. 485, 37 L. Ed. 380. Some other matters hereafter to be referred to were received in evidence over objections which were incompetent to disturb or affect the ultimate material facts, and could not, therefore, affect the judgment. The case is properly here for review to determine whether the judgment is the one which the facts agreed required.

Each of the parties derives his title from Edward Bissell, a former resident of Toledo. On May 19, 1838, Bissell, claiming to be the owner of the premises, gave his bond to Charles Butler of New York for the sum of \$21,500, payable one year from that date, with interest at 7 per cent., and to secure the payment thereof, gave, with his wife, to said Butler, a mortgage on the premises in question. This bond and the mortgage were assigned by Butler on September 23, 1841, to Henry Anderson, a resident of Holly Springs, Miss., to secure the payment of his note to Anderson for the sum of \$20,000 and interest thereon; and for further security Butler assigned to said Anderson 546 shares of the Erie and Kalamazoo Railroad Company of the par

value of \$50 per share. Butler having defaulted in the payment of his note, Anderson, on September 19, 1843, filed his bill in chancery in the court of common pleas for Lucas county, Ohio, to foreclose the Bissell mortgage, making Bissell and his wife, Butler and other parties, defendants. These parties other than Butler were served with process. Butler was not served and did not appear. That suit was pursued to a decree which was rendered April 1, 1844, for the sum of \$29,139.01. A sale was ordered and a master appointed to conduct it. The mortgaged lands were bid off by Henry Anderson at the price of \$6,910. The sale was duly confirmed and the master was ordered to make the proper deed to the purchaser. At this stage of the proceedings and on October 4, 1844, an agreement was entered into between Butler and Anderson, which, after reciting the giving of the bond and mortgage by Bissell, the assignment thereof by Butler to Anderson and the assignment of the 546 shares of railroad stock to secure Butler's note, and the above-stated proceedings for the foreclosure of the mortgage, proceeded as follows:

"And, whereas, the said Henry Anderson at the instance and request of the said Charles Butler and in consideration of the covenant of the said Charles Butler hereinafter contained, is willing to relinquish and surrender to the said Charles Butler, the collateral securities, so assigned as aforesaid, for the payment of said note of twenty thousand dollars, so far as the same may be done without prejudice or injury to the order obtained for the sale of the said mortgaged premises, and the rights of the said Henry Anderson under the same, and without prejudice to the personal liability of the said Charles Butler, to the said Henry Anderson on the principal debt.

"Now, therefore, these presents witness, that in consideration of the premises and for the purpose of giving effect to the same, and said Henry Anderson has on the day of the date hereof executed and delivered a power of attorney to the said Charles Butler, empowering and authorizing him fully and effectually, if he shall see fit to do so, to release and discharge the said Edward Bissell of and from all personal claim, demand or liability, whatsoever for or on account of the said bond and mortgage, but without prejudice to the proceedings, which have been or may be adopted, to effect the sale of the said mortgaged premises, and that the said Henry Anderson has also by instrument in writing released and transferred to the said Charles Butler the said five hundred and forty-six shares of Erie & Kalamazoo Railroad Company stock.

"And the said Charles Butler, in consideration of the surrender and relinquishment of the securities, hereby covenants and agrees to and with the said Henry Anderson, that the same shall not be held or construed in any way to affect or impair the liability of him the said Butler on the said note for twenty thousand dollars, and the said Charles Butler also covenants and agrees to and with said Henry Anderson that he, the said Butler, will well and faithfully apply and pay over to the said Henry Anderson, on account of the said note, all sums of money or other valuable consideration which he, the said Butler, may receive or derive, by reason of the surrender and relinquishment of the securities aforesaid, by him the said Henry Anderson.

"In testimony whereof the said Henry Anderson and Charles Butler have hereunto respectively set their hands and seals in duplicate this fourth day of October in the year one thousand eight hundred and forty-four.

"[Signed]

Henry Anderson.
"Charles Butler."

Thereafter, on November 18, 1844, the master in pursuance of the above-mentioned decree and of the sale and the order of confirmation

thereof, executed and delivered his deed of conveyance to Anderson, his heirs and assigns of the premises here in question, and which, as above stated, had been bid off by him. Prior to the date of this last-mentioned agreement between Butler and Anderson, Butler had, on February 22, 1843, obtained a quitclaim deed of these premises from Bissell and wife. But this deed was not recorded until after Anderson's death, nor until October 13, 1849, and it does not appear that the latter ever had notice of it. After the contract of October 4, 1844, Butler made no further payment on his debt to Anderson during the lifetime of the latter, nor to his representatives until October, 1849.

The first question in the case is what, as the consequence of these proceedings for foreclosure, the sale of the property to Henry Anderson under the decree, and the agreement of October 4, 1844 between him and Butler, was the nature of the title conveyed to Anderson by the master's deed. The contention for the plaintiff is that it conveyed to him the title to the property freed from the incumbrance of the mortgage, and that the price which he paid was properly applicable to the payment pro tanto of Butler's note. For the defendant it is contended that Anderson being assignee of the mortgage and having bid off the property and taken the master's deed to himself, acquired only Bissell's equity of redemption and held the property thereafter as trustee for Butler and as a continuing security for the payment of the latter's note. It is a well-settled rule of law that when the owner of securities pledges them to secure the payment of his own debt, he impliedly transfers the right to the remedies which will make the securities available for the payment of his debt in case of his own default. *Schlieman v. Bowlin*, 36 Minn. 198, 30 N. W. 879; *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48, 78. And there necessarily goes with this power to make the securities available, the incidental power to transfer the assignor's interest in the securities; otherwise the purchaser does not get the property pledged by the securities, but an indefinite interest depending on contingencies over which he has a remote, if any, control, a circumstance which would greatly depreciate the value of the pledge.

There is also another rule of general application which is that a pledgee, who is a trustee, cannot become the purchaser at his own sale of the pledge. But this rule is not applicable to a judicial sale conducted by an officer appointed by law. Nor indeed is such a purchase absolutely void in all circumstances when the sale is a private sale and the purchaser has an interest to protect. In either of the last-stated instances, the sale would be voidable if the purchaser were guilty of any fraud or other wrongful practice in the transaction; in the first instance by a refusal of the court to confirm the sale or by some judicial proceeding to impeach it, and in the latter instance by such appropriate action private or judicial as he should elect to make his objection effective. *Richards v. Holmes*, 18 How. 143, 15 L. Ed. 304; *Smith v. Black*, 115 U. S. 308, 6 Sup. Ct. 50, 29 L. Ed. 398; *Allen v. Gillette*, 127 U. S. 589, 8 Sup. Ct. 1331, 32 L. Ed. 271; *Pewabic Mining Co. v. Mason*, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732.

In *Richards v. Holmes*, supra, a deed of trust had been given to secure the payment of a note, which, at the time of the sale under the trust, was held by Harper. The latter authorized the auctioneer to make a bid for him, and that being the best price offered, the property was struck off to him. Upon a bill filed by a subsequent incumbrancer to redeem, it was contended that the sale under the trust deed was void upon the ground that the beneficiary of the trust could not bid at the trustee's sale, and that the first mortgage continued subject to redemption. But the court by Mr. Justice Curtis, observing that no fraud appeared, said:

"It was for the advantage of these complainants, as subsequent incumbrancers, that this property should sell for the best price which could be obtained. Even improper practices to enhance the price, if any such had been resorted to, could not be complained of by them. It is only some practice to prevent bidding, or procure a sale for less than the property would have otherwise brought, which can be relied on by them to avoid the sale. We have no doubt the creditor, for the satisfaction of whose debt the sale was made, had a right to compete fairly at the sale; but whether he had or not, his doing so could not be injurious to the complainants."

It would have made no difference in that case if the bid had been in the trustee's name, for his act would have enured to his *cestui que* trust who was the real party. And the learned justice further said:

"And the same remark applies to the trustee. It was his duty to obtain for the property the best price he could by the use of due diligence in a fair sale. It would have been improper for him, in behalf of the creditor, to employ the auctioneer to buy at anything short of that best price. But there was no impropriety in his employing him to bid a particular sum for the creditor, to prevent a sacrifice of the property."

But in any such case, the pledgor may, if he chooses, affirm the sale, and if he does, the ground of objection is removed. *Glidden v. Mechanics' Bank*, 53 Ohio St. 588, 42 N. E. 995, 43 L. R. A. 737.

If, in the present case, the property had been sold to another party, there could be no doubt that the sale and deed would have carried to the purchaser the title which the mortgagor, Bissell, had when he made the mortgage, and would have transferred any interest which Butler had in the property to the proceeds of the sale. The trust would attach to them. And to the extent of the sum due on Butler's debt they would be a satisfaction of it. If there were a surplus it would belong to Butler. Nor could it make any difference that Anderson bid off the property. The result would be the same. If he paid to the master the amount of his bid, it would be paid back to him on its being brought into court, a formality generally dispensed with by the master's taking the receipt of the creditor for so much of the proceeds as the decree adjudges to be due to him and bringing the balance into court to be paid over to the party entitled. If as here the party who might be so entitled was beyond the process of the court, he could come in by petition and on showing his right, obtain it. Butler, the assignor, was not served with process. He was a proper, but not an indispensable, party, and he was not within the jurisdiction of the court. The object in making him a party would be to enable him to make any objections which his interest might require and to

preclude him from thereafter raising any. But his agreement shows that the debt remained unpaid, and that, knowing the proceedings were pending and without suggesting any objection to them, he stipulated for their completion. The reasons on which a party in interest is allowed to purchase at a judicial sale whereby he must become answerable for his bid, are inconsistent with the notion that the proceedings have resulted in nothing more than a continuance of the trust for the same whole debt. We think the legitimate result of the foreclosure proceedings was to transfer the trust to the proceeds of the sale; for by assigning the Bissell debt and mortgage, Butler must have contemplated that the consequence must be that upon his default this transmutation of his interest by foreclosure of the mortgage and the sale of the mortgaged property would be likely to ensue.

We are aware that in *Slee v. Manhattan Co.*, 1 Paige (N. Y.) 48, it was held in substance by Chancellor Walworth that in a case where the assignee of a mortgage becomes the purchaser of the premises at a sale made under a power given by the mortgage, that, the assignee having become the purchaser at his own sale, there was no transmutation of the interest of the mortgagee; that his interest in the mortgage "remained untouched by that foreclosure," and that the purchaser had acquired thereby only the equity of redemption. The learned chancellor further indicated his opinion that the same consequence would ensue in the case of an assignee of a mortgage bidding in the property at a sale under a decree in a suit brought by him to foreclose the mortgage. This was obiter. But the case has been accepted by the courts of New York as authority for the application of the doctrine to judicial sales, as well as to sales under a power in the mortgage deed. The chancellor in his opinion admitted that the authority to execute the power was vested in the assignee "by the mere act of the assigning the legal interest in the mortgage," and that if the assignee in the fair execution of the power had sold and conveyed the premises to a stranger for one-half the amount of the debt, the assignor would have been bound to pay the balance of the debt, and would have had no claim to redeem the mortgaged premises from such purchaser; "that he must have understood that the defendants (the assignees) had a right to foreclose under the statute. The premises were advertised and sold with his full knowledge of the facts, and he made no objection that they were not thus authorized to proceed." And the chancellor further says that if the assignee had foreclosed in chancery, "a stranger purchasing under the decree, would unite the legal estate which is in the defendants [the assignors] with the equity of redemption of the mortgagors sold under the decree and thus acquire the whole estate which existed in the mortgagors previous to the giving of the mortgage." But because the premises were bid off by the assignee (in that case they were sold to a person who was an agent of the assignee, who conveyed them to his principal) the chancellor held that the assignor's interest had not been cut off by the sale. This is opposed to the decision in *Richards v. Holmes*, *supra*. There might be good reason for holding in such a case that if any injury had been done to the assignor in consequence of the assignee's bidding, the

former could have elected to disaffirm the sale. But the dictum that the sale to the assignee under a decree would be ineffectual to pass the title of the assignor, and the distinction made between a purchase by the assignee, and one made by a stranger cannot be supported, when it has been admitted that the assignee may bid at the sale. In such a case the thing sold is not one thing if sold to a stranger and another thing if sold to an assignee. They were not bidding for different things, and the deed of the master is for the thing sold.

Coming, then, to the agreement of October 4, 1844, it is apparent that Butler knew that Anderson had bid off the property, and he consented that the sale should go on to its consummation. It was not stated that the expected deed should be affected by a trust, and the insistence with which Anderson, by the stipulation of his contract, held on to the benefits of his purchase is indicative of his understanding in making the agreement, and it was indicative to Butler of Anderson's expectation. The latter relinquished the control of his other securities and gave Butler the power to discharge Bissell's liability upon his note. It seems singular that Anderson would have practically stripped himself of the control of everything else in the nature of a security to a slow debtor for so large a sum as \$29,000 unless he were to gain some substantial advantage under his purchase at the master's sale. And it is noteworthy that in the deeds which Butler obtained from the sons of Henry Anderson after the latter's death and which deeds will hereafter be more particularly considered, they are moved to recite that Henry Anderson took the title to said lands as security for Butler's debt and that he died without "having made or executed any declaration in writing of the purpose for which said property was held;" which seems to indicate that such a declaration was due and expected, and the inquiry is pertinent, why, if there was such an understanding, nothing was said about it in the agreement of October 4, 1844. Butler seems to have been very watchful for his own interests, and it seems unlikely that so important a matter should have then been overlooked and not taken care of until several years after Anderson's death and only developed while the trustees were settling his estate. But the material circumstance, now to be regarded, is that there is no fact agreed, or finding by the court which imports any qualification of the legal effect of the foreclosure proceedings, the agreement of Butler and Anderson made pending those proceedings, and the master's deed following thereon. We have given detailed exposition of special facts for the reason that it is proposed to fasten a trust upon the deed in question by proof of subsequent transactions and thereby raise an equity which would entitle the defendant to the possession of the premises notwithstanding it should be held that the plaintiff has the legal title. We think it must be held that at the time of Henry Anderson's death he held the legal title to the lands in question unaffected by any trust in favor of Butler.

On February 28, 1846, Henry Anderson made his will, and on the 3d day of April following he died, being then a resident of Mississippi. He was at the date of his will and at the time of his death a widower.

He left two children only, William, born February 12, 1828, and James H., born June 25, 1831. The parts of this will which are now material are here set forth:

"I, Henry Anderson, do make and ordain this to be my last will and testament. I declare my domicile to be the town of Holly Springs, Marshall County, State of Mississippi. I revoke the will made by me on the 3d of March, 1837, and all other wills, if any there be.

"Item. I give, devise and bequeath to Peter Anderson, Walter Goodman and Peter W. Lucas all my property, both real and personal, legal and equitable in possession, reversion or remainder, and all claims and demands whatsoever, except such right, title or claim to land, money or choses in action as I may be entitled to as one of the agents of the American Land Company and as one of the stockholders of said company; this property they shall hold in trust, and if one or more of them die, the survivors or survivor shall hold in trust for the following purposes: They shall pay my debts, other than such as may be owing to the American Land Company, out of moneys on hand and such property as may be sold least injurious to my estate. I wish them to collect debts due to me and apply to this purpose. They may, if they think fit, and can, obtain an extension of time on any debt, and they may pledge my property to raise money to pay debts. They may sell for cash or on credit, and if at any time they have funds on hand not required for debts or legacies they may invest the same. They shall have full power to make titles for property sold and to pay charges for preservation, and in all respects have the power of owners, but always as trustees. I have entire confidence in each of them, and therefore give each the power of all, so that each may do separately what all acting together may do, except in making investments; in that I wish all to join. The annual accounts of my said trustees, signed by their respective names, shall be binding on my heirs and shall be conclusively so unless error or fraud be clearly established. I have directed the payment of debts other than what I may owe the American Land Company. I exclude the debts to the company because that is subject to an account with the company, and I do not wish my trustees to make payments before that account is adjusted. The adjustment of that account, and the direction and management of the affairs of the company, so far as I have power, right or interest. I place in the hands of Peter Anderson and Walter Goodman, and when they have finally closed it, it shall become a part of the trust created by this article of my will and subject to the control of my said trustees. By saying 'it shall become a part of the trust,' I mean the effects and proceeds that I may be entitled to as stockholder and agent of the company. * * *

"Item. It is my will that when my son William arrives at the age of twenty-one years the trustees of the first and general trust shall deliver to him a settlement of the affairs of the trust, and if my debts are then paid, and as soon as that takes place, they shall put him in possession of one-half of my property, reserving thereout two-fifth parts of said moiety by valuation, which my said trustees shall hold in trust and properly invest and pay over to him at the age of twenty-five years. If my interest in the American Land Company be not brought into the general trust at the time William becomes twenty-one, but is brought in at any time before he arrives at twenty-five, so soon as brought in, two-fifths shall be deducted therefrom and invested and paid over to him at twenty-five, the other three-fifths he shall have as soon as paid in. I find the above does not express my will in this: When I say two-fifths shall be deducted from the interest I may have in the land company for investment, and three-fifths to be paid to him, I mean two-fifths of a moiety shall be deducted and three-fifths of a moiety paid over.

"And it is my will that my said trustees hold and invest and pay over the remaining moiety of my estate to my son James at the respective periods of twenty-one and twenty-five years of age, being governed as to the amounts to be paid at each of the respective periods by the same rules and directions as are above laid down in the bequest to William, and to be governed in all other respects by the regulations laid down concerning the same.

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and, if the survivor dies without lineal descendants, then one-half both of the decedent's original portion, as well as one-half of the portion taken by survivorship, shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son. I make the following explanation: The limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son. Nothing in the foregoing will shall be construed as to deprive either of my sons disposing of their portions by will on their attaining the age of twenty-one years, respectively. The above limitations over shall give way to the provisions of such will."

This will was duly probated in Mississippi, and an authenticated copy of the will and of the probate thereof were thereafter duly filed in the probate court of Lucas county, Ohio, where the will was duly admitted to probate and record as a will from another state. The construction of this will of Henry Anderson is the next subject which engages our attention. The particular question is, what did the testator intend by the words of the will:

"If either of my sons die without lineal descendants, the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then one-half both of the decedent's original portion as well as one-half of the portion taken by survivorship shall go to my brother Peter, the other half to such of my brothers and sisters as may be living at the time of the death of such surviving son. If my brother Peter be not living at the time of the death of my surviving son, so dying without lineal descendants, then the share he would have taken, if living, shall go to his children living at the time of the decease of my said son, and if there be no children surviving, then the share shall go to my other brother and sisters surviving at the time of such decease of my son."

The other language of the will is important only as it sheds light upon the testator's meaning by the use of the language quoted. The plaintiff, who is the lineal descendant of the testator's surviving son, James H. Anderson, claims that the testator intended to give to each of his sons a life estate in his moiety with a remainder over to the survivor of the one first dying, in the event of his dying without lineal descendants, and to the survivor a life estate in both moieties with remainder over to the lineal descendants if such should be living at his death, and if not, then to the testator's brother Peter one-half and to his other brother and sisters one-half, or, if Peter should not then be living, to Peter's children, if any, and if there be none, then to the surviving brother and sisters of the testator. If this is correct, the plaintiff took an estate in remainder in both moieties on the death of his father, James H. Anderson. The defendant claims that the testator intended that each of his sons should take a fee simple in one moiety, which would be defeated by his death without lineal descendants, in which event the surviving son should take a fee simple in that moiety which with the fee simple in his own moiety would be defeated by his dying without lineal descendants, in which event, the whole estate

would go to the testator's brother Peter, etc.; in other words, that each of the two sons of the testator took an estate in fee simple, which would be defeated if the survivor died without lineal descendants, whereupon the testator's brother Peter and the other collateral relatives would take the estate by way of an executory devise.

The rule by which the court will be guided is stated by Chief Justice Marshall in *Smith v. Bell*, 6 Pet. 68, 75, 76, 8 L. Ed. 322, 325, as follows:

"The first and great rule in the exposition of wills, to which all other rules must bend, is that the intention of the testator, expressed in his will, shall prevail, provided it be consistent with the rules of law. 1 Doug. 322, 1 W. Bl. 672 et seq."

And this statement has been repeated and confirmed in many subsequent cases. *Brant v. Virginia Coal and Iron Co.*, 93 U. S. 333, 23 L. Ed. 927; *Blake v. Hawkins*, 98 U. S. 324, 25 L. Ed. 139; *Giles v. Little*, 104 U. S. 296, 26 L. Ed. 745; *Colton v. Colton*, 127 U. S. 309, 8 Sup. Ct. 1164, 32 L. Ed. 138; *Hardenberg v. Ray*, 151 U. S. 126, 14 Sup. Ct. 305, 38 L. Ed. 93; *Home v. Noble*, 172 U. S. 391, 19 Sup. Ct. 226, 43 L. Ed. 486; *Adams v. Cowen*, 177 U. S. 475, 20 Sup. Ct. 668, 44 L. Ed. 851; *Robbins v. Smith*, 72 Ohio St. 1, 17, 73 N. E. 1051. And in order to "attain the general intent," said the court in *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617, "words of limitation shall operate as words of purchase, and words of implication shall supply verbal omissions."

Another rule in the construction of wills is that we are to put ourselves in the place of the testator and search all parts of the will in order to gather his meaning in the use of the words employed in the particular parts of it. If, by so doing, we become convinced in regard to his general purpose, we use that light in preference to arbitrary rules. But if the testator's meaning cannot be clearly discerned, we are at liberty, and, generally for the sake of certainty in the possession and transmission of estates, required, to apply such rules of construction as have by long usage been approved and used. It often happens that in wills in which the provisions are complex and elaborate, especially in such as are written by testators themselves, implications are seen where the testator has assumed as understood what he has not in terms expressed; and in such case, if the implication is clear, it has equal effect, as if the purpose had been expressed in words. The relevancy of these observations is found in undertaking to determine what consequences the testator intended when he said, "If either of my sons die without lineal descendants the one surviving shall take his estate above bequeathed, and if the survivor die without lineal descendants, then" to his collateral relatives. Now, we cannot but think that to the common understanding this language would convey the meaning that in the other alternative—that is, if the sons should leave lineal descendants—it was intended that they should take, and that it was only in the event of their not leaving lineal descendants, that the estate should go over to collateral relatives. The reason which gives force to the familiar rule of construction, that the inclusion of one alternative is the exclusion of the other, and vice versa,

would tend to confirm the impression. Moreover, the whole paragraph shows beyond doubt that the testator intended to prefer his lineal descendants to the collateral branches of his family. After providing that his sons should take the estate by moieties, his mind went forward to the time of their death. The working of the natural instinct to keep the property in the family becomes evident. He does not say if either of my sons shall die "without heirs," but without "lineal descendants." He evidently chose his words, and the distinction is clear. It would not comport with his idea that the lineal descendants should take as heirs. Nor did he intend so wide a class. He made a distinct blunder if he discarded the familiar term "heirs" and employed the selection of "lineal descendants" if he had in mind a succession by inheritance, and not by purchase. We are now considering this paragraph as if it stood unaffected by anything else in the will, and we cannot but be much impressed by the considerations which tend to the conclusion that the testator intended that if the survivor of the sons should die leaving lineal descendants they should take the remainder.

Then, if this were doubtful, there is a long established rule of construction of devises in the law of real property, one of such as were referred to in the early part of our discussion of this subject, that when a devise can, without doing violence to the language of the testator, be construed as creating a remainder, it shall not be construed as being an executory devise. 3 Comyn's Dig. 450, Devises N. 17; Fearne on Remainder, 393; 6 Cruise Dig. Tit. 38, c. 17, § 11; Purefoy v. Rogers, 2 Saund. 380; 2 Washb. on Real Prop. (3d Ed.) 565; 4 Kent. Com. 263; Doe, dem. v. Considine, 6 Wall. 458, 475, 18 L. Ed. 869; Blanchard v. Blanchard, 1 Allen (Mass.) 223; Moore v. Lyons, 25 Wend. (N. Y.) 119, 126; Wolfe v. Van Nostrand, 2 N. Y. 436.

In *Purefoy v. Rogers*, supra, which has always been regarded as a leading case, the Lord Ch. J. Hale said:

"Where a contingency is limited to depend on an estate in freehold which is capable of supporting a remainder it shall never be construed to be an executory devise but a contingent remainder only, and not otherwise."

And in the note by Patterson and Williams to the Sixth Edition of Saunders, it is said that:

"This rule so laid down by Lord Hale has been uniformly adhered to ever since."

And upon the matter of construction Washburn says (second volume, 506, same edition), citing 2 Cruise Dig. 203:

"The term remainder, it should be observed, is not one of art which is necessary to employ in creating an estate in expectancy, such as has been described. Any form of expression indicating the intention of the grantor or devisor to do this would be sufficient."

Executory devises were the creation of the judges to effectuate the intention of testators where their purpose could not take effect as the creation of a remainder. A good illustration of this subject would be to suppose that in the present instance the testator had devised to each of his sons "his heirs and assigns" the moiety, etc., and

then in another place had devised the estate over upon the happening of some contingency. The estate going over could not take effect because there could be no remainder of an estate in fee simple. It is therefore construed to be an executory devise which will defeat the fee-simple estate. It is so done because the intent of the testator would be otherwise disappointed. The case of *McArthur v. Scott*, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015, is one where both species of estates were created by the will. The testator devised his property to trustees who were to hold it until his children were dead and until his youngest grandchild should be 21 years old, whereupon the trustees were to divide and turn it over to his several grandchildren in fee, and if any of them should have died leaving children, then to the children of such grandchild. As to the grandchildren living at the time of distribution, it was held they took an estate in remainder; but as to the children of deceased grandchildren it was held that they took by way of an executory devise. This last result followed because of the death of those grandchildren before the expiration of the precedent estate in the trustees, and therefore a gift to them could not be held to be a remainder. But to give effect to the probable intention of the testator, it was construed as an executory devise.

The essential conditions on which there can be construed to be a remainder are that there must be a precedent estate which will necessarily terminate at some future time, and there must be nominated a person who will be in esse at the termination of the precedent estate competent to take the remaining estate. Both estates must be created at the same time and by the same act or instrument. And the one must begin when the other ends. The order and succession of the estates was a requirement of the feudal system in order that there should at all times be some one to perform the obligations due to the sovereign, or his immediate feudatory, from the tenant on account of his tenure. Enough remains of this requirement to support at least in technical contemplation the rule as it formerly existed. Now, if these provisions of Anderson's will be held to convey a life estate to the sons with remainder to his lineal descendants, we have the most common form of an estate in remainder. It is not necessary that the remainderman should be in esse at the time when the will is made or becomes effective by the death of the testator. It is enough if he is in being at the time when the estate vests in possession; that is, at the termination of the particular estate. If the remainderman is in esse at the death of the testator, the right vests immediately, if not, the right is suspended, but exists in consideration of law, until he comes into being, whereupon it vests, and in either case the estate will open to let in after-born remaindermen, if any such appear. *Doe v. Peryn*, 3 Term. R. 484; 3 Comyn's Dig. Estates, B. 13; 4 Kent Com. 206, note b; *McArthur v. Scott*, 113 U. S. 340, 380, 5 Sup. Ct. 652, 28 L. Ed. 1015.

The contention of the defendant rests upon the assumption that the language of the will imports a devise of an estate in fee simple to the sons of the testator, and this assumption would probably be well taken

if we looked only to that part of the will which devises the property to them. It is true there is no mention of heirs, but it would in the case supposed be implied that the testator intended to devise the whole estate. But the implication is removed, if from other provisions in the will it is seen that the testator did not intend to devise an unqualified estate. And it is to be observed that the defendant's contention proposes to cut down the fee simple which the earlier parts of the will are said to devise to the sons, by a condition that the sons shall leave lineal descendants. So, in either construction of the parties, the implication which would arise from the unqualified language of the devise to the sons cannot prevail. The generally accepted rule now is that an unqualified gift in wills to a devisee without mention of heirs imports a fee simple absolute; or, if the testator has not so great an interest therein, such an estate as he has. And this rule is incorporated in Rev. St. Ohio, 1906, § 5970. But this cannot apply here, as we have shown, for confessedly the gift was not of a fee simple absolute. The conditions therefore exist for the application of the rule laid down by the Lord Ch. J. in *Purefoy v. Rogers*, *supra*.

The early rule in England was that such an implication as results from such language as is employed in this will would be sufficient to indicate that the testator meant that the lineal descendants of his sons should take an estate in remainder upon the death of the sons. In the early editions of *Jarman on Wills*, p. 465, the author in treating of estates by implication in wills, said:

"In the application of this principle, our chief topic of controversy has been how far a devise to any person, in the event of the nonexistence or on the decease of another indicates an intention to make the last-named person a prior object of the testator's bounty. In such cases it is probable that the person whose nonexistence is made the contingency on which the devise over is to fall into possession is placed in this position for the purpose of taking the property in the first instance; and this probability is of course greatly strengthened if the devisee is the person on whom the law in the absence of disposition would cast the property."

And there are several decisions of the courts in this country which have put the same construction upon such language. *Shaw v. Hoard*, 18 Ohio St. 228; *Wetter v. United Hydraulic Cotton Press Co.*, 75 Ga. 540, where the foregoing passage from *Jarman* is quoted; *Carr v. Green*, 2 McCord (S. C.) 75. And Washburn, in his treatise on the Law of Real Property, lays down the rule in accordance with these decisions. He says:

"An instance of an estate tail by construction, where there is no direct limitation to the heirs of the donee's body, would be an estate to A. with a proviso that if he shall die without heirs of his body, the estate shall revert to the donor or go over to one in remainder. Here, it will be perceived, that there was no direct limitation to the heirs of A., and it is too plain for doubt that the donor intended the heirs of his body should take it at his decease, for he gives it over, or reserves it, in case he has no such heirs, and only in that contingency." 1 Washb. on Real Prop. (3d Ed.) 87; *Id.* (6th Ed.) § 192.

The case of *Shaw v. Hoard*, *supra*, is much in point; so like the present, that if a rule of construction be also a rule of law in its application to grants and gifts of real property and that case is the

law in Ohio, we should feel bound to accept it as controlling this question in the present case, if indeed we did not agree with it. In that case, the will of the testator contained the following items:

"Item 2. I give and bequeath unto my said wife and daughter all the real estate of which I may be seized at the time of my death, to each one-half.

"Item 4. On the death of either my wife or daughter then the survivor shall have all the property left them by me; and if both die without leaving any heirs of their body, then and in that case, said property shall be given to my wife's brother, William Campbell."

The wife and daughter died leaving another daughter of the mother. It was held that the wife and daughter mentioned in the will took each a life estate and that upon the death of the survivor, the remainder went by implication to the other daughter, the "heir of her body." But it is said that that case is overruled by subsequent decisions of the Supreme Court of that state. The principal cases which are relied upon in support of this contention are *Carter v. Reddish*, 32 Ohio St. 1; *Piatt v. Sinton*, 37 Ohio St. 353; *Collins v. Collins*, 40 Ohio St. 353; and *Durfee v. MacNeil*, 58 Ohio St. 238, 50 N. E. 721. In the first of these cases, the judge (Chief Justice Day) who had delivered the opinion of the court in *Shaw v. Hoard*, was a member of the court. No intention to overrule the case of *Shaw v. Hoard* is indicated, nor is the case mentioned. But Judge Scott, who delivered the opinion, distinguishes a case involving the facts of *Shaw v. Hoard*. After referring to the cases of *Parish's Heirs v. Ferris*, 6 Ohio St. 563, and *Niles v. Gray*, 12 Ohio St. 320, cases upon which the later decisions referred to rest, he says:

"Still, we should have no hesitation in finding, from the language of the will before us, that the testator intended a life estate only for the first devisees, if the sole condition of the limitation over to the nephews and nieces had been the dying of his children without issue, and without reference to the time when they should die. But such is not the language of the will."

The difference was that the case supposed was the case, in its facts, of *Shaw v. Hoard*, and of this case, while in the case in which the judge was giving the opinion, the device over was in the contingency of the first devisee's dying within age and without lawful issue. The distinction rests upon the fact that the contingency on which the life estate would terminate was uncertain, for the first devisee might attain the age of 21 and have children, in which event there would be no remainder, for both conditions would not happen. And, as we have said, a remainder must depend upon a contingency which must surely happen. Nor do the other cases mention the case of *Shaw v. Hoard*. It may well be that its facts having been once distinguished, the court in the later cases thought it unnecessary to repeat the distinction and decided the cases upon its view of the special facts. However that be, that court has always adhered to the general rule that the intention of the testator is to be gathered from all parts of the will, as well from what is expressed as from what is fairly implied. Referring to the other cases which are cited to establish that *Shaw v. Hoard* has been overruled, we observe that in *Piatt v. Sinton*, 37 Ohio St. 353, the testator devised "all my prop-

erty of every description" to Lucinda Piatt * * * and in case she should die without any legitimate heirs of her body, then the same property to go over to others named. The court construed "all my property" as "all my estate," and the heirs of the body of Lucinda Piatt were strangers to the blood of the testator. In *Collins v. Collins* the testator devised a life estate to his wife with remainder to his two sons and their heirs, but that in the case of the death of either leaving no children, then to the survivor. But in case of the death of both of the sons leaving no children, then to the testator's heirs. In that case the estate was granted by "clear and decisive words," and the rule laid down in *Thornhill v. Hull*, 2 Clark & Fin. 22, was applied, which is that:

"It is a rule of the courts in construing written instruments that where an estate is given or an estate conveyed in one clause of the instrument in clear and decisive terms, such interest cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, not by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving the interest or estate."

Moreover, an estate in remainder cannot rest upon an estate in remainder when the latter is given to one and his heirs, for the whole estate is exhausted. In *Durfee v. MacNeil*, 58 Ohio St. 238, 50 N. E. 721, the testator "devised all my estate, after defraying expenses, etc., to three persons equally, one of whom was then unborn, and to their heirs forever, and should the child not be born alive, or should either die without heirs, each one's share should go to the survivor," and in the event that the testator should be without heirs of his body, the legacies to his children should go to his wife. No question arose of the kind here involved. The facts in the case had little or no analogy to the present. There was a clear and decisive gift of an estate in fee simple, and the contingency was that either of the children should die without heirs capable of inheriting. The devise over was held to be an executory device. Sometimes it is stated by the courts (we are not now referring specially to the Ohio courts) in terms that the implication must be a "necessary" implication, but by this is meant not absolutely necessary, but that it is reasonably necessary in order to carry out the intention of the testator. Inasmuch as the case of *Shaw v. Hoard* has never been expressly overruled and its doctrine was in a later case confirmed, even if it should be held that the rule of construction is not settled, this court would decide the question upon its own understanding of the law applicable to it.

Much reliance is placed by counsel for defendant upon the case of *Abbott v. Essex Company*, 18 How. 202, 15 L. Ed. 352, which they claim "is parallel with and conclusive of this case." But this is a misconception. In that case the testator had given to his two sons John and Jacob "all my estate," to use his own words, in a certain described part of his property real and personal, and then declared that if either of his said sons should die without any lawful heirs of his own, it should go to the survivor and his heirs. And he charged the payment of certain debts and a legacy for the main-

tenance of a person named, upon the estates devised. After some preliminary observations, Mr. Justice Grier, who delivered the opinion of the court, said:

"Our inquiry must be, therefore, from an examination of the whole context of this will: (1) Whether, independent of the second clause, by which the estate is limited over, the sons took an estate in fee simple, or only a life estate; and (2) whether he intended to give over the share of each to the other on the contingency of his death, without issue living at the time of his decease, or upon an indefinite failure of issue."

He then proceeds to state the reasons for thinking the testator intended to give a fee-simple estate to each of the sons. The first reason stated was that the testator in the devise to the sons had employed the words "my estate" in the property, which the learned justice said had "always been construed to describe not only the lands devised, but the whole interest of the testator in the subject of the devise." And, as to the legacy for maintenance, he points out that it would be defeated by the death of a tenant for life. He further observes that the will stated that the payment of these debts and legacies by the devisees was the consideration for the devises, and that the devisees by acceptance of the devises, became personally liable to pay the debts and legacies charged upon them. "In such cases," he says, "it is well settled that the devisee takes a fee, without words of inheritance." "On this point, therefore," he says, "we are of opinion that John and Jacob each took a fee in their respective share, or moiety, of the estate delivered to them." None of the reasons on which the conclusion of the court was rested exist in the present case.

If, however, it should be held that the alternative phrases in the will already considered are not sufficient to show that the testator intended the lineal descendants should take a remainder, we should next consider the will upon that assumption. In the English courts the rule upon this subject has been changed by the modern decisions and its present state is exhibited in the case of *Scale v. Rawlins*, L. R. 45 Chan. Div. 299, and App. Cas. (1892) 342, sub nom. *Rawlins Trust*. In the Court of Appeals, Lord Justice Fry stated that the modern rule was inaugurated in *Green v. Ward*, 1 Russell, 262, a case decided by Lord Gifford, the master of the rolls, in 1826. That rule is this: That the mere fact that the testator has directed that the estate shall go over to other persons if the first takers shall die without surviving "heirs of his body," "lineal descendants," or other equivalent words, is not a sufficient implication to create a remainder in such "heirs of his body" or other person or class named; but that if there be other language in the will which supports the implication and upon the whole the court is satisfied that such was his purpose, it will give the devise effect accordingly. None of the decisions in Ohio or elsewhere have sanctioned a stricter rule than this. It may be observed in passing, that one cannot help noticing that the English courts carry the practice of applying fixed rules to the construction of devises to an extent which is not generally adopted in this country. This may probably be explained by what was said by Mr. Justice Grier in *Abbott v. Essex Company*, 18 How. 202, 213, 15 L. Ed. 352, 355:

"If wills were always drawn by counsel learned in the law, it would be highly proper that courts should rigidly adhere to precedents, because every such instrument might justly be presumed to have been drawn with reference to them. But, in a country where, from necessity or choice, every man acts as his own scrivener, his will is subject to be perverted by the application of rules of construction of which he was wholly ignorant."

But, pursuing the inquiry above suggested, we see that the testator emphasizes the alternative he had stated by adding:

"I make the following explanation: the limitation over on the death of my surviving son without lineal descendants is intended to take effect if there be no lineal descendants living at the time of the decease of such son."

It is observable that his explanation relates to the death of the surviving son. He plainly intends that the presence of lineal descendants at that time shall block the way to a devise over to the next preferred classes of relatives. And he repeats the designation of "lineal descendants" instead of "heirs." He certainly intended that if such persons were living the estate should go to them in some character, and he gives them a peculiar designation. Then, again, if a fee simple was intended to be vested in the sons, words of inheritance must be implied in the gift to them, as if the gift run to him, his heirs and assigns, in express terms. To be in harmony with this, the defeasance would naturally have been incident to his dying without heirs, and it would follow that the testator used the expression "lineal descendants" as a synonym for "heirs," which we must think an inadmissible proposition. The recent case of *Home v. Liphardt*, 70 Ohio St. 261, 71 N. E. 770, is pertinent to this discussion. In that case, the testator, as here, gave his estate to the first taker in general terms, later on he gave him a qualified power of disposition. And the court said:

"The clear implication of such a bequest, taking all the parts together, is that B. (the first taker) is to possess a life estate. Here a life estate is implied, and is not expressly created."

The power to dispose of the property was not inconsistent with the gift of a fee simple. It was an incident of such an estate. But the court laid hold of it as an implication that the testator intended only a life estate in the first taker. It certainly was not an absolutely necessary one. It was necessary only for the purpose of giving effect to the apparent intention of the testator.

There is another consideration which must not be ignored. The authorities recognize a more significant purpose in an implication which tends to cut down a larger estate to a life estate where the remainder thereby passes to a person who is in the line of descent than it would if it were to pass to a stranger. This results from the stronger motive which the testator would have to prefer the former to the latter class. The gift of the power to dispose of the property by will when the sons should reach the age of 21 does not enlarge a life estate. *Jones v. Shields*, 14 Ohio, 359; *Baxter v. Bowyer*, 19 Ohio St. 490; *Stableton v. Ellison*, 21 Ohio St. 527; *Huston v. Craighead*, 23 Ohio St. 198. We are therefore of opinion that the in-

tention of the testator was that the lineal descendants of the surviving son should take an estate in remainder at his decease.

The persons named as trustees accepted their appointments, and they also qualified as executors. William Anderson became of age February 12, 1849, and on October 10th of that year Butler obtained from him an agreement in writing, declaring himself to be an heir at law of Henry Anderson, and that Henry Anderson "held and intended to hold" the premises in question in trust to secure the payment of Butler's note; that said Henry Anderson had died without declaring said trust in writing, and that, being desirous of carrying into effect his father's wishes and intentions, he had "consented to execute and deliver to the said Butler this declaration of the terms and conditions on which he holds the title to the premises above referred to remaining unsold at the date hereof." And Butler therein agreed to pay to the executors the sum due on his note of \$20,000 in installments and at dates therein specified. William died intestate in January, 1850, unmarried and without issue. James Anderson became of age June 25, 1852. But before that time, and on September 16, 1851, Butler obtained from him a like declaration that Henry Anderson held the premises in trust, but that he having died without having made or executed any declaration thereof, he, James, in order to carry out his father's wishes and intentions, was desirous of making the declaration. But it was therein stipulated that the lands should be held subject to the payment of the principal and interest of the debt due from Butler. On October 1, 1852, there was appended to this document a "memorandum" between Butler and James containing an agreement to change dates of payment of the note, and that the agreement should be taken as supplemental to the agreement to which it was appended. Thereafter, from time to time, Butler made payments to the executors and trustees upon his \$20,000 note, but the same had not been fully paid at the time when the executors and trustees settled their trust with James H. Anderson and turned over to him the property and effects coming to him under said will, which was some time prior to May 1, 1860. If any more payments were made on said note, they were made to James H. Anderson. The plaintiff is the only son and child of James H. Anderson, and, as has been stated, was born August 27, 1859.

About the 1st of May, 1860, Peter Anderson and Walter Goodman, styling themselves "executors and trustees of Henry Anderson's will," delivered a quitclaim deed of the premises in question to Butler, reciting therein the receipt "of \$1 (and other considerations)." The deed recited further that it "being understood that the above-described premises were conveyed to Henry Anderson in fee but held by him in his lifetime as a mortgage to secure the payment of a certain sum of money due from Charles Butler, which fact after his death was duly acknowledged under seal of William Anderson and James H. Anderson, his only heirs at law," said first parties covenant, grant, etc. This deed purports to have been made October 1, 1855, and acknowledged October 9, 1855, but, as above stated, it was not delivered until about May 1, 1860. On April 17, 1860, Lucas,

the other executor and trustee, but signing as executor, executed and on or about May 1, 1860, delivered to Butler a deed of the same premises in the same form, for a like consideration, and with the same recitals as the deed from Goodman and Peter Anderson. On April 23, 1860, Butler gave a warranty deed of the lands in question to Calvin Bronson, who soon after entered upon the premises and he and his grantees have since occupied and possessed the same under claim of title through that deed. The defendant holds the title conveyed by the Butler deed to Bronson.

The questions upon the facts occurring since the death of Henry Anderson are, first, whether, assuming the latter to have then had the legal and equitable estates in the land, the deeds from Peter Anderson, Sr., Goodman and Lucas to Butler conveyed to the latter the legal title which had been in Henry Anderson; or, second, whether their transactions with Butler raised an equity in his favor which, having been transmitted to the defendant, entitles him to the possession of the premises as against the plaintiff. The first question, then, upon this part of the case is whether the trustees had authority under the will to declare the master's deed to Henry Anderson to be a mortgage and to deed the lands to Butler at the time when this was done. Having regard to the language of the testator, there is room for doubt whether the power given to the trustees in respect to the alienation of real estate extended beyond an authority to sell or mortgage the lands of the testator for the purpose of paying debts; that specific power is expressly granted and the general language added might be thought to grant powers incidental to that main purpose. Besides, these deeds of the trustees were not made for the purpose of raising money to pay debts of the estate, but proposed a different object. But we do not decide how this may be. No doubt the rule is that unless there is by the terms of its creation a limitation upon the duration of the trust, it will be held to endure so long as the purposes of the trust require. But when the duration of the trust is expressly limited, the authority of the trustee expires according to the limitation. 1 Perry on Trusts, § 316. Says the author:

"So trustees may take only a chattel interest in real estate, although limited to them and their heirs, as when they are to hold in trust only for a short time to pay debts and legacies and to convey it to the cestui que trust when he comes of age, or at a certain time."

And, see, among the cases there cited, *Goodlittle v. Whitby*, 1 Burr. 228; *Stanley v. Stanley*, 16 Ves. 491; *Pearce v. Savage*, 45 Me. 90. And, also, *Powell v. Glenn*, 21 Ala. 458; and *Smithwick v. Wintersmith*, 14 S. W. 354, 12 Ky. Law Rep. 380.

Here the testator directed that the trustees should deliver a settlement of their trust to each of his sons on their reaching the age of 21, respectively, and then put him in possession of one-half of the property, except that there might be a reservation of a fraction of the moiety until the sons should respectively arrive at the age of 25, when the remaining part should be turned over to them. James, the youngest of the sons, arrived at the age of 25 on June 25, 1856, nearly four years before the trustees deeded the lands to But-

ler. No account can be taken of the fact that the deeds were prepared in 1855. They had no effect until they were delivered in 1860. It is stated in the brief of counsel that they were in escrow in the meantime; but it is not one of the stipulated facts nor found by the court, nor indeed was there any competent evidence tending to prove such fact. In these circumstances we think the duration of time for the active duties of the trustees was limited to the time when they were required to make their settlement with the beneficiaries and turn over to them the trust property. This is admitted by counsel for defendants in error, who say in their brief:

"The language of the will makes it entirely clear, we think, that the testator contemplated that the trustees should in any event fully perform and discharge their trust by the time the youngest son had reached the age of 25 years, and that at this date, at latest, the title of the trustees should cease and determine."

It follows that the deeds to Butler, so far as they are regarded as deeds of the trustees, conveyed no title, for the trust had been extinguished several years before. No judicial act was required to terminate the trust as would be necessary in the case of an executor. The testator had also appointed executors, whose powers would continue so long as the estate remained unsettled in the probate court, and the continuance of the term of the trust was not necessary. They were the same persons as those created trustees, but their relations to the estate were the same as if they had been different persons. It was not a case where the trust is imposed upon the executors as such. 1 Lewin on Trusts, § 206; Herron v. Comstock (C. C. A.) 139 Fed. 370, 377, and the cases there cited. The distinction is also referred to by Mr. Justice Gray in *McArthur v. Scott*, 113 U. S. 340, 377, 5 Sup. Ct. 652, 28 L. Ed. 1015. When the trust expired the legal title became vested in James H. Anderson. The executors might in certain circumstances sell and convey the lands of the testator, as, for instance, to pay debts. But this would require an order of the probate court upon notice to the parties interested.

The second question is whether the transactions between the trustees and Butler were such as to raise an equity in his favor which, being transmitted to the defendant, entitles him to retain the possession of the land as against the plaintiff's legal title. For if the defendant has an equity which thus entitles him, the plaintiff cannot recover. It was so held in *Cincinnati v. White*, 6 Pet. 431, 8 L. Ed. 452. To the same effect is *Dickerson v. Colgrove*, 100 U. S. 582, 25 L. Ed. 618. But we are unable to discover any grounds on which it could be claimed that any equity was created for Butler by his transactions with the trustees. It is unnecessary to say he was conscious of wrongdoing, for he may have conceived that the legal effect of the foreclosure proceeding left Henry Anderson in the position of a trustee for him in respect to the lands; but his course was taken entirely in his own interest, and was prejudicial to the estate. The trustees were induced by his representations to treat the master's deed to Henry Anderson as a mortgage, when in fact

it was not. The sons were induced by appeals to filial sentiment to make admissions the truth of which was taken on trust, and these admissions were adopted by the trustees as the basis of their dealings with Butler. The money which he paid to them, as trustees, upon his note was not much, if any, more than was sufficient to pay it after crediting him with the proceeds of the master's sale. He based his action in making the sale of the property upon his supposed success in acquiring it. We desire to make no further comments upon the character of these transactions than the adjudication of the rights of these parties requires, but we cannot realize any basis on which to build up anything more than the strictly legal rights which Butler acquired therefrom.

It remains to be observed that if by Anderson's will an estate in remainder after the death of his surviving son was given to his lineal descendants, it was beyond the power of the tenants for life to defeat or prejudice the remainderman by their own acts or admissions. The only way in which the remainder could have been destroyed would have been by the valid exercise of the power given to the trustees by the will. The vigilance with which the court protects the estate in remainder for infants is illustrated by the case of *McArthur v. Scott*, above referred to, where the will which had created it had been vacated by a decree in a suit brought by an heir at law in which children contemplated by the will as sharers in the remainder, but yet unborn, were not represented, though all the living parties in interest having life estates were. It was held that the devise to those children was unaffected by the decree, and that their respective estates became vested upon the subsequent birth of each.

The judgment must be reversed, with costs, and a new trial awarded.

VOGEL et al. v. WARSING et al.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1906.)

No. 1,216.

1. MINES AND MINERALS—LOCATION CERTIFICATE—DISCOVERY OF MINERAL—PRESUMPTIONS.

Where the validity of a location had been unchallenged for more than five years up to the commencement of ejectment, and the original locators were absent from the country, the certificate of location created a presumption of discovery of mineral and of a valid location, especially on an application for a preliminary injunction depending on affidavits in which plaintiff appeared as a subsequent locator and attached the title of the prior locator and that of his successor in interest.

2. SAME—LOCATION NOTICE—DESCRIPTION OF CLAIM—PERMANENT LANDMARKS—MONUMENTS.

Where a mining claim location notice described the claim by metes and bounds and with reference to stakes set in the land, adding that the claim lay "about a mile from Anvil Mountain in a southeasterly direction," the notice was not defective for failure to point out a particular portion of Anvil Mountain as the beginning point.

[Ed. Note.—For cases in point, see vol. 34, Cent. Dig. Mines and Minerals, § 46.]

3. INJUNCTION—PRELIMINARY INJUNCTION—DISCRETION.

The granting or withholding of an injunction pendente lite ordinarily rests in the sound discretion of the court to which the application is made.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, § 304.]

4. APPEAL—DISCRETION—PRELIMINARY INJUNCTION—DENIAL—REVIEW.

An order denying an application for a preliminary injunction will not be reversed on appeal, unless there has been a plain disregard of the facts or of settled principles of equity applicable thereto.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, §§ 3818-3821.]

5. INJUNCTION—PRELIMINARY INJUNCTION—DENIAL—DISCRETION—EVIDENCE.

Where, in a suit to recover possession of certain mineral ground, complainants prayed an injunction pendente lite, but it was shown that complainants were subsequent locators, on substantially all the ground covered by their claim, and there was also evidence indicating that none of the ground was open to relocation at the time plaintiff located it, the denial of the injunction was not an abuse of discretion.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Injunction, §§ 307-308.]

Appeal from the District Court of the United States for the District of Alaska.

This is an appeal, under section 507 of the Code of Civil Procedure of Alaska, from an order denying an injunction pendente lite, the application for which was made in an action of ejectment brought by the appellants to recover the possession of the Happy Four mining claim, situated on a bench above Dry creek in the Cape Nome mining district, Alaska, containing 75.725 acres. In the complaint it was alleged that the appellants had owned said claim since January 1, 1901, and that on December 1, 1904, the appellees ousted them of the possession. Upon filing the complaint and issuing summons thereon, the appellants made their motion for an injunction pendente lite to enjoin the extraction of gold from the claim, and supported the same by affidavits alleging that the defendants were mining on certain portions of the claim. An order to show cause why the injunction should not be granted was made and served. Thereafter affidavits were filed by and on behalf of the appellees in opposition to the motion, and certain of the appellees filed an answer asserting that they owned the Panorama mining claim, which is a portion of the land described in the complaint. Counter affidavits were filed by the appellants, and after a hearing the injunction was denied. In their affidavits the appellees claimed the right to mine upon certain portions of the land described in the complaint. Those portions are represented by mining locations designated the "Panorama," the "Big Two," and the "Morning Star" claims, respectively. It was deposed that the Panorama was located on August 30, 1899; that the Big Two was located on February 2, 1903, and the Morning Star was located on April 11, 1903.

Albert Fink, J. K. Wood, John Rustgard, Charles Page, Edward J. McCutchen, and Samuel Knight, for the appellants.

Woodworth Clum, Joseph C. Campbell, W. H. Metson, F. C. Drew, and C. H. Oatman, for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended that the court erred in denying the injunction pendente lite, for the reason that it appeared from the pleadings and the affidavits of the appellants that the Happy Four claim was located on January 1, 1901, on vacant unappropriated public land, and that

the locations under which defendants claim the right to mine were made subsequent to that date, excepting that of the Panorama claim, and that, as to that claim, the location of the original locators was void for two reasons: First, that no affidavit of discovery of gold therein is shown by the record; and, second, that the location notice is defective for the lack of a proper reference to a natural object or permanent monument, as required by section 2324 of the Revised Statutes [U. S. Comp. St. 1901, p. 1426]. The appellees, who claim to own the Panorama claim, are Clum, Cochran, and Briggs. They claim to be owners as purchasers, and not as locators. As the original locator and his witness were absent from Alaska, their affidavits could not be obtained. The validity of the location had been unchallenged for more than five years and up to the time of the commencement of the present action. It has been held that under such circumstances the certificate of location creates a presumption of discovery of mineral and of a valid location. *Harris v. Equator Mining & Smelting Co.* (C. C.) 8 Fed. 863, 5 McCrary, 14; *Cheesman v. Shreeve* (C. C.) 40 Fed. 791; *Cheesman v. Hart* (C. C.) 42 Fed. 98. Especially should such a presumption be indulged in a summary proceeding instituted at the beginning of a suit where the granting or withholding of an injunction depends upon facts presented by affidavits and rests largely in the discretion of the trial court, and where a subsequent locator attacks the title of the prior locator or that of his successor in interest. In view of these considerations, we are not authorized to say that the court erred in denying the injunction sought for, on the ground that the location notice failed to mention the discovery of gold on the claim, and this conclusion is aided by the affidavit of Warsing, who had a lay on the claim and deposed that pay had been discovered by him and his co-lessees, and that "gravel on said claim is exposed on the surface on many parts thereof and carries fine gold throughout, so that panning from the surface is easily done and colors are easily found."

Unless some convincing reason for it appears, we ought not to decide the merits of a case before they are decided in the court below, and we do not think it would be proper, upon the showing made in this case, to render a decision on the merits of the contention that the location of the Panorama claim is invalid for want of a permanent monument for its identification. It is sufficient to say that, upon the evidence which was before the court below, we are not convinced that there was error in refusing the injunction on that ground. The location notice is headed "Bristow Gulch Cape Nome Mining District." It describes the claim by metes and bounds and a reference to stakes set in the ground, and adds that the claim "lies about one mile from Anvil Mountain in a southeasterly direction." The defect of this notice is said to be that it points out no particular portion of Anvil Mountain as a beginning point. Such a defect, however, in the light of the information contained in the affidavits, is not necessarily fatal. We are not advised of the shape or dimensions of the mountain; but, in the absence of evidence to the contrary, we must assume that it was a recognized landmark. What are natural objects or permanent monuments are often questions of fact. *Hammer v. Garfield*

Mining, etc., Co., 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; *North Noonday Mining Co. v. Orient Mining Co.* (C. C.) 1 Fed. 522, 6 Sawy. 299; *McEvoy v. Hyman* (C. C.) 25 Fed. 596; *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 384. In *Flavin v. Mattingly*, the mining claim was described as located about one-fourth of a mile from Park Canyon. This was held sufficient. In *Brady v. Husby*, 21 Nev. 453, 38 Pac. 801, the claim was located on the "Cortez Mountain." The court said:

"The record makes one reference to what must be presumed to be a natural object, the Cortez Mountain."

In *Hammer v. Garfield M. & M. Co.*, 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964, the court said:

"Mining lode claims are frequently found where there are no permanent monuments or natural objects other than rocks or neighboring hills. Stakes driven into the ground are, in such cases, the most certain means of identification. Such stakes were placed here with a description of the premises by metes, and, to comply with the requirements of the statute as far as possible, the location of the lode is also indicated by stating its distance south of 'Vaughn's Little Jennie mine,' probably the best known and most easily defined object in the vicinity."

The location of the Panorama claim is also aided by the reference to the Bristow Gulch. Presuming, as we must, that Anvil Mountain is a well-known permanent object, one attempting to find the location of the claim, proceeding in the proper direction and distance from that mountain, and having in view its location on Bristow Gulch, would, it would seem, be able to find the stakes which indicate the lines of the Panorama claim. We do not consider important the dispute in the affidavits as to whether or not the so-called Bristow Gulch is really a gulch or merely a depression or draw through which water runs in the summer season. By the laws of Alaska provision is made for recording affidavits of the performance of annual labor on mining claims, and certain copies of such affidavits were introduced which had been recorded in the years 1900, 1901, 1902, 1903, and 1904, and which purported to show that the annual assessment work on the Panorama claim was done during each of those years. The first of those affidavits was made by the appellee Clum and states that, during the months of August and September, 1900, more than \$100 worth of work was performed on the claim, that the work consisted of numerous prospect holes sunk to an average depth of 10 feet, that the work was done at the instance of the owners, and that the claim was located on Bristow Gulch, a tributary of Bourbon creek in the Cape Nome mining district.

Although it appeared from the affidavits that the appellees who claimed to own the Morning Star asserted their claim thereto under a location made on April 11, 1903, the land covered by that claim had been first located in December, 1899, a year prior to the date when the appellants located the Happy Four claim. The original locator of the Morning Star stated in his affidavit that in the spring of 1900 he made a discovery of gold thereon and panned frequently on the claim. Peter Petersen, the locator of the Morning Star, stated in

his affidavit that he had been intimately acquainted with the ground covered by that claim since the spring of 1901, and that during the year 1902 he was carefully watching the ground, and that no work of any kind was done on the claim during that year. In his affidavit he further stated that in June, 1901, he was about to locate Basin Bench No. 2, now known as the Big Two, when he saw that a location had been made and a notice signed by one Grosdidier, and that the assessment work thereon was done for that year, so that it was not then open to relocation. This claim also, according to one of the affidavits, had been first located in December, 1899. By all of these affidavits the right of the appellants to locate that portion of their claim which includes the ground within the limits of the Morning Star and the Big Two was distinctly put in issue, and the appellants' title denied. There are numerous other affidavits which allege prior locations on substantially all of the ground covered by the Happy Four claim, and which tend to indicate that none of that ground was open to relocation on January 1, 1901. But it is not necessary here to refer to such affidavits, for the reason that the persons who claim to own said claims are not made parties defendant to the complaint and are not named in the appellants' affidavits, and the appellees are not shown to be mining on that portion of the ground described in the complaint.

No allegation appears anywhere in the record of the insolvency of the appellees or of their inability to respond in damages. The granting or withholding of an injunction pendente lite ordinarily rests in the sound discretion of the court to which the application is made. It is not for this court to say whether it would have granted or withheld an injunction upon the showing which was made in the court below. We must recognize that upon that court was imposed the responsibility of the exercise of sound discretion upon the case as it was presented. Unless there has been a plain disregard of the facts or of the settled principles of equity applicable thereto, the exercise of the discretion of that court is not subject to reversal in this. *Empire State-Idaho M. & D. Co. v. Bunker Hill & S. M. & C. Co.*, 121 Fed. 973, 58 C. C. A. 311, 316; *Shea v. Nilima*, 133 Fed. 209, 66 C. C. A. 263, 270; *Chickering v. Chickering & Sons*, 120 Fed. 69, 56 C. C. A. 475.

Applying these settled principles to the case at bar, we find no ground to reverse the decision of the District Court.

Its order will be affirmed.

TOLEDO, ST. L. & W. R. R. V. STAR FLOURING MILLS CO.

(Circuit Court of Appeals, Sixth Circuit. July 10, 1906.)

No. 1,517.

1. RAILROADS—FIRES—EVIDENCE AS TO CONDITION OF SPARK ARRESTER.

In an action against a railroad company to recover for the loss of property alleged to have been set on fire and burned by sparks from a locomotive engine on defendant's road where witnesses for defendant

testified that the engine was equipped with the most approved kind of spark arresting device, and that the same was in good condition, plaintiff was entitled to show in rebuttal of such testimony that on the same day ten fires were caused by sparks from the same engine within two miles of plaintiff's property and by the testimony of experts that such fact would indicate that the spark arrester was not in good condition.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 1719-1723.]

2. SAME—ACTION UNDER OHIO STATUTE—BURDEN AND MEASURE OF PROOF.

Under the provision of Rev. St. Ohio 1906, § 3365-6, which makes the fact that a fire was set to property adjacent to a railroad by sparks escaping from a locomotive prima facie proof of the railroad company's negligence, in an action to recover for the loss of such property, the company is not required in order to overcome such prima facie case to produce a preponderance of the evidence bearing on the question of negligence, but it is sufficient if it produce enough to counterbalance that by which the prima facie case is made out, the ground of recovery under the statute as under the common law being negligence the burden of proving which rests upon the plaintiff.

[Ed. Note.—For cases in point, see vol. 41, Cent. Dig. Railroads, §§ 731, 1709-1716.]

Error to the Circuit Court of the United States for the Northern District of Ohio.

This was an action brought by the defendant in error against the plaintiff in error to recover damages for the destruction by fire of the plaintiff's flouring mill and contents at Venedocia, Ohio. The petition is drawn under section 3365-6 Rev. St. Ohio 1906, and alleges that the fire which destroyed the mill was caused by sparks emitted by a locomotive drawing a train of freight cars on defendant's railway. The answer was a general denial, coupled with special averments that the locomotive in question was equipped as required by the statute, and carefully operated by skillful and competent employes. At the close of all the evidence the plaintiff in error moved for a peremptory instruction for a verdict in its favor. This motion was overruled, and this has been assigned as error. The case was then submitted to a jury, who were required to answer certain interrogatories propounded by the court. These interrogatories and the answers of the jury were as follows:

By the Court: Gentlemen of the jury, I am asked to submit to you certain questions, which I do, and which you will answer, as indicated to you by the court:

(1) "Do you find that the fire which consumed the plaintiff's property originated from a spark emitted by one of defendant's locomotives?" That question you will answer, and by your foreman sign.

(2) "If you answer interrogatory No. 1 in the affirmative, do you find that the locomotive which set said fire was engine 66, attached to defendant's through freight train No. 42?" That will be answered similarly.

(3) "Do you find that said engine 66 was at the time of the fire equipped with a spark arresting device of the best and most effective pattern known or in use at the date of said fire?" You must answer that question, although it is not couched in the language which the law provides shall be descriptive of such a spark arrester."

(4) "Do you find that the said spark arresting device on said engine was at the time of the fire in good repair?" You may answer.

(5) "Do you find that the defendant's employes in charge of and operating said engine at the time of the fire were competent and skillful?" You will answer.

(6) "Do you find that the defendant's said employes in charge of said engine at the time of the fire were at such time operating the engine in a careful manner?" All of these questions, gentlemen, you may answer according to the fact.

Clarence Brown, for plaintiff in error.

O. S. Brumback and H. L. Conn, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge, after making the foregoing statement, announced the opinion of the court.

In respect of the error assigned upon the refusal of the court to instruct a verdict for the plaintiff in error, it is only necessary to say that a careful examination of the record convinces us that there was material evidence upon which the jury might find as they did; that the fire which consumed plaintiff's mill was started by sparks emitted from a locomotive in operation upon the defendant's railway. Under the Ohio statute, which will be later considered, the effect of proof that the fire was started by sparks from a passing engine was to make that fact *prima facie* evidence that the escape of sparks was due to negligence and the burden was thus cast upon the defendant to rebut or counterbalance the presumption. In view of the finding by the jury that the spark arrester was of the best and most effective make and that the servants of the company operating the engine, efficient and skillful, we need not discuss either of those matters, for the refusal to instruct the jury to find for the plaintiff on those parts of the case did no harm. There remains then, only the question of whether this spark arresting device was in good condition upon the day when this fire was started. The jury found that it was not, and we are not at all disposed to think that there was not evidence sufficient to carry that question to the jury. That there was substantial, uncontradicted evidence that the netting of this particular engine had been replaced by new netting 30 days before the fire, and that the average life of such netting was from 6 to 18 months, must be conceded.

The servants of the railroad company also testified that this netting was inspected on the night before the fire, and again within one-half hour after the fire, and found to be in good condition. There was also uncontradicted evidence from competent experts that no spark arresting device will prevent the escape of all sparks and at the same time leave draft enough to operate the engine. To rebut this evidence of good repair the plaintiff relied, first, upon evidence tending to show that no less than 10 fires in grass and hay and stubble had been started by this very engine on the day in question within two miles of plaintiff's mill. There was also expert evidence to the effect that the fact that the same engine started 10 fires within two miles upon the same day and trip would indicate something wrong with the arrester. This testimony was admitted over the objection of the defendant in error, but we think it was competent to go to the jury as to the question of the condition of the arrester. *Peck v. N. Y. C. R. R.*, 165 N. Y. 347, 59 N. E. 206. The jury were not bound to accept the evidence of the inspector and other servants of the defendant as to the condition of the arrester if there was evidence tending to show that the sparks actually emitted in size and number were not such as could be anticipated if the condition of the arrester was

as testified to. *Karsen v. M. & St. P. Ry.*, 29 Minn. 12, 16, 11 N. W. 122; *Carter v. Penn. R. R. Co.*, 120 Fed 663, 57 C. C. A. 125; *Babcock v. C. & N. Ry.*, 62 Iowa, 593-597, 13 N. W. 740, 17 N. W. 909.

There remains the question as to whether the court erred in instructing the jury that the defendant could only escape liability if they should find that the plaintiff's mill had been burned by sparks from a passing engine by establishing by a "preponderance" of the evidence that its engine was provided with the best and most effective spark arrester, that it was in good condition, and that its engine was in care of competent and skillful men. The question is whether under the Ohio statute the prima facie case of negligence made by evidence that a fire was set by escaping sparks can only be rebutted by a preponderance of the evidence bearing upon the subject of negligence. At the common law the ground upon which the owner of the property consumed by fire, started upon or suffered to escape from the premises of another, could recover for such loss was negligence. This rule requiring the plaintiff to affirmatively show that the fire by which he suffered had resulted from a negligent act of the defendant, applied also to fires started by escaping sparks from locomotives of railway companies lawfully using such locomotives in the operation of their railways. *Garrett v. Southern Railway*, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645; *Cincinnati Railway v. South Fork Coal Co.* (C. C. A.) 139 Fed. 528-531; *Shearman & Redfield on Negligence*, §§ 655-666; *St. L. Ry. Co. v. Mathews*, 165 U. S. 1, 5, 15, 17 Sup. Ct. 243, 41 L. Ed. 611. There has always existed sharp conflict between decisions of eminent courts as to whether evidence that a fire was started by escaping sparks constituted, without more, a prima facie case of negligence. Upon the affirmative of this question was such cases as *McCullen v. C. & N. W. R. R.*, 101 Fed. 66, 41 C. C. A. 365, 49 L. R. A. 642; *Spaulding v. C. & N. W. R. R.*, 30 Wis. 110, 11 Am. Rep. 550.

In which case the Wisconsin court said:

"Some fire under all circumstances, and under even the best conditions of the engine to prevent it, will sometimes escape. The presumption, therefore, of negligence or the want of proper equipments, arising from the mere fact of fire having escaped, is not conclusive, nor, indeed, a very strong one, but of the two, rather weak and unsatisfactory. It is indulged in merely for the purpose of putting the company to proof and compelling it to explain and show, with a reasonable and fair degree of certainty, not by the highest and most clear and unmistakable kind of evidence, that it had performed its duty in this particular. Hence, evidence showing that the engines passing over a road were properly constructed and equipped, and were subjected to the vigilant and careful inspection of a competent and skillful person as often as once in two days, and found to be in proper order, would seem to satisfy the requirements of the rule."

See, also, *Menominee River Sash & Door Co. v. Milwaukee & Northern R. Co.*, 91 Wis. 459-460, 65 N. W. 176.

Upon the other hand there are many cases which seem to rest upon a more logical basis in holding that the gravamen of an action for loss of property by fire communicated by sparks, is negligence, and that inasmuch as a railway company may lawfully use locomotives it

can not be made liable for a loss from sparks emitted, unless the plaintiff shows such sparks to have been negligently emitted, the burden of showing negligence being always upon him who affirms it. *Henderson v. Railway Co.*, 144 Pa. 461, 475, 476, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652; *Flinn v. N. Y. C.*, etc., R. R., 142 N. Y. 11, 19, 36 N. E. 1046. This was the view entertained by this court in a case originating in Tennessee, where there was no statute. *Garrett v. Southern Ry.*, 101 Fed. 102, 41 C. C. A. 237, 49 L. R. A. 645. To the same effect are: *Burroughs v. Housatonic Rd.*, 15 Conn. 124, 38 Am. Dec. 64; *Gandy v. Chicago N. W. Rd.*, 30 Iowa, 420, 6 Am. Rep. 682.

There is a substantial agreement in all the cases, however, in holding that very slight evidence, such as proof that the sparks were of an unusual character in size, or in number, or that an unusual number of fires had been caused by sparks immediately before the fire in question, or that the defendant had been negligent in leaving upon its premises, in a very dry season, inflammable material, liable to be set on fire by the small sparks which inevitably escape under the most ordinary precautions, is enough to make a *prima facie* case of negligence demanding evidence of due care in rebuttal. Types of such cases appear in *Railway Co. v. Richardson*, 91 U. S. 454, 23 L. Ed. 356; *Flinn v. N. Y. C. & C. R. R.*, 142 N. Y. 11, 36 N. E. 1046; *Smith v. London*, etc., R. R., 6 L. R. C. P. Cases 14; *Peck v. N. Y. C. R. R.*, 165 N. Y. 347, 59 N. E. 206; *Burke v. Railroad*, 7 Heisk. (Tenn.) 451, 19 Am. Rep. 618; *Huyett v. Railroad*, 23 Pa. 373; *Henderson v. Railroad*, 144 Pa. 461, 477, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652. For the principles applicable to fires originating from collisions on a railroad track, see *C. S. Ry. Co. v. South Fork Coal Co.* (C. C. A.) 139 Fed. 528. In some of the states the statutes impose a liability unless the defendant company shall prove that the sparks escaped without negligence and that it was in all respects free from censure. Among the states having such statutes are Vermont, Michigan, Iowa, Louisiana. See *Railroad v. Richardson*, 91 U. S. 456, 23 L. Ed. 356; *Ann Arbor Rd. Co. v. Fox*, 92 Fed. 494, 34 C. C. A. 497; *Small v C. R. I. Rd. Co.*, 50 Iowa 338.

In Ohio the statute makes a railway company absolutely liable, irrespective of negligence, for a fire started upon its own premises, in the operation of its railway, by which adjacent property is destroyed. By another provision of the same act, the fact that fire was communicated by sparks from an engine to property adjacent to the railway right of way is made *prima facie* evidence of negligence. In other states absolute liability for fire communicated by sparks is imposed regardless of any actual negligence. Among such statutes are those of Missouri, Massachusetts, Maine, New Hampshire, Connecticut, Colorado, South Carolina. For the terms and dates of these statutes the very elaborate opinion of Justice Gray in *St. Louis, etc., Ry. Co. v. Mathews*, 165 U. S. 1, 17 Sup. Ct. 243, 41 L. Ed. 611, in which the constitutionality of the Missouri statutes was vindicated, may be consulted.

In *Railway Company v. Kreager*, 61 Ohio St. 313, 56 N. E. 203, the Ohio statute here involved, and to which we refer above, was under construction. Its provisions, so far as they have any bearing upon the decision in that case, have been already substantially stated. The syllabus of the case is as follows:

"1. The act of April 26, 1894 (91 Ohio Laws, p. 187), imposes upon every railroad company operating a railroad or part thereof in this state, an absolute liability for loss or damage by fire, originating on its land, caused by operating the road; and the fact that the fire originated on the land of the company is made prima facie evidence that it was caused by operating the road. In an action for such loss or damage, it is not necessary to allege or prove negligence on the part of the company; nor is the absence of such negligence a defense.

"2. A different rule of liability, and of evidence, is provided by the act, where the loss or damage is caused by fire originating on land adjacent to the land of the railroad company. In such cases the company is liable only when the fire was caused in whole, or in part, by sparks from an engine on or passing over the road; and the fact that the fire was so caused is made prima facie evidence of negligence on the part of the company or person operating the road. But this prima facie case of negligence may be overcome by proof, under a proper pleading, that the company exercised due care, the burden being on the company to show that it was free from negligence."

The question as to whether the prima facie case made for the plaintiff might be rebutted or overbalanced by the evidence offered by the party upon whom the burden had been thus shifted was not involved. "No evidence," said the court in its opinion, "was offered to show the defendant exercised due care and the only instruction asked" (in reference to the care for a loss occasioned by sparks from an engine to property adjacent to right of way) "was: 'That unless the jury find the injury complained of resulted from the carelessness and negligence of the defendant in running and operating its road, then the verdict should be for the defendant.'" In the absence of any evidence to rebut the presumption of negligence from the fact that the fire was communicated by sparks from a passing engine the plaintiff was plainly entitled to a verdict.

In the case of *Klunk v. Hocking Valley Railway Company* (Ohio) 77 N. E. 752, the action involved a construction and application of 3365-21, Rev. St. Ohio 1906, by which it is provided that if an employé shall receive an injury by reason of any defect in any car, locomotive or machinery owned or operated by such corporation, "such corporation shall be deemed to have had knowledge of such defect before and at the time such injury is sustained, and when the fact of such defect shall be made to appear in the trial of any action in the courts of this state brought by such employé or his legal representatives, against any railroad corporation for damages on account of such injury so received, the same shall be prima facie evidence of negligence on the part of such corporation." It appeared that the injury resulted from an alleged defect in a water glass upon a locomotive upon which plaintiff was employed as engineer.

The trial judge charged the jury on the subject of burden of proof as follows:

"If you find from the evidence that said water glass was then and there defective, and that the plaintiff received said injuries in consequence thereof

then such is prima facie evidence of negligence on the part of the defendant. This, however, does not preclude the defendant from rebutting such prima facie evidence of negligence by showing that it had not knowledge of the defect and that it was not guilty of negligence. In order to overcome such presumption, the defendant must show by a preponderance of the evidence, that it did not, at the time of the bursting and breaking of said water glass, have such knowledge, and that it could not have obtained such knowledge by the use of ordinary care, skill and diligence."

The Supreme Court, among other things, in respect of the meaning of this statute, said:

"But while the effect of this statute in the cases to which its provisions apply, is to so modify the rules of evidence as to make the proof of such defect prima facie evidence of negligence on the part of the corporation, yet this statute neither changes nor affects the rule as to the quantum or degree of evidence sufficient or necessary to rebut and control the prima facie case thus raised. The general rule would seem to be well established by an almost unbroken line of authority, that to rebut and destroy a mere prima facie case, the party upon whom rests the burden of repelling its effect, need only to produce such amount or degree of proof as will counter-avail the presumption arising therefrom. In other words, it is sufficient if the evidence offered for that purpose counter-balance the evidence by which the prima facie case is made out and established. It need not overbalance or outweigh it. *Smith v. Sac Co.*, 11 Wall. 139, 20 L. Ed. 102; *Stewart v. Lansing*, 104 U. S. 505, 26 L. Ed. 866; *Foster v. Hall*, 12 Pick. 89, 22 Am. Dec. 400; *R. R. Co. v. Brazzil*, 72 Tex. 233, 10 S. W. 403.

"In the present case the cause of action pleaded and relied upon by plaintiff is grounded solely upon the alleged negligence of the defendant railway company. The general denial in the answer of the railway company puts in issue every allegation of fact in the petition necessary to establish in the plaintiff a right to recover, and the allegation of negligence being the allegation of a material and affirmative fact, the burden, at all times, was upon the plaintiff to establish such fact by a preponderance of the evidence. During the progress of a trial it often happens that a party gives evidence tending to establish his allegation, sufficient it may be to establish it prima facie, and it is sometimes said that the burden of proof is then shifted. All that is meant by this is, that there is a necessity of evidence to answer the prima facie case or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial. *Heineman v. Heard*, 62 N. Y. 448. Whether in the case at bar the defendant railway company was guilty of such negligence as would create a liability against it, depended upon the whole of the evidence, as well that which by force of the statute constituted a prima facie case against the defendant, as all the other evidence produced by plaintiff tending to corroborate and, by the railway company, tending to rebut the charge of negligence made against it; and if upon the whole case defendant's negligence was not established by a preponderance of the evidence, or if upon all the evidence adduced upon that issue the case was left in equipoise, the defendant was entitled to a verdict, and the jury should have been so charged. Instead, the jury was instructed by the trial judge that to overcome the presumption or inference of negligence raised against it by the statute, the defendant company 'was required to satisfy you by a preponderance of the evidence that it is not negligent.' This, we think for the reasons above stated, was clearly misleading and erroneous."

Under this opinion, as well as that in the *Kreager Case*, it is obvious that negligence is just as much the ground upon which the liability of a railway company rests under the provisions of the fire statute as it would be if there was no such statute. The statute only provides that proof of the fact that fire was caused by escaping sparks shall constitute prima facie evidence of negligence. This, as we

have already shown, was the conclusion of many courts as to the effect of such evidence independently of any statute. This is also what the statute does in respect to an injury to an employé resulting from a defect in car, engine, or appliance of a railway company. If a passenger had shown an injury through defective appliance, negligence would be presumed. At the common law this was not the case as to an employé. The latter must go on and affirmatively show that the defect was due to negligence and this he would commonly do by evidence that it was known or should have been known to the master, who had neglected the duty of repair. But the statute construed in the Klunk Case provides that proof by the fact of an injury from a defect "shall be prima facie evidence of negligence on the part of such corporation." Whether the action be by an employé for an injury due to a defective engine, or by an owner of property destroyed by fire communicated by sparks from an engine, the statute in substance says:

"That in the one action the fact of an injury by a defect in the engine shall be prima facie evidence of negligence and in the other the fact that the fire was started by escaping sparks from an engine shall likewise be prima facie evidence of negligence."

In both cases the statute effects a mere matter of evidence and in both instances the burden of proving negligence is upon the plaintiff, it shifting only when he has proven one fact from which the other fact, negligence, is inferred and prima facie made out until rebutted or countervailed by evidence of due care. Upon principle we can see no room for distinction between the statute interpreted in the Kreager Case and that under consideration in the Klunk Case in so far as that under each proof of one fact is made to constitute prima facie evidence of another.

In the Kreager Case the question of what would counterbalance the prima facie evidence of negligence was not involved. That the burden is shifted by the statute to the defendant is true, but, as stated in the Klunk Case:

"To rebut or destroy a mere prima facie case, the party upon whom the burden rests of repelling its effect, need only to produce such amount or degree of proof as will countervail the presumption therefrom. In other words, it is sufficient if the evidence offered for that purpose counter-balance the evidence by which the prima facie case is made out and established. It need not overbalance or outweigh it."

There is, we think, no conflict between the Kreager and Klunk Cases. The latter is the later decision and we can but regard it as an authoritative construction of one Ohio statute which, in respect to the point construed, is identical with the Ohio statute here involved.

If it was error to charge that the prima facie evidence of negligence arising from proof of one fact under the one statute could be overcome only by a preponderance of the evidence bearing upon the question of negligence, it was error to charge that such a preponderance was necessary in the case at bar. This the trial judge did and an exception was sufficiently reserved.

For this error the judgment must be reversed, and a new trial awarded.

McDEARMOTT COMMISSION CO. et al. v. BOARD OF TRADE OF CITY OF CHICAGO.

(Circuit Court of Appeals, Eighth Circuit. July 9, 1906.)

No. 2,491.

EXCHANGES—RIGHT OF PROPERTY IN MARKET QUOTATIONS—RESTRICTED PUBLICATION.

A board of trade, which has a right of property in market quotations collected in its exchange, does not surrender or dedicate them to the public by permitting subscribers, to whom they are communicated upon condition that they shall not be made public, to post them upon blackboards in their places of business, where the posting is done for the advantage of the subscribers, and not of the public, and does not make knowledge of the quotations general, or make them accessible to the public as of right, or render them of no further value.

[Ed. Note.—For cases in point, see vol. 21, Cent. Dig. Exchanges, § 16; Quotations of prices and transactions on exchanges, see note to Sullivan v. Postal Tel. Cable Co., 61 C. C. A. 2.]

(Syllabus by the Court.)

Appeal from the Circuit Court of the United States for the Western District of Missouri.

For opinion below, see 143 Fed. 188.

James H. Harkless (Charles S. Crysler and Clifford Histed, on the brief), for appellants.

Martin H. Foss (Henry S. Robbins, on the brief), for appellee.

Before VAN DEVANTER and ADAMS, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. This is an appeal from an interlocutory order granting an injunction restraining the appellants from acquiring and using certain continuous market quotations without the appellee's consent.

Recognizing that these quotations as collected by the appellee in its exchange are its property, that while they remain such it has the right to control their acquisition and use by others, and that wrongful invasions of this right may be restrained in equity (Board of Trade v. Christie, 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031; Board of Trade v. Cella Commission Co. [C. C. A.] 145 Fed. 28), the appellants rest their opposition to the injunction upon the sole claim that they do not obtain the quotations until they have been given to the public with the appellee's knowledge and approval, and have ceased to be private property. In brief, the facts are these: Under an arrangement between the appellee and certain telegraph companies, which act as distributing agents, the quotations—that is, those wherein the price of any commodity is quoted oftener than at intervals of 10 minutes—are communicated by telegraph to commercial exchanges, brokers, and others throughout the country upon the express condition that they shall be used only in the private and individual business of the receiver; that they shall not be sold, communi-

cated, or otherwise given to news distributors or others; that no one shall be allowed to directly or indirectly take them from the office of the receiver, or to make a wire connection with the instrument or wires over which they are received; and that a failure to strictly comply with any of these requirements shall terminate the receiver's right to a continuance of the service. By reason of a charge which is made for communicating the quotations in this way, their collection and distribution are a source of substantial profit or gain to the appellee. Many of those to whom they are so communicated immediately post them upon blackboards in their places of business as a convenient means of stimulating and facilitating trade. These places of business, including the commercial exchanges, are maintained by private owners for the transaction of private business, and members of the public enter, not as a matter of common right, but only by the license of the owners, and usually for purposes in connection with their business. The posting seems to be with the knowledge and approval of the appellee, but not with any assent that the quotations may be copied and taken away or reproduced and used elsewhere. The appellants are brokers and commission merchants at Kansas City, Mo. In some systematic way, not satisfactorily disclosed, but confessedly without the consent of the appellee, they obtain the quotations immediately upon their being posted by those who rightfully receive them. They then display them upon blackboards in their own offices, and use them in their own business in like manner as do their competitors, who pay for them. The time intervening after the quotations are posted by others and before they are displayed in the appellants' offices is sometimes five minutes, but generally is much less.

It is the contention of the appellants that in the circumstances described the posting of the quotations by those who rightfully receive them is a general publication, and instantly operates as a surrender or dedication to the public of the proprietary rights of the appellee. The Circuit Court held otherwise (143 Fed. 188), resting its decision largely upon the reasoning and conclusion of the Supreme Court in *Board of Trade v. Christie*, supra, where it is said:

"The plaintiff does not lose its rights by communicating the result to persons, even if many, in confidential relations to itself, under a contract not to make it public, and strangers to the trust will be restrained from getting at the knowledge by inducing a breach of trust, and using knowledge obtained by such breach [citing cases]. The publication insisted on in some of the arguments were publications in breach of contract, and do not affect the plaintiff's rights. Time is of the essence in matters like this, and it fairly may be said that, if the contracts with the plaintiff are kept, the information will not become public property until the plaintiff has gained its reward. A priority of a few minutes probably is enough."

While that case in principle goes far toward sustaining the ruling of the Circuit Court, we think it must be conceded to the appellants that it does not determine the precise question now presented, that is, whether the posting of the quotations in the circumstances described is such a general publication as to make them public property. The question is not, however, altogether new. It was presented and

determined adversely to the appellants' contention in *Board of Trade v. Hadden-Krull Co.* (C. C.) 109 Fed. 705, where it was said by Judge Seaman:

"These market quotations are peculiar in their property use and value, and, without immediate transmission to the customer, so that he receives them simultaneously with all other customers, and before their publication generally, they possess no purchase value. To make them available, it is essential to have the quotations written or printed in some form for the information of all entitled to their use; and it appears here that they were in some instances so furnished in the 'ticker,' and in others were placed on a blackboard in the office of the customer. No reason appears for finding a publication in the one method if not in the other, and I am of opinion that neither constitutes a dedication to the public while limited to the use and office of the customer."

Older and more frequent application of the principle underlying that decision is found in the cases defining the common-law rights of an author in his literary or dramatic composition. Thus a professor of a university, who delivers orally in his classroom lectures which are his own composition, does not communicate them to the public, so as to entitle one who hears them, or another, to print and circulate them without his permission. 2 Story, Eq. Jur. §§ 943, 949; *Abernethy v. Hutchinson*, 1 H. & T. 28; *Caird v. Sime*, L. R. 12 App. Cas. 326; *Bartlette v. Crittenden*, 2 Fed. Cas. 981, No. 1,082; *New Jersey State Dental Society v. Dentacura Co.* (N. J. Eq.) 41 Atl. 672; *Id.* (N. J. Err. & App.) 43 Atl. 1098. And an author of a drama or play, who permits another to represent it upon the stage, does not surrender or dedicate it to the public, so as to entitle one who attends its representation, or another, to print and publish it, or to represent it upon the stage, without the author's permission. 2 Story, Eq. Jur. § 950; *Macklin v. Richardson*, Amb. 694, 2 Eng. Rul. Cas. 66; *Turner v. Robinson*, 10 Irish Ch. 121, 510; *Roberts v. Myers*, 20 Fed. Cas. 898, No. 11,906; *Boucicault v. Fox*, 3 Fed. Cas. 977, No. 1,691; *Crowe v. Aiken*, 6 Fed. Cas. 904, No. 3,441; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *Palmer v. Dewitt*, 47 N. Y. 532, 7 Am. Rep. 480. In the last case it is said:

"So far as is disclosed by the case, the drama remained in manuscript until printed by the defendant, and there is no claim that it has been published by the author or the plaintiff, or with their assent, except by its public performance on the stage; and if it has not, by that act, become publici juris, it still remains the private property of the author or his assignee, who alone have the exclusive right to it, and may prevent its publication. When a literary work is exhibited for a particular purpose, or to a limited number of persons, it will not be construed as a general gift or authority for any purpose of profit or publication by others. An author retains his right in his manuscript until he relinquishes it by contract, or some unequivocal act indicating an intent to dedicate it to the public. An unqualified publication by printing and offering for sale is such a dedication. The rights of an author of a drama in his composition are twofold. He is entitled to the profit arising from its performance, and also from the sale of the manuscript, or the printing and publishing it. Lectures and plays are not, by their public delivery or performance, in the presence of all who choose to attend, so dedicated to the public that they can be printed and published without the author's permission. It does not give to the hearer any title to the manuscript or a copy of it, or a right to the use of a copy. The manuscript and the right of the author therein are still within the protection of the law, the same as if they had never

been communicated to the public in any form. The permission to act a play at a public theater does not amount to an abandonment by the author of his title to it, or to a dedication of it to the public."

Without extending the reference to adjudged cases, we hold that the effect of the publication relied upon by the appellants is to be determined by inquiring whether it is so restricted in point of place, purpose, and persons as to be consistent with the retention by the appellee of its proprietary rights, or is so general or unqualified as to indicate an intent to surrender or dedicate them to the public at large. Tested in this way, the facts before recited admit of but one conclusion. The publication relied upon consists altogether in the posting of the quotations by those who subscribe for them. This is done in places which, by reason of their ownership and use, are private. Its controlling purpose is that of stimulating and facilitating trade with the subscriber, and not of conferring a benefit upon the public. It implies, of course, a permission that in dealing with the subscriber his patrons may use the information which the quotations contain, but not that they may be copied and taken away or reproduced and used elsewhere. It does not make knowledge of them general, or make them accessible to the public as of right, or render them of no further value. In short, it is so restricted as to be consistent with the retention by the appellee of its proprietary rights, and does not indicate an intent to surrender or dedicate them to the public.

We conclude, therefore, that the order granting the injunction was rightly made, and it is affirmed.

CONFEDERATE MEMORIAL ASS'N v. SHAUGHNESSY.

(Circuit Court of Appeals, Second Circuit. June 29, 1906.)

No. 238.

CONTRACTS—CONSTRUCTION—COMMISSIONS ON SUBSCRIPTIONS TO MEMORIAL ASSOCIATION.

An ex-confederate soldier of the Civil War originated a project for building a memorial hall for confederate relics and archives, and made a subscription of \$100,000 for the purpose on condition that an equal amount be otherwise obtained. Subsequently, for the purpose of raising such sum and carrying out the project, defendant, the Confederate Memorial Association, was incorporated and plaintiff was elected superintendent and secretary under a contract by which he was to take charge of collecting funds, and as compensation for "his services to be hereafter rendered," was to receive a fixed salary and expenses and also a commission of 25 per cent. "of the first \$200,000 raised by him and 20 per cent. of all other amounts * * * raised by him * * * to be due and payable when moneys are collected, and shall be reserved out of each particular donation." *Held*, that such contract was plain and unambiguous, and could not be construed to entitle plaintiff to a commission on the original \$100,000 subscription which he had no part in raising, and especially in view of the subsequent conduct of the parties which plainly indicated that it was not so understood by either.

In Error to the Circuit Court of the United States for the Eastern District of New York.

On writ of error to the Circuit Court of the Eastern District of New York to review a judgment entered upon the verdict of a jury in favor of the plaintiff for \$16,228. The action was brought by the plaintiff, as assignee of John C. Underwood, to recover a balance alleged to be due the said Underwood under a contract with the defendant whereby the association agreed to pay him an annual salary as superintendent and secretary and also a commission of 25 per cent. on the first \$200,000, and 20 per cent. on all sums above said amount, raised and collected by him for the memorial fund of the association. The ultimate object of the association was to secure sufficient funds to erect a so-called "Battle Abbey" or permanent museum hall for the confederate relics and archives. The principal defense is that Underwood did not raise or collect the amounts upon which he seeks to recover commissions. At the close of the plaintiff's case, and again at the close of the evidence, the defendant moved to dismiss the complaint and for the direction of a verdict for the defendant on the ground that the plaintiff had failed to prove a cause of action. The court refused to grant the motion, and the defendant excepted. The refusal to grant these motions is duly assigned as error.

A. Snowden Marshall, for plaintiff in error.

William Lindsay, for defendant in error.

Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

COXE, Circuit Judge (after stating the facts). The project of "The South's Battle Abbey" originated with Charles Broadway Rouss, formerly of Winchester, Va., a private in the Confederate Army and subsequently a successful merchant in New York. He conceived the idea, suggested the plans for a memorial hall and, in order to give the project an auspicious start, made a cash subscription of \$100,000. The announcement of this gift was made at a reunion of confederate soldiers, held at Houston, in May, 1895. The record of the proceedings concludes as follows:

"When the storm of applause which greeted this announcement subsided Gen. Gordon moved that the thanks of the veterans and greeting be sent to Charles Broadway Rouss, expressing their deep gratitude for his munificent gift, and heartfelt sympathy for the misfortune to his eyesight, which all hoped would be only temporary. This was carried amidst the wildest applause, and by a rising vote. Gen. Gordon then moved that a committee, to be composed of one member to be named by each southern state, or division, be appointed to examine into and report upon the plan submitted by Charles Broadway Rouss, which was unanimously adopted."

Of this sum \$60,000 was paid by Mr. Rouss during his lifetime, \$40,000 has, apparently, not been paid, and yet Underwood, the plaintiff's assignor, insists that he is entitled to a commission of 25 per cent. on the entire \$100,000 upon the theory that he raised and collected that amount. Upon this theory he succeeded in the Circuit Court. It is well to keep this fact in mind as we proceed to the consideration of the other facts.

The subscription of Mr. Rouss was upon the condition that a like sum should be raised from other sources. Various plans were suggested for securing the amount proposed and on August 6, 1896, the defendant association was organized under the laws of Mississippi. On November 12, 1896, the association entered into the contract with Underwood on which this action is based. By the terms of this contract, so far as applicable to the present controversy, Underwood agreed: First. To perform the duties of super-

intendent and secretary as expressed in the by-laws. Second. To keep a true and accurate account of all subscriptions to the memorial fund that may be obtained and moneys that shall be paid thereon for final report. The association agreed as compensation for "his services hereafter to be rendered": First. To pay Underwood, from and after November 1, 1896, an unconditional salary of \$4,000 per annum. Second. To pay him a commission of 25 per cent. of the first \$200,000 raised by him and 20 per cent. of all other amounts over and above the said sum of \$200,000 raised by him. "The said commissions to be due and payable when moneys are collected and shall be reserved out of each particular donation; and the remainders only as net subscriptions to the memorial fund, shall be turned over to the treasurer of the said association as prescribed by law." Third. To furnish him an office, stenographer, stationery and traveling expenses.

Immediately prior to making the contract Underwood, in company with Gen. W. D. Chipley, president of the association, had an interview with Mr. Rouss in which Underwood stated that it would be impossible to raise the \$100,000, needed to secure the Rouss subscription, in the South and proposed that he be permitted to canvass the North and West as well. To this Rouss at first demurred, thinking, quite naturally, that a memorial designed to perpetuate the memories of the Southern Confederacy should be paid for by the people of the South and that it would be distasteful to them to have the money for such a purpose subscribed at the North. After hearing that it was impossible to raise the amount in the southern states Rouss concluded to waive his objection and modify his original purpose by permitting the money necessary to duplicate his donation to be raised without territorial limitation. So that, prior to the contract, Rouss had obligated himself unconditionally to pay \$100,000 when a like sum, no matter from what source, was raised by the association. In order to assist Underwood in securing the needed amount Rouss agreed for a time to pay six per cent. annual interest on his subscription "as working capital" to carry on temporarily the business of the association. Rouss also promised not to defer the payment of the \$100,000 subscribed by him until a like sum had been raised by Underwood, but he agreed to cover all sums so raised, without limitation as to time, upon being notified of their being properly deposited. In this way Rouss paid \$60,000. The substance of this agreement on the part of Rouss was reduced to writing by Underwood, presented to Rouss and signed by him. The paper is dated January 12, 1898. The reason given for obtaining this paper was that Underwood might have something tangible to show to persons from whom he was soliciting subscriptions. In May, 1899, the contract with Underwood was renewed for two years and modified. The modification was reduced to writing at a meeting of the executive committee of the board of trustees of the defendant, held at Washington, January 17, 1901, and is as follows:

"It was agreed between the executive committee and John C. Underwood, superintendent and secretary, at the meeting of the board of trustees at Charleston in May, 1899, at which time said John C. Underwood was re-elected to

his present position, that his compensation shall continue the same as provided for in the contract in writing heretofore made, except that the payment of his salary of four thousand dollars (\$4,000) per annum shall be deferred until he shall have raised the sum of one hundred thousand dollars (\$100,000) including that already raised by him and paid over, less his commissions, to the association or its proper officer; provided that the contribution of C. B. Rouss shall not be estimated therein; and it was further agreed that such salary commencing on the 1st day of June, 1899, shall be paid out of the cash subscriptions raised by him over and above said sum of one hundred thousand dollars (\$100,000)."

In our opinion the contract of November 12, 1896, is explicit and unambiguous, needing no interpretation or construction. Before it was signed Rouss, the originator of the entire scheme, had promised to give \$100,000 on the sole condition that a like sum should be raised by the defendant. All limitation as to time and place where money was to be raised had been waived by him. He had even gone so far as to offer to pay \$6,000 annual interest on his subscription to be used to defray the expenses of Underwood in securing the rest of the fund. At the interview, which culminated in making the contract, Rouss paid to Gen. Chipley \$1,000 for this purpose. So that, before Underwood finally undertook the work, every obstacle suggested by him had been removed and Rouss had even supplemented his original offer by agreeing, for a time at least, to pay the expenses of those engaged in duplicating his subscription. That Rouss had bound himself legally and morally to pay the \$100,000 we have no doubt and it is manifest that both parties to the contract so understood the situation. For what purpose was the contract made? Was it to "raise" \$100,000 from Rouss? Certainly not! The plan was his; he had not only promised to pay but was doing everything in his power to hasten the day when payment would be necessary. It is perfectly plain from the contract itself and from all the antecedent circumstances that Underwood was employed solely for the purpose of raising the \$100,000 necessary to secure the Rouss subscription. That subscription was the foundation of the entire movement. It was recognized by all as an absolute verity. To secure it the defendant was organized, trustees were elected, committees appointed and a superintendent and secretary chosen. Underwood agreed "to keep a true and accurate account of all subscriptions to the memorial fund that may be obtained." The subscription of Rouss was obtained long prior to November 12, 1896.

The contract provides "that as compensation for his services hereafter to be rendered Underwood shall receive a yearly salary of \$4,000, and a commission of 25 per cent. of the first \$200,000 he raises." Can it be supposed that when the defendant agreed to pay a commission for money raised by Underwood after November 12, 1896, either he or the association intended that language to apply to a subscription made over a year previously and which had been settled in all its minute details before the contract was made? If Underwood succeeded in securing the \$100,000 within a year he would on this hypothesis receive in addition to his salary and expenses the sum of \$50,000, leaving but \$150,000 to build a \$200,000

memorial building. It is inconceivable that the men connected with this enterprise intended to make a present to Underwood of \$25,000. Would it not have been regarded as a breach of trust thus to have depleted the funds of the association? In any view, if this had been the intention of the parties would they not have made their purpose clear? Would Underwood have accepted an agreement to pay him a percentage on sums "hereafter" raised by him if he expected to receive \$25,000 on a subscription with which he apparently had nothing to do in the future? If, however, interpretation were needed we think the conduct and declarations of Underwood indicate that at the time and long after the signing of the contract he understood its provisions as the defendant does to-day. Thus we find him continually alluding to the "generous subscription," "munificent donation" and "proffered donation" of Rouss and the necessity of "raising" funds to duplicate it.

By the terms of the contract commissions were to be deducted from each particular donation and the remainder only turned over to the treasurer of the association, and yet, in a letter to Rouss, dated January 1, 1902, giving a complete account of his stewardship, Underwood makes no charge or claim for commissions on the amounts paid him by Rouss; stating that the full amount so received was paid to the treasurer. "The treasurer has to his credit * * * from C. B. Rouss \$60,000." The letter shows that in every other instance the commission was deducted. It is true that Underwood made a claim in the previous January for commissions on the Rouss money, but it was promptly rejected by the executive committee to whom it was suggested and frequently thereafter he alluded to the sum "collected" by him which did not include the Rouss payment.

It is argued that the renewal of the contract in May, 1899, which was reduced to writing at the Washington meeting of the executive committee, is a recognition of the claim for commissions on the Rouss money. It is contended that without the proviso, quoted above, the payment of Underwood's salary would have been deferred no longer than the time when he would raise \$100,000 including the Rouss money, thus showing that it was the understanding that the commission of 25 per cent. was to apply to the money raised from Rouss as well as from others. We think this a strained and unnatural interpretation, especially when it is recollected that the record was made at the Washington meeting where Underwood for the first time presented his claim for commissions on the Rouss money and where it was vehemently repudiated by the committee. We think the proviso was added for greater caution in order that the minutes might show that the claim was disallowed by the committee. It may be that the language is not well chosen from a legal point of view, but to assert that the committee intended to put in writing an allowance of a claim, which they had at the same meeting almost indignantly rejected, is to do violence alike to the rules of evidence and of common sense.

The so-called "Rouss Guarantee" added nothing to his previous obligation; it was a concession made to Underwood to help him in

his work of collecting funds. The payment by installments, instead of in a lump sum at the end, enabled him to show better results to those from whom he was soliciting subscriptions. He did not raise the money because Rouss consented to pay it in nine payments instead of one payment.

We do not discuss the other exceptions assigned as error, for the reason that we are convinced that there can be no recovery for commissions on the Rouss subscription.

Judgment reversed with costs.

THOMAS et al. v. GREEN COUNTY.

(Circuit Court of Appeals, Sixth Circuit. July 23, 1906.)

No. 1,483.

1. WRIT OF ERROR—PARTIES—INCLUDING PERSONS NOT PARTIES TO SUIT.

The inclusion as plaintiffs in error of persons who were not parties to the action does not vitiate the writ as to those who were parties, but is an error which may be corrected by dismissing the writ as to such persons, or by striking out their names.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 1868-1876.]

2. SAME—AMENDMENT OF WRIT—ADDING NAMES OF OMITTED PLAINTIFFS.

The right to amend a writ of error and citation by adding omitted plaintiffs depends primarily upon whether the record shows enough to authorize the amendment, under Rev. St. § 1005 [U. S. Comp. St. 1901, p. 714]. If it appears from the record that the omission was accidental, the amendment should be allowed.

[Ed. Note.—For cases in point, see vol. 2, Cent. Dig. Appeal and Error, §§ 2115-2119.]

3. ABATEMENT AND REVIVAL—FEDERAL COURTS—DEATH OF JOINT PLAINTIFF.

An action brought in a federal court by plaintiffs as joint owners of bonds does not abate by the death of one of the plaintiffs, but under Rev. St. § 956 [U. S. Comp. St. 1901, p. 697], the suit may proceed in the name of the survivors upon the suggestion of the death upon the record.

[Ed. Note.—For cases in point, see vol. 1, Cent. Dig. Abatement and Revival, §§ 315-319.]

In Error to the Circuit Court of the United States for the Western District of Kentucky.

On motion to dismiss and motion to amend writ of error and citation.

Alex. P. Humphrey, for plaintiffs in error.

Ernest MacPherson, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

LURTON, Circuit Judge. This was an action by numerous persons as plaintiffs against Green county upon bonds, and coupons clipped therefrom, issued by that county; the plaintiffs averring that they were jointly the holders and owners of the bonds and coupons upon which the action was brought. The county denied that they were such joint owners, and denied liability upon the bonds and coupons

upon several grounds not necessary to be now stated. The issues were by stipulation submitted to the trial judge upon an agreed statement of facts, and there was a judgment against the plaintiffs and in favor of the defendant. From this judgment certain of the plaintiffs have sued out this writ of error.

The defendant in error has entered a motion to dismiss the writ: First. Because some of the persons named as plaintiffs below have not joined as plaintiffs in error, and have not been cut off by a summons and severance. Second. Because certain persons are named as plaintiffs in error who were not parties below. Third. Because one of the parties named as a plaintiff in error died more than a year before the judgment complained of, and that the action was never revived by her representative. Fourth. Because no brief has been filed, as required by rule 24 of this court. 90 Fed. lxxxi, 31 C. C. A. clxiv.

The plaintiffs in error meet the matter of the failure of all the plaintiffs to join in suing out the writ by a motion to amend the writ and citation, by inserting in each the names of the omitted plaintiffs below, and to amend the bond or give another. They also move the court to strike from the writ and citation the names of such persons therein appearing as plaintiffs in error who were not parties to the suit. The inclusion of persons as plaintiffs in error who were not parties to the suit is an error which may be corrected by dismissing the writ as to them or by striking their names out. The motion to so strike out the names set out in the motion paper is accordingly allowed, and an order will be so entered.

That persons not parties below were included as plaintiffs in error does not vitiate the writ as to those who were parties; such inclusion being of no effect. "Surpulsage does not vitiate that which in other respects is good and valid" is a maxim applicable to pleading as well as to other written instruments. Brown, *Legal Maxims*, *604. The right to amend the writ of error and citation by adding omitted plaintiffs depends primarily upon whether the record shows enough to authorize the amendment under section 1005, Rev. St. [U. S. Comp. St. 1901, p. 714]. *Estis v. Trabue*, 128 U. S. 226, 9 Sup. Ct. 58, 32 L. Ed. 437; *Walton v. Marietta Chair Co.*, 157 U. S. 342, 15 Sup. Ct. 626, 39 L. Ed. 725. Thus in *Estis v. Trabue* the plaintiffs in error, as well as the defendant in error, were described only by the names of firms. The record disclosed the names composing the firms, and an amendment inserting their names was allowed. In *Walton v. Marietta Chair Co.* the plaintiff in error was described as administrator of a certain estate. The accompanying record showed that another person named therein claimed to have succeeded the person named as administrator, and that this other had tendered the bill of exceptions and given bond to prosecute the writ of error. The substitution was allowed. In *Knickerbocker Life Ins. Co. v. Pendleton et als.*, 115 U. S. 339, 6 Sup. Ct. 74, 29 L. Ed. 432, the Supreme Court after final judgment discovered that the writ of error was sued out and citation directed and served against P. H. Pendleton, only one of the plaintiffs below; that the appeal bond was made to him alone, but that the supersedeas bond ran to all of the plaintiffs below, and that all subsequent pro-

ceedings were entitled in the name of P. H. Pendleton et al. After notice to plaintiff to show cause, the court allowed the writ of error to be amended, set aside the judgment, ordered a new citation to all the plaintiffs below, and when same was served allowed a reargument.

The test of the right to amend when some of the plaintiffs are not joined in a writ of error seems from the case cited to turn upon whether the omission to join them appears from the record to have been accidental. The accompanying record here shows that this was a suit by a large number of persons and corporations, who averred that they were joint owners of the bonds and coupons in suit. The case lingered long before a hearing, and some of the plaintiffs died. The representatives of some of those who died were brought in by amended petitions, and the suit revived in their names. In one case it seems that the representative of a deceased plaintiff was not brought in. If in fact the plaintiffs were joint owners of the bonds and coupons in suit, it would seem, under section 956, Rev. St. [U. S. Comp. St. 1901, p. 697], that the suit might proceed in the name of the survivors upon the suggestion of the death upon the record, and that the suit would not abate. The question as to whether they were such joint owners is one of mixed fact and law, and we pretermit the present determination of that question. For the purposes of the present motion, we assume the fact to be as averred in the pleadings. Upon that premise, it was unnecessary to revive in consequence of the death of any person named as plaintiff, and the suit did not abate for want of such revivor.

That the persons who are now asked to be named by amendment as plaintiffs in error were plaintiffs below appears from the accompanying record. That they were accidentally omitted as plaintiffs in error we are also satisfied from an examination of the record. Their omission seems accounted for by counsel preparing the petition for the writ inadvertently taking the names of the plaintiffs from a transcript of a record of another suit, which was introduced in the court below as evidence upon a question of estoppel, and from the omission to examine certain amendments to the pleadings bringing in new plaintiffs as representatives of deceased plaintiffs. This confusion is explained by an affidavit of the counsel who filed the petition for the writ of error. This he did at the request of Mr. Simrall, who had represented the plaintiffs, from a memorandum which Mr. Simrall prepared from the office file while lying seriously ill from a sickness which shortly proved fatal. The lawyer who prepared the writ of error papers was not of counsel, knew nothing of the case, and used this memorandum alone as containing names of the plaintiffs. The circumstance that persons who appeared as plaintiffs in the transcript of a former suit should be made plaintiffs in error in this suit, although not parties plaintiff below, and that persons who were parties plaintiff below should be omitted as plaintiffs in error here, not being parties to the record of the former suit in evidence, seems to make it plain that the memorandum of names to be made plaintiffs in error was made from this evidential transcript by inadvertence, and to establish that the omission of the persons who now ask to join as plaintiffs in error was accidental and not intentional.

The motion to amend the writ and citation and to give a new bond will be allowed. The motion to dismiss the writ is denied.

The court takes judicial notice that there is pending on its calendar another suit which involves some of the series of bonds here in litigation, which case has already been argued. Important and doubtful questions of law, upon which the liability of the defendant in error must turn in both cases, have been certified to the Supreme Court.

It is therefore ordered that upon the amendment of the writ and citation according to the filed motion and the substitution of another bond that this case stand continued until the Supreme Court shall answer the interrogatories propounded in the other case, and that time for filing briefs be extended until then.

SOUTHERN RY. CO. v. THOMASON.

(Circuit Court of Appeals, Fourth Circuit. July 11, 1906.)

No. 652.

REMOVAL OF CAUSES—PREJUDICE—CONTROVERSY PARTLY BETWEEN CITIZENS OF SAME STATE.

Act March 3, 1887, c. 373, § 2, cl. 4, 24 Stat. 553, as corrected by Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509], authorizing the removal of causes from state to federal courts because of prejudice and local influence, does not furnish a separate and independent ground of jurisdiction, but relates only to special cases comprised in the preceding clauses, consisting of cases in which there is a controversy between a citizen or citizens of the state in which the suit was brought, and a citizen or citizens of other states, excluding cases wherein the controversy is partly between citizens of the same state.

[Ed. Note.—For cases in point, see vol. 42, Cent. Dig. Removal of Causes, §§ 120, 123.]

Prejudice or local influence ground for removal of cause to federal court, see note to *P. Schwenk & Co. v. Strong*, 8 C. C. A. 95.]

In Error to the Circuit Court of the United States for the Western District of North Carolina, at Asheville.

Charles A. Moore (Moore & Rollins, on the brief), for plaintiff in error.

James H. Merrimon (Locke Craig, on the brief), for defendant in error.

Before GOFF, Circuit Judge, and PURNELL and McDOWELL, District Judges.

GOFF, Circuit Judge. This action at law was instituted by Ernest Thomason, the defendant in error, who acted by and through his guardian, Garland A. Thomason, in the superior court of Buncombe county, N. C., against the Southern Railway Company, the plaintiff in error, the Western North Carolina Railroad Company, and Luther F. Long. On the 12th day of September, 1899, the said Ernest Thomason, then an infant about 12 years of age, was injured upon a turntable belonging to and used by the Southern Railway Company at Old Fort,

in North Carolina. The object of this suit was to recover damages from the defendants because of said injuries. The defendants filed their joint answer in said superior court of Buncombe county, in which they admitted the allegation in the complaint that the Southern Railway Company was a corporation organized under the laws of the state of Virginia, and in which they denied all of the other material allegations contained in said complaint, and in addition, as a further defense, alleged that the plaintiff contributed to his injury by his own negligence, and was the author of his own misfortune and injuries. As a further defense, said defendants filed a special plea reciting the proceedings had in a former suit by said plaintiff against the Southern Railway Company for the same cause of action, and pleading the judgment rendered therein as a bar to this action.

Afterwards this cause was, by the order of the Circuit Court of the United States for the Western District of North Carolina, removed into said court, on consideration of the petition, affidavit, and bond filed therein by the Southern Railway Company; said order reciting that such petitioner could not, on account of prejudice and local influence, obtain justice in the superior court of North Carolina. Afterwards, on May 8, 1903, the plaintiff below moved the said Circuit Court of the United States to remand this suit to the court from which it had been removed, which motion the court below denied, and the cause, issue having been joined, was tried to a jury, which found a verdict in favor of the plaintiff, on which judgment was, after the amount so found had been reduced by the court, rendered for the plaintiff. From this judgment the defendant below sued out the writ of error now under consideration. The assignments of error are many. They raise questions of procedure of unusual interest, and involve the application of propositions of law of great importance. We are met, however, with a question of jurisdiction which must first be disposed of. That question is distinctly raised by the motion to remand, and were it not so presented it would nevertheless be our duty to consider it. Had the court below jurisdiction of this cause? Was it properly removed from the superior court of Buncombe county, N. C.? Did the Circuit Court for the Western District of North Carolina err when it refused to remand this case?

It is stated in the petition on which the removal was ordered that the plaintiff is a citizen of the state of North Carolina, and that the defendant, the Southern Railway Company, is a citizen of the state of Virginia, and it appears that the other two defendants are citizens of the state of North Carolina. The petition for and the order of removal are both based solely on the ground of "prejudice and local influence." The case does not present a controversy separable in its character, and it is not claimed that the joinder of defendants was made for the purpose of defeating the jurisdiction of the United States Circuit Court, of preventing a removal of the case to that court under the legislation applicable thereto. The question of jurisdiction must be determined by the status of the case, as it existed at the time the order of removal was made. Pleas filed, amendments made, and orders entered subsequent to the docketing of the case in the court below can have no bearing on this question.

The Circuit Courts of the United States can remove from the state courts only those cases of which such Circuit Courts are given original jurisdiction. Could this suit have been brought in the court below? Does not the complaint show a controversy between a citizen of North Carolina on one side, and a citizen of Virginia in connection with other citizens of North Carolina on the other side? It is plain that the jurisdiction of the Circuit Court was invoked upon the ground alone of the diversity of citizenship of the parties. The fourth clause of section 2 of the act of March 3, 1887, c. 373, 24 Stat. 553, as corrected in 1888 (Act Aug. 13, 1888, c. 866, § 2, 25 Stat. 434 [U. S. Comp. St. 1901, p. 509]), relating to removal because of prejudice and local influence, does not furnish a separate and independent ground of jurisdiction, but relates only to special cases which are comprised in the preceding clauses. Suits removable on the ground of prejudice or local influence are those "in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state." The settled construction of the act last quoted, under which this case was removed, is, we think, so far as the class of cases removable on the ground of prejudice and local influence is concerned, that they are confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is brought, and a citizen or citizens of another or other states, and it does not include cases wherein the controversy is partly between citizens of the same state. As was said by the Chief Justice, in *Cochran v. County of Montgomery*, 199 U. S. 260, 272, 26 Sup. Ct. 58, 50 L. Ed. 182:

"To hold otherwise brings the language of the clause into conflict with the rule that a suit to be removable must be within the original jurisdiction of the Circuit Court, departs from the settled former construction, and ignores the main purpose of the act of 1887, which was to restrict the jurisdiction of the Circuit Court. *Hanrick v. Hanrick*, 153 U. S. 192, 14 Sup. Ct. 835, 38 L. Ed. 685; *Anderson v. Bowers* (C. C.) 43 Fed. 321; *Moon on the Removal of Causes*, § 189 and notes. And there does not seem to be any escape from this conclusion in view of the provision of the first section of the act of 1887, that where the jurisdiction is founded solely on diversity of citizenship, suit can be brought only in the district of the plaintiff or the defendant."

In the case we now consider, the suit was brought in the plaintiff's state against the Western North Carolina Railroad Company and Luther F. Long, shown by the complaint to be necessary parties, citizens of the state of North Carolina, and the Southern Railway Company, a citizen of the state of Virginia, also a necessary party. It could not have been brought in the Circuit Court of the United States for the Western District of North Carolina. The controversy is one between a citizen of that state and district and other citizens of that state and district in conjunction with a citizen of the state of Virginia, and consequently the circuit court of that state and district under the legislation referred to, did not have jurisdiction of it. The case was improvidently removed and should have been remanded. The following cases discuss and construe the jurisdictional questions by which we are governed in the disposition of this case: *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510, 28 L. Ed. 462; *Plymouth Gold Mining Co. v. Amador & Sacramento Canal Co.*, 118

U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232; Louisville & Nashville Railroad Company v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; Cameron v. Hodges, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. Ed. 132; Chicago, Rock Island & Pacific Railway Co. v. Martin, 178 U. S. 245, 20 Sup. Ct. 854, 44 L. Ed. 1055; Chesapeake & Ohio Railway Co. v. Dixon, 179 U. S. 131, 21 Sup. Ct. 67, 45 L. Ed. 121; Cochran and Fidelity & Deposit Co. v. Montgomery County, 199 U. S. 260, 26 Sup. Ct. 58, 50 L. Ed. 182.

The removal from the state court having been made on the application of the Southern Railway Company, that company will be required to pay the costs incurred in this court and in the court below.

Judgment reversed and cause remanded to the Circuit Court, with a direction to remand to the state court. All costs to be paid by the plaintiff in error.

BROWN et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. July 30, 1906.)

No. 2,072.

1. INDIANS—CRIMES COMMITTED ON RESERVATIONS—JURISDICTION—LARCENY.

Larceny committed in an Indian reservation in the Territory of Oklahoma by one not an Indian is a crime against the laws of the United States and cognizable by the district courts of the territory while exercising the jurisdiction vested in the Circuit and District Courts of the United States.

[Ed. Note.—For cases in point, see vol. 27, Cent. Dig. Indians, § 64; vol. 14, Cent. Dig. Criminal Law, § 167.]

2. LARCENY—INDICTMENT—ALLEGATION OF VALUE.

Rev. St. U. S. § 5356 [U. S. Comp. St. 1901, p. 3638], providing for the punishment of larceny, does not make the value of the property stolen an element of the offense or a factor in determining its grade or punishment, and therefore it is not necessary that an indictment thereunder shall allege the value.

[Ed. Note.—For cases in point, see vol. 32, Cent. Dig. Larceny, § 76.]

(Syllabus by the Court.)

In Error to the Supreme Court of the Territory of Oklahoma.

For opinion below, see 75 Pac. 291.

C. R. Buckner and G. W. Buckner, for plaintiffs in error.

Horace Speed, U. S. Atty.

Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

VAN DEVANTER, Circuit Judge. The plaintiffs in error were convicted in the district court of Pawnee county in the territory of Oklahoma, while it was exercising the jurisdiction of the Circuit and District Courts of the United States, of the larceny of a horse in the Osage Indian Reservation, which is within that territory and is attached to Pawnee county for judicial purposes. The conviction was affirmed by the Supreme Court of the territory, 13 Okl. 512, 75 Pac. 291,

and its judgment is challenged by the present writ of error. The only matters relied upon to obtain a reversal are that the district court, while exercising the jurisdiction of the Circuit and District Courts of the United States, was without jurisdiction of the offense because it was one against the laws of the territory and not the laws of the United States, and that the indictment does not state any offense because it is not charged that the horse stolen had any value.

The district courts of the territory have a dual jurisdiction, one to administer the local law of the territorial government and the other to administer the laws of the United States, or, as the latter is expressed in the act establishing the territory, "the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States." 26 Stat. c. 182, § 9; *Ex parte Crow Dog*, 109 U. S. 556, 560, 3 Sup. Ct. 396, 27 L. Ed. 1030; *Gon-shay-ee*, Petitioner, 130 U. S. 343, 348, 9 Sup. Ct. 542, 32 L. Ed. 973; *United States v. Pidgeon*, 153 U. S. 48, 58, 14 Sup. Ct. 746, 38 L. Ed. 631.

A general statute of the United States declares that every person who, upon the high seas, or in any place under the exclusive jurisdiction of the United States, takes and carries away, with intent to steal or purloin, the personal goods of another, shall be punished by a fine of not more than \$1,000, or by imprisonment not more than one year, or by both such fine and imprisonment. Rev. St. § 5356 [U. S. Comp. St. 1901, p. 3638]. Another statute declares, subject to exceptions not here material, that the general laws of the United States as to the punishment of crimes committed in any place within the exclusive jurisdiction of the United States shall extend to the Indian country. Rev. St. § 2145. Other statutes make the last one inapplicable to certain crimes committed by Indians in the Indian country (Rev. St. § 2146; 23 Stat. c. 341, § 9), but they need not be noticed specially because the plaintiffs in error are not shown to be Indians. The locus of this offense, the Osage Indian Reservation, was Indian country—the Indian title to it had not been extinguished—and therefore the general statute for the punishment of larceny committed in any place within the exclusive jurisdiction of the United States extended to it under the operation of section 2145. Such is plainly the effect of the decision of the Supreme Court in *Re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513, which involved a like question of jurisdiction in respect of an offense committed in an Indian reservation in the territory of Arizona. But the plaintiffs in error say that section 2145 was made inapplicable to the Indian reservations in Oklahoma by the act establishing the territorial government and extending its legislative power to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. 26 Stat. c. 182, §§ 1, 6. We cannot assent to this. The establishment of the territorial government did not take from these reservations their status as Indian country or remove them from the plenary authority of the United States; nor was the continued application to them of section 2145 at all inconsistent with the possession by the territory of the restricted measure

of legislative power conferred upon it. *United States v. Rogers*, 4 How. 567, 573, 11 L. Ed. 1105; *Bates v. Clark*, 95 U. S. 204, 24 L. Ed. 471; *National Bank v. County of Yankton*, 101 U. S. 129, 133, 25 L. Ed. 1046; *Ex parte Crow Dog*, 109 U. S. 556, 3 Sup. Ct. 396, 27 L. Ed. 1030; *In re Wilson*, 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513. Section 2145 was one of the laws of the United States with which the territorial laws were required to be consistent. True, some portions of the opinion in *United States v. Pridgeon*, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631, give color to the view advanced by the plaintiffs in error, but these were not necessary to a decision of the case and cannot be regarded as overruling the decision in *Re Wilson*, or as holding that section 2145 has been in any sense superseded, particularly when neither is mentioned in the opinion. Pridgeon was convicted, not under sections 2145 and 5356, but under an act specially providing for the punishment of horse stealing and other crimes in the Indian Territory (25 Stat. 33, c. 10), and the real question presented and decided in the case, so far as it is of present concern, was whether this special act was superseded with respect to so much of the Indian Territory as was subsequently severed therefrom and incorporated into the Territory of Oklahoma. It was held that the act was so superseded. The distinction between that case and the present one is plain. Other cases relied upon, such as *McBratney v. United States*, 104 U. S. 621, 26 L. Ed. 869, and *Draper v. United States*, 164 U. S. 240, 17 Sup. Ct. 107, 41 L. Ed. 419, are inapplicable because they relate to crimes committed in a sovereign state the admission of which into the Union, without any exception with respect to the Indian reservations therein or the jurisdiction over them, removed those reservations from the plenary authority of the United States by reason of the constitutional rule of equality in respect of statehood. The case of *Hollister v. United States* (C. C. A.) 145 Fed. 773, related to a crime committed in an Indian reservation in South Dakota, jurisdiction to punish which had been competently ceded to the United States by the state and accepted by Congress before its commission. Our conclusion is that the offense of which the plaintiffs in error were convicted was one against the laws of the United States and therefore was properly cognizable on the federal side of the district court.

Section 5356, Rev. St. [U. S. Comp. St. 1901, p. 3638] does not make the offense which it defines and is designed to punish dependent upon the value of the property stolen and does not grade the punishment according to value. It was therefore not necessary that the value be alleged in the indictment. 1 Bishop, *New Cr. Pro.*, §§ 540, 541; Bishop, *Stat. Crimes*, § 427.

The judgment is affirmed.

RABENS v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 12, 1906.)

No. 628.

CONSPIRACY—INDICTMENT—ISSUES AND PROOF.

Where accused was indicted for conspiracy to rob the post office at L., evidence was incompetent to show a general conspiracy, in which accused participated, to rob banks and everything that was "robbable."

In Error to the Circuit Court of the United States for the District of South Carolina, at Charleston.

W. Turner Logan, for plaintiff in error.

John G. Capers, U. S. Atty. and T. W. Bacot, Asst. U. S. Atty.

Before PRITCHARD, Circuit Judge, and KELLER, District Judge.

PRITCHARD, Circuit Judge. In this case the plaintiff in error was tried, with two other defendants, on an indictment the first count of which charged a conspiracy on the part of the defendants to rob the post office at Latta, S. C. The material part of the count in question is as follows:

"That the defendants feloniously did combine, conspire, confederate, and agree together to commit an offense against the United States; that is to say, to then and there forcibly break into a certain building used in part as a post office of the United States, to wit, the post office at Latta, in the county of Marion, in the state of South Carolina, with intent to commit therein larceny and other depredation, and having so then and there combined, conspired, confederated, and agreed together as aforesaid to then and there to commit the offense as aforesaid. * * *

There are two other counts in the indictment, one of which charges the parties with forcibly breaking into the building used as a post office at Latta with intent to commit larceny and other depredation, and the other charging the defendants with stealing and purloining money, property, and valuable things belonging to the United States, consisting of goods, moneys, and chattels of the United States, including postage stamps, to the amount of \$96.46. During the progress of the trial in the court below the witness McCarthy, who had been convicted of the offense of robbing post offices and was serving a sentence in the penitentiary, testified to facts which tended to prove a general conspiracy between himself and the other defendants then on trial for robbing banks; one of the witnesses testifying that the agreement between the parties at the time the conspiracy was formed was that they were to rob everything that was "robbable." The evidence tended to show a general conspiracy to rob, but there was no evidence connecting the plaintiff in error with a conspiracy to rob the post office at Latta.

The count upon which the plaintiff in error was indicted is clear and specific, and leaves no doubt as to the offense charged, to wit, a conspiracy to rob the post office at Latta. There is no allegation in the count which can in any way be construed to mean a general

conspiracy to rob. The district attorney could undoubtedly have charged a general conspiracy to rob. However, he did not see fit to do so, but elected to rely upon the specific charge of a conspiracy to rob the post office at Latta. Therefore evidence tending to show a general conspiracy was incompetent and should have been rejected by the court. The government having relied upon a count charging a conspiracy which is restricted to one transaction, it was incumbent that it should satisfy the jury beyond a reasonable doubt that the plaintiff in error entered into a conspiracy with intent to rob the post office at Latta, as alleged. The case of *Commonwealth v. Harley* and another, 7 Metc. (Mass.) 506, is on all fours with the case at bar. In that case it was held that the averment in an indictment for conspiracy charging defendants with a conspiracy to defraud A. was not supported by proof that they conspired to defraud the public generally or individuals whom they might meet and be able to defraud.

A careful inspection of the record leads us to the conclusion that the introduction of evidence by the government tending to show a general conspiracy without showing that the defendant had knowledge that the robbery of the post office at Latta was contemplated by the conspirators was prejudicial to the plaintiff in error, and no doubt resulted in his conviction on all the counts; and, whereas, there is no evidence to justify a conviction of the plaintiff in error on the other counts, we are of opinion that the plaintiff in error is entitled to a new trial. The judgment of the Circuit Court is therefore reversed, and the cause remanded, with directions to grant a new trial.

Reversed.

THE CHICAGO. THE PENCOYD. THE ASHBOURNE. THE TOWNSEND.

(Circuit Court of Appeals, Second Circuit. June 9, 1906.)

No. 255.

COLLISION—FERRYBOAT AND TOW—CONTRIBUTORY FAULT OF TUGS.

Three tugs started from Perth Amboy on the flood tide with a tow of 24 boats for distribution at points in the North and East rivers. It was clear when they started, but, a dense fog coming on, they decided to take the entire tow to a dock at Jersey City until it cleared. Owing to the fog they passed the dock, and after turning to go back to it were in front of a ferry slip, and because of the strong tide were able to move the tow but slowly. While in this position and sounding proper fog signals a ferryboat came out of the slip, and by reason of her excessive speed and negligent navigation came into collision with and sank one of the boats in the tow. *Held*, that the tugs were not chargeable with contributory fault, on the ground that they were without power to handle their tow with greater dispatch, under the particular circumstances, which were not reasonably to have been anticipated.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 213-215.]

Appeal from the District Court of the United States for the Southern District of New York.

This cause comes here upon appeal from a decree holding the three tugs jointly responsible with the ferryboat Chicago for a collision

resulting in the sinking of the barge *Eliza*, one of a number of boats in tow of the three tugs. The opinion of the District Court is reported in 134 Fed. 1013.

Pierce M. Brown, for appellant.

Henry G. Ward, for appellee *The Chicago*.

LaRoy S. Gove, for appellee libellant.

Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. The 3 tugs, with a flotilla of 24 boats, started from Perth Amboy for points in the East and North rivers. It is the custom for such tows to proceed up the bay, taking advantage of the flood tide, and about in the neighborhood of Oyster Island to separate the barges bound up the North river from those consigned to the East river. They reached Oyster Island about 6 a. m., the tide running a strong flood, and began to separate the tow. There was no fog when they started, and, although it had got thick by the time they reached Oyster Island, they could still see a distance of more than four miles. By the time, however, that they had got about half through effecting the separation, dense fog set in, and it was decided not to continue the work, but to take the entire tow up the North river to Packer Dock, Jersey City. This was undoubtedly the proper and prudent course to take. Packer Dock is about 1,000 feet below the Pennsylvania Railroad ferry slips. The tow proceeded cautiously, blowing regular fog signals; but so dense was the fog that they passed Packer Dock, and the first land they made out was a pier between it and the ferry slips. Thereupon they at once proceeded to round to under a starboard helm; the *Ashbourne* ahead on a hawser, the *Townsend* on the port side of the head tier, and the *Pencoyd* on the starboard side of the tail tier. During this operation the tide carried the whole flotilla up river, and when it was completed they were either abreast of, or a little above, the ferry slips. When the master of the *Ashbourne* got the tow straightened out, he found he was still going astern and blew for the *Townsend*, which came forward and put out her hawser, and, they both being unable to move the tow, he blew for the *Pencoyd*, which joined them, and, with all three pulling, gradually, but slowly, moved forward towards Packer Dock. The consequence was that for half an hour the tow remained opposite the ferry slips; regular fog signals being blown at all times. In consequence of the fog the ferryboats made trips at irregular times. While the flotilla was lying off the slips, the *Chicago*, starting from Jersey City under a full-speed bell, collided with the *Eliza*.

Inasmuch as the *Chicago* has not appealed, there is no need to set forth the grounds on which she was held liable. We concur with the District Judge in his findings as to her navigation. The libel was filed against the ferryboat, which brought in the tugs. The only faults charged against them in the pleadings were (1) that the fog signals required by law were not blown; (2) in endeavoring to handle the tow with only one tug; and (3) in proceeding too near the pierhead line on the Jersey shore. The District Court found that all three allegations were without merit, and the evidence abundantly

sustains such conclusion. The proper signals were sounded, three tugs were used, and, being bound to a wharf in the vicinity, they were justified in being so close to the pierhead line. The court, however, held that the tugs "were not warranted in obstructing the ferry slips an unreasonable length of time, even in a fog, and they must be held to have participated in the negligence which brought about the disaster, because of insufficient power to handle their tow with proper dispatch."

It may be noted that, inasmuch as this was not charged as a fault in the pleadings, the testimony was not directed specifically to that point. Upon the record as it stands, however, the majority of the court are of the opinion that the three tugs were of sufficient power to handle the tow under all ordinary conditions, and are not to be held in fault because, in consequence of an unexpected combination of dense fog with a tide, which they had to breast, instead of getting its help, they could not haul the tow faster than they did. Had they started in a fog, or when one was threatening, or put themselves in an awkward position in front of a ferry slip through some fault of navigation, a different case would be presented. But as it was clear when they started, and they had sufficient power for their short trip, and, when suddenly caught in dense fog, proceeded cautiously, observing the proper rules of navigation, the majority of the court are unable to concur in the conclusion that the tugs should be held in fault.

The decree is reversed, with costs of this court to the Philadelphia & Reading Railroad against the Chicago, and cause remanded, with instructions to decree in favor of the Eliza against the Chicago alone for damages, interest, and costs.

UNIVERSAL ADDING MACH. CO. v. COMPTOGRAPH CO.

(Circuit Court of Appeals, Seventh Circuit. August 11, 1906.)

No. 1,251.

1. PATENTS—ABANDONMENT—COMPUTING MACHINE.

The Felt patent No. 628,176 for an improvement in computing machines, claims 1, 2, and 4, which are broad and generic covering the use of a lateral movement in such machine to bring about the placing of the figures in parallel columns are void, either for anticipation by the Hiett & Cable patent No. 580,863 or for abandonment if, as claimed, the invention was substantially perfected eight years before application was made for the patent.

[Ed. Note.—Abandonment of invention, see note to Hayes-Young Tie Plate Co. v. St. Louis Transit Co., 70 C. C. A. 6.]

2. SAME.

An inventor having grasped an idea and put it in mechanical form may not wait to secure a monopoly on the broad thought until everything in the nature of mere accessory improvement that makes it commercially better has been worked out and perfected.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, §§ 106-108.]

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Illinois.

For opinion below see 142 Fed. 539.

The suit in the Circuit Court was to restrain infringement of claims one, two and four, of letters patent No. 628,176, issued July 4, 1899, to Dorr E. Felt, for an improvement in tabulating machines. The claims sued upon are as follows:

1. The combination with the printing mechanism adapted to print two or more characters side by side, of a laterally-movable paper-carriage, devices for feeding the paper longitudinally mounted in said carriage, and automatic mechanism acting in any position of the carriage to actuate said feeding devices in the line-spacing movements, substantially as specified.

2. The combination with a series of type arranged to print side by side, devices for impressing the paper upon the type, a laterally-movable paper-carriage adapted to position the paper for the different columns, feed-rolls for moving the paper longitudinally past the type, and means for actuating said rolls, substantially as specified.

4. The tabulating-machine having in combination a laterally-movable paper-carriage, means for feeding the paper vertically in any position of the carriage, and mechanism for shifting the carriage laterally the width of a column-space, substantially as specified.

The decree appealed from sustained these claims, and restrained the appellee from infringement.

Other patents cited are: No. 388,119, Aug. 21, 1888, W. S. Burroughs; No. 401,780, April 23, 1889, L. G. Garrett; No. 439,544, Oct. 28, 1890, U. S. McCormack; No. 439,847, Nov. 4, 1890, W. M. Reason; No. 441,232, Nov. 25, 1890, D. E. Felt; No. 441,233, Nov. 25, 1890, D. E. Felt; No. 465,255, Dec. 15, 1891, D. E. Felt; No. 465,451, Dec. 22, 1891, A. T. Brown; No. 471,872, March 29, 1892, G. F. Loar; No. 500,793, July 4, 1893, F. H. Bowen; No. 501,753, July 18, 1893, J. N. Williams; No. 504,903, Sept. 12, 1893, W. S. Burroughs; No. 505,078, Sept. 12, 1893, W. S. Burroughs; No. 517,735, April 3, 1894, J. D. Daugherty; No. 524,867, Aug. 21, 1894, W. Sears; No. 538,807, May 7, 1895, J. C. Wolfe; No. 543,111, July 23, 1895, C. Spiro; No. 553,331, Jan. 21, 1896, L. S. Burridge and N. R. Marshman; No. 555,039, Feb. 18, 1896, G. W. Dudley; No. 568,021, Sept. 22, 1896, D. E. Felt; No. 578,303, March 2, 1897, J. C. Wolfe; No. 580,863, April 20, 1897, De Kernen. J. T. Hiett; No. 595,864, Dec. 21, 1897, W. H. Pike, Jr.; No. 693,958, Feb. 25, 1902, D. E. Felt; German letters patent No. 7,393, Nov. 19, 1879, Konigsberger & Co.; German letters patent No. 66,340, March 13, 1892, to J. L. Heuber.

Further facts are stated in the opinion.

Paul Bakewell, F. R. Cornwall, Thomas F. Sheridan, and W. Clyde Jones, for appellant.

John W. Munday and Henry Love Clarke, for appellee.

Before GROSSCUP, BAKER and SEAMAN, Circuit Judges.

GROSSCUP, Circuit Judge (after stating the facts). The claims relied upon are generic. If sustained they would exclude any other adding machine from using a lateral movement produced by the pressing of a key. The contention is that Felt was a pioneer in this particular improvement, and is entitled therefore not only to the broad claims set forth, but to the allowance of time said to have been necessarily taken—about eight years—to bring the improvement to perfection.

The patent was applied for May 31st, 1898, and allowed July 4th, 1899. Admittedly the adding machine, tabulating figures in single columns, was at that time in full use. The improvement was intended merely to embody the tabulations in parallel columns, thus introduc-

ing greater compactness, and greater convenience in the sheets containing the tabulated figures.

It turns out however, that at the time the Felt patent was applied for and allowed, there was another patent in existence—No. 580,863, applied for Sept. 16th, 1896, and issued April 20th, 1897, to Hiatt and Cable; this earlier patent disclosing descriptively, though not claiming generically, all that is contained in claims one, two, and four of the Felt patent in suit. Indeed, Felt's only escape from the Hiatt patent, as an anticipating device, lies in the claim that though the Felt patent was not applied for until 1898, the idea was conceived, and put into process of mechanical development in 1889 and 1890—a conception and mechanical embodiment that at that early date was entirely practical and operative, and only needed certain accessories to make it commercially a success.

These accessories are reduced in argument to five in number: (1) That though the machine of 1890 produced parallel columns adding the numbers, it had no automatic mechanism for printing the answers; the perfected machine of 1898, and the Hiatt machine contains such a mechanism. (2) The machine of 1890 was so constructed that the operator was liable to feed the paper clear out of the machine at the bottom of a column, and thus lose his work; the perfected machine of 1898, as well as the Hiatt machine, embodied means for preventing this. (3) That although the machine of 1890 printed ciphers automatically, it required, to print the ciphers, that the keys be touched in certain order; the perfected machine of 1898, as also the Hiatt machine, print the ciphers automatically, in whatever order the keys are touched. (4) The machine of 1890 was a key driven machine; the perfected machine of 1898, as also the Hiatt machine, being a lever driven machine; that is to say, the lateral motion in the machine of 1890 was produced by pressing hard upon a key, while in the later machines the depression of the key does none of that work, but merely sets the mechanism so that all of the work is done afterwards by the hand lever. (5) The machine of 1890, although it contained means for turning the sheet of paper back by hand, did not contain an automatic mechanism for performing this operation; the perfected machine, as also the Hiatt machine, contains such automatic mechanism. And the argument of the patentee is, that though it took eight years to develop and perfect these accessories, all things considered the time was not too long, and the patentee ought not, either through the doctrine of laches or abandonment to be thereby barred from claiming the date of his invention to have been 1890, while its commercial perfection did not take place until 1898, the date of his application for the patent.

A study of the development, and the appearance in the art, of these accessories, fails to sustain the equity of appellee's claim. The first one pointed out was employed in the Felt patent, No. 465,255, issued December 15th, 1891, as also the earlier Burroughs patent; and the fourth and fifth seem to have been clearly pointed out in Felt's invention, No. 568,021, applied for June 14, 1895. And respecting none of them is there any evidence in the record showing when they were conceived, or when they were perfected. For anything the record shows, all of these accessories could have been added more than two

years prior to the application for the patent. And the significance of this silence is emphasized by the fact that though the Hiett patent admittedly embodies them all, more than a year and a month elapsed after the issuance of that patent, before Felt incorporated them in his application for the perfected machine.

All this leads us up merely to the proposition upon which this case turns. The claims sued upon, as already stated, are generic. Felt seeks to monopolize, in his patent, the right to use a lateral movement to bring about the placing of the figures in parallel columns. Assuming that this concept of the patentee was complete when the patent was exhibited to the census office in 1890, so as to be practicable and operative, the machine was sufficiently completed to obtain a patent (if the feature were patentable at all) upon the broad feature claimed. The accessories subsequently developed added nothing either to the concept, or to the operativeness of the mechanism embodying the concept. What followed, if anything, was not development or evolution, but improvement merely. And an inventor having grasped an idea, and put it in mechanical form, may not wait to secure a monopoly upon the broad thought until everything in the nature of mere accessory improvement that makes it commercially better has been run out and perfected. To so hold would put it in the power of a patentee to hold back his improvement from the world indefinitely, obtaining in the end a patent that would exclude everything relating to the art, although the whole world had contributed to the perfecting, commercially, of his conception.

One of two things in this case seems to us plain: Either the mechanism of 1890, upon which these broad claims are based, was a mere experiment, inoperative and impracticable, and as such supplanted by the Hiett patent coming some six years later; or else, for the purposes of the broad claims allowed, the mechanism of 1890 was operative and practical, and therefore abandoned or lost through the eight years of inaction that followed. And either view compels us to reverse the decree of the Circuit Court appealed from. The decree of the court below is reversed, and the case remanded with instructions to enter a decree dismissing the bill for want of equity.

BRADFORD et al. v. EXPANDED METAL CO. et al.

(Circuit Court of Appeals, Third Circuit. September 10, 1906.)

No. 4.

PATENTS—INVENTION—PROCESS OF EXPANDING SHEET METAL.

The Golding patent No. 527,242, for a process of making open or reticulated sheet metal by slitting and stretching the sheet at the same time, is void for lack of patentable invention in that it describes merely an abstract idea without sufficiently disclosing means by which it may be put into practice.

Appeal from Circuit Court of the United States for the Eastern District of Pennsylvania.

For opinion below see 136 Fed. 870.

George H. Christy and E. Hayward Fairbanks, for appellants.
Ernest Howard Hunter, for appellees.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

DALLAS, Circuit Judge. The Expanded Metal Company and Chess Bros., the company's exclusive licensees in the state of Pennsylvania, were the complainants below, and charged the appellants with infringing letters patent No. 527,242, issued in October, 1894, for an invention made by John F. Golding and assigned to the Metal Company before the letters were actually issued. The subject of the invention, as declared in the specification, is "a new and useful improvement in the art of expanding sheet metal"; and the precise improvement which the applicant asserted that he had made was the simultaneous cutting and opening, or expanding, the metal at the cuts by stretching the severed portions. In other words, he applied for a patent upon a method of manufacture, and as will appear from the specification, which we are about to quote, he distinctly limited the novelty of his method to the stretching of the severed portion at the time when the metal was cut and the slits were opened. The specification refers to the prior art, and to the applicant's proposed improvement, in the following language:

"In the manufacture of what is now generally known as 'expanded sheet metal,' it has been customary to first cut the slits in the sheet metal at short distances apart, and to open the metal at the cuts thus formed by bending the severed portions or strands in a direction at right angles substantially to the plane of the sheet. It has also been made by simultaneously cutting and opening the metal by means of cutters set off, or stepped, relatively so as to make the slashes or cuts in different lines in the manner set forth in patents No. 381,230 or No. 381,231, of April 17, 1888. In both of these methods the product is somewhat shorter and materially wider than the original sheet, but practically no stretching or elongation of the metal forming the strands is caused.

"In my present invention I seek to avail myself of the ability of the metal to stretch or distend as well as of its ability to bend under strain or pressure, and the invention consists in the improved method of making expanded metal, viz., by simultaneously cutting and opening or expanding the metal at the cuts by stretching the severed portions.

"In the practice of the invention I prefer to make a series of slits in a straight line across the edge of the sheet, and at the time of cutting the slits, and as a continuation of that operation, to depress or stretch the severed metal, i. e., those portions of the sheet lying outside of the cuts, in a direction at right angles to the sheet, without any contraction for the length of the original sheet. This operation is then repeated after the sheet has been fed forward, the slits being made opposite the portions unsevered at the previous operation, and so on until the entire sheet is expanded.

"My invention allows the use of a single straight under knife, which of course does not need to be shifted in changing the location of the cuts, and the upper cutters are also arranged in a straight line, but their acting edges represent a corrugated form of alternate transverse projections and recesses adapted to coact with the under knife in cutting the slits at the proper intervals and to stretch the severed strands, and either the upper cutter or the sheet is shifted back and forth between the operations as will be understood.

"In the accompanying drawings Fig. 1 is a perspective of a sheet, a part of which has been expanded by my invention. Fig. 2 is an elevation of the preferred form of cutters used in manufacturing it. Fig. 3 is a section on

line 3-3 of Fig. 2. Fig. 4 is a plan of the sheet showing the first line of slits in dotted lines.

"In the drawings A represents the sheet from which the expanded metal is formed. B represents the series of upper or moving cutters and C is the lower knife which may be and preferably is stationary. The lower edges of the cutters B are so shaped as to form alternate transverse projections, b, and recesses or intervening openings, c; the projecting portions being adapted to coact with the lower knife in forming the slits. They are also adapted to force or carry downward the severed portions of the metal at the same operation to the position indicated by the broken lines, m, at Fig. 2. It will be noticed that at the time the bend is imparted to the severed portion, there can be no contraction in the product from the length of the sheet A, because the ends of the severed portion or strand are still integral with the sheet and will not permit it. The sheet is then fed forward and the slitting and stretching operation is repeated. One line of slits across the sheet is formed at each operation, and the upper cutters, or the sheet, may be shifted and the sheet be fed forward between the operations so that the slits are in every case made back of the portions left unsevered at the preceding operation, or, in other words, the slits and unsevered portions alternate in position at successive operations. The bend given to the severed portion or strands as they are usually called, is in a direction at right angles to the plane of the sheet, and as there is no contraction in the length of the metal, it necessarily follows that the expansion is obtained from the stretch, distention or elongation of the severed strands."

In conformity with the specification, the applicant claimed:

"The herein described method of making open or reticulated metal work, which consists in simultaneously slitting and bending portions of a plate or sheet of metal in such manner as to stretch or elongate the bars connecting the slit portions and body of the sheet or plate, and then similarly slitting and bending in places alternate to the first mentioned portions, thus producing the finished expanded sheet metal of the same length as that of the original sheet or plate, substantially as described."

The Circuit Court sustained the validity of the patent and the charge of infringement, and made the usual decree for a perpetual injunction and an account. From this decree the present appeal is taken, and several questions are presented and have been ably argued by counsel, both orally and upon the printed briefs. Of these, however, we think it unnecessary to consider more than one, namely, the validity of the patent in suit. It must be conceded that the case is close, and that reasons for the decision of the Circuit Court are not lacking; but we have been obliged to come to the conclusion that the so-called invention was not really an invention at all within the meaning of the patent laws. As we regard the application, it was no more than the announcement by Golding of a happy thought, unaccompanied by any sufficient description of the means by which his thought might be realized. Indeed, it does not seem unfair to add, that the applicant himself was in such doubt about the validity of the patent in suit by which he sought to protect the method of manufacture therein described, that he hastened to take out a patent for a machine by which the desired result could be accomplished, and obtained by letters No. 581,713, all the advantage over his competitors to which we think he is entitled.

When the patent in suit was applied for, it was certainly well known that a strip of a thin metal blank, partially severed by a slot from the portion adjacent thereto, could be stretched; but, in

spite of this fact, the patent undertakes to obtain a monopoly of such stretching, whenever this result is accomplished by a particular method, namely, by acting upon the bars that connect the slit portions and the body of the sheet or plate, so as to stretch them at the time when the slit is made and the slit portion is bent. Whatever the manner by which this simultaneous action is brought about, the claim is broad enough to cover it, and the consequence is, as it seems to us, that the applicant is asking for a patent upon what may have been a valuable idea, but was after all no more than this. His specification and claim may be condensed into a brief announcement to the world, that it would be an improvement in the process of manufacturing expanded metal, to stretch certain portions of the metal at the time when the slit was cut and the mesh was opened. He did not explain how this was to be done, save in a rudimentary and insufficient way, until he made his application for a machine to put his idea into practice; and we repeat, therefore, that in our opinion his patent for a so-called method is obnoxious to the well-known rule which is thus summarized in section 509 of Robinson on Patents:

"Patents are not granted for abstract ideas, principles, modes of operation, functions or results of machines, but underlying every patentable invention is the idea of means. The thing patented is the concrete expression of this idea, the mechanism by which it is reduced to practice. *Burr v. Duryee*, 1 Wall. 532, 17 L. Ed. 650, 660, 661; *O'Reilly v. Morse*, 15 How. 62, 14 L. Ed. 601. It is this which must be set forth in the claim in distinction from the discovery, or conception, idea or mode of operation which it embodies."

Without extending this opinion, we think the principles laid down by the Supreme Court in *Risdon Iron Works v. Medart*, 158 U. S. 68, 15 Sup. Ct. 745, 39 L. Ed. 899, and the other cases, both in that court and in the lower courts, which have recognized these principles as valid—many of them are cited on the appellant's brief—require the reversal of the decree appealed from, with instructions to the Circuit Court to dismiss the bill at the costs of the complainant.

It is therefore so ordered, with further instructions to the clerk of this court that the costs of the appeal are to be paid by the appellees.

CHADELOID CHEMICAL CO. v. FRANK S. DE RONDE CO.

(Circuit Court, S. D. New York. August 1, 1906.)

PATENTS—VALIDITY AND INFRINGEMENT—PAINT REMOVER.

The Ellis patent, No. 714,880, for a composition for removing paint and varnish and the process of making the same, which consists in dissolving a wax in a hydrocarbon oil or other suitable solvent and the subsequent precipitation of the wax by the addition of an alcoholic body miscible with the solvent, the purpose being to thicken the composition and prevent the volatilizing of the solvent when applied, was not anticipated and discloses patentable invention; the remover described being more practicable and successful in use than any in the prior art. It is also infringed by a similar composition, in which acetone is substituted for alcohol, for which in such composition and for the purpose employed it is the chemical equivalent.

In Equity. On final hearing.

Duncan & Duncan, Frederick S. Duncan, and Harry L. Duncan, for complainant.

James L. Steuart and Steuart & Steuart, for defendant.

HAZEL, District Judge. This suit in equity for infringement of letters patent No. 714,880, dated December 2, 1902, issued to Carleton Ellis (assignor of complainant) for a composition and process for removing paint and varnish, comes here at final hearing and proofs. The bill contains the usual averments and asks an injunction and accounting. The specification describes fully the operation and function of the combined ingredients, as the following quotations will show:

"My new process consists in the dissolution of a wax or waxy body in a hydrocarbon oil or other suitable solvent and the subsequent precipitation of this wax in a gelatinous state by the addition of an alcoholic body miscible with the solvent employed. The solvent is, preferably, benzol or its homologues, toluol or xylol."

"A composition for removing coats of paint or varnish must contain an energetic softening or loosening agent. This, it is evident, is secured in my process by the combination of a penetrating hydrocarbon or analogous solvent with a softening agent, the alcoholic body. Such a mixture in itself would, however, be ineffectual, owing to its tendency to evaporate and to the difficulty in applying to vertical surfaces. These difficulties are overcome and the composition given the requisite consistency by the gelatinization process, as hereinbefore described."

As illustrative of the function of the alcoholic body the specification says:

"The alcoholic body or gelatinizing agent must be miscible with the solvent and in itself have at the most only a slight solvent action on waxes. Methyl, ethyl, butyl, amyl, allyl, and benzyl alcohol are included in the class of gelatinizers."

The patent describes a method of preparing the composition or product, and, for illustration, sets forth a formula, which reads:

"A suitable composition for general purposes can be obtained by the solution by heat of four parts each of paraffin and currier's hard grease in eight parts of benzol. This solution, while still warm, is gelatinized by the gradual addition of seven parts of methyl alcohol. The mixture should be rapidly stirred until cold."

Claims 1 to 6 relate to the process, and claims 6, 7, 8, and 9 to the composition. They read as follows:

"(1) The process herein described for producing a composition for removing paint and varnish, which consists in adding an alcoholic body to a solution of a suitable wax.

"(2) The process of producing a paint and varnish remover by the solution of a wax or waxy body in an aromatic hydrocarbon and the addition of an alcoholic body to induce gelatinization, substantially as described.

"(3) The process of thickening or gelatinizing a composition which softens dried paint or varnish by the precipitation of a dissolved wax by means of an aliphatic alcohol, substantially as described.

"(4) The process for producing a composition for removing paint and varnish by the dissolution of a wax or mixtures of waxes in benzol and the subsequent precipitation by an alcohol, substantially as set forth.

"(5) The process for producing a composition for removing paint and varnish by the solution of a wax or waxy body in benzol and the subsequent precipitation by methyl alcohol, substantially as described.

"(6) A composition for removing paint and varnish, consisting of a wax, a solvent for the wax, and an alcohol combined, substantially as described.

"(7) A composition for removing paint and varnish, consisting of a wax, an aromatic hydrocarbon as a solvent for the wax, and an alcohol combined, substantially as described.

"(8) A composition for removing paint and varnish, consisting of a wax dissolved in benzol or its immediate homologues, and gelatinized by the addition of an alcohol, substantially as described.

"(9) A composition for removing paint and varnish, consisting of four parts each of paraffin and currier's hard grease, eight parts benzol, and seven parts methyl alcohol, substantially as described."

The patentee asserts that benzol, which is a penetrant of the paint or varnish, induces a solution of the wax; the function of the latter being to prevent evaporation of the volatile ingredients upon exposure to the atmosphere, the alcoholic body acting as a precipitant and gelatinizer of the wax, the resultant of their use in the manner specified being a new product or article of manufacture. The ingredients of the wax solvent and alcoholic body, as, for example, benzol and methyl alcohol, are extremely volatile, and their utilization would not be successful if it were not for the means devised by the invention to prevent evaporation. This is done, complainant claims, by the wax, which is precipitated or separated from the benzol solution by the action of the alcohol, and forms on the surface of the remover a filmy pellicle of glassy appearance. Thus spreading and evaporation of the volatile liquids of the remover is prevented, and they are retained in contact with the paint and varnish to soften and dissolve the same. When the paint and varnish have become softened by the action of the chemicals, they may be removed from the wood by rubbing a cloth over the surface, which is left free and clean of the coatings.

The patentee was not the first to invent a compound for removing paint and varnish. Indeed, prior to the patent in suit, varnish removers had been used which included in their composition the ingredients benzol, alcohol, and fusel oil (the patent to Ball, No. 488,416), and in the manufacture of paint removers by the Wadsworth-Howland Company, Arnstein, and Johnson benzol, alcohol, wax, and carboic acid were compounded. The evidence abundantly establishes that the carboic acid removers were impracticable and harmful, and

could not remove paint and varnish as efficiently as the composition in suit. It is conceded that they were injurious to the hands of the workmen engaged in applying the same, and roughened and discolored the grain of the wood. In addition to these defects, it was necessary in the prior art, after the application of the remover, to scrape the paint and varnish from the surface with a knife or other device. In this situation the patentee combined the chemical elements specified in the patent, and claims to have overcome the difficulties and inefficiencies of the antecedent art. To reduce his conception to practice he has departed from known compounds. In his method he neutralizes the solvent, giving the remover greater and more desirable consistency, by which evaporation is successfully retarded, and the harmful effects to the operator and the wood surface avoided. All these difficulties, though evidently troublesome, have been surmounted by the process of compounding known elements to produce a new result, namely, a gelatinous or colloidal condition of the wax immediately upon application of the remover, thus preventing evaporation of the volatile solvents, which evidently was an important obstacle to the practicability of prior removers.

The defenses are anticipation, noninvention, and principally non-infringement. No doubt exists in the mind of the court that the patent discloses invention, despite the fact that the chemical action and reaction of the materials were familiar to the art. In the patent to Ball for a paint and varnish remover the specification shows that four parts of benzol, three of fusel oil, and one of alcohol (the kind of alcohol not being mentioned) are compounded. This composition probably to a slight extent retarded evaporation, but the ingredients used were highly volatile and subject to the objection and difficulty of running off vertical surfaces and evaporating before the composition could efficiently soften the paint. That the Ellis remover, when applied to the wood, acts more efficiently and requires a less quantity to achieve the result than the remover of Ball is frankly admitted by the expert witnesses of the defendant. And it is fairly established by the evidence that the Ball compound, because of the difficulties stated, together with the noxious fumes arising from the fusel oil, was unsuccessful and impractical. Accordingly it cannot be held to anticipate the patent in suit. *Westinghouse Elec. & Mfg. Co. v. Beacon Lamp Co.* (C. C.) 95 Fed. 464; *Bowers v. San Francisco Bridge Co.* (C. C.) 91 Fed. 410; *General Elec. Co. v. Wise* (C. C.) 119 Fed. 926. The so-called alkaline and carbolic removers of the Wadsworth-Howland Company, Arnstein, and Johnson are subject to similar criticism and objection. But stress is laid upon the formulæ of such prior removers; it being pointed out that the wax contained therein operated in precisely the same way in relation to the precipitating and gelatinizing action as is described in the patent in suit. The consistency of the wax solution, however, when mixed with carbolic acid, is not thought to perform the function of the Ellis composition. Upon this point Dr. Boesch, witness for complainant, testified:

"The function of the carbolic acid in removers is to destroy the paint or varnish layer by chemical disintegration, producing a new product of a mixed

character. This effect is clearly observed in the interaction of carbollic acid and the waxes or resins, whereby the two substances after a very short contact seem to get converted into a magma, entirely losing the identity on the one hand of the wax or resin or other carbollic acid as such, forming entirely a new body."

This testimony finds corroboration in that of Dr. Ellis and in the commercial failures of the products as shown by the record. In these circumstances the substitution by the patentee of a practical wax solution, together with a gelatinizing agent for that familiarly known in the art and which had proven ineffectual, solved the problem. In determining the question of invention, as stated in *Rumford Chemical Works v. N. Y. Baking Powder Co.*, 134 Fed. 385, 67 C. C. A. 367.

"Each case must depend upon its own facts, the inquiry always being whether what has been done required the exercise of the inventive faculties. Has a new or better result been obtained? Is it cheaper and more durable? Has it new capabilities? Does it perform new functions?"

An affirmative answer to these questions indirectly suggests another. To what extent, if at all, may the patentee invoke the doctrine of equivalents? There is little, if any, question regarding the primacy of the wax as a preventative of the evaporation of the volatile ingredients and the alcoholic body as a precipitant of the wax. In this respect a meritorious discovery has been made. That the product has commended itself to the public is also unquestioned. The expert witnesses for complainant and defendant are in dispute as to whether a chemical distinction exists between alcohols and ketone or acetone, an ingredient in defendant's composition. An analysis of the testimony on this point is not thought necessary, as the question of infringement depends upon whether such ingredient is the well-known chemical equivalent of alcohol.

As to infringement: An analysis of defendant's De Ronde remover No. 1 and the semipaste remover, so called, shows that benzol and similar hydrocarbons, acetone, and paraffin wax were compounded. The defendant contends that such composition or process did not produce a precipitation or separation of the wax, but that, when the product was applied to the painted or varnished surface, the waxy substance coming in contact therewith formed a glassy skum over the liquid, which prevented evaporation of the volatile solvents. It insists that no precipitation resulted from the chemical reaction and no gelatinization of the wax by the alcoholic body, and hence defendant has not infringed complainant's process and composition. The distinction is drawn that if the gelatinous condition of the wax results from the evaporation of the volatile solvents, and not from the chemical reaction by which precipitation is produced, there is no infringement by the defendant. As hereinbefore stated, the essentials of complainant's compound are a wax, a wax solvent, such as benzol, and an alcoholic body miscible with the solvent and which will act as a gelatinizer of the dissolved wax. The materials used by the defendant in compounding its product are practically similar to those of the composition in suit, and by their use the same product is created. It follows, therefore, that the products of defendant and

complainant are identical, even though they may not be created in exactly the same manner.

The proposition that the defendant's ingredient, acetone or ketone, was similar to complainant's alcoholic ingredient, was much discussed in the briefs submitted. Defendant admits that acetone in appearance is similar to alcohol, but that it possesses equivalent chemical properties is strenuously denied. It is unnecessary to elaborate upon the divergent views expressed by the expert witnesses on this point. That acetone in a paint and varnish remover is a recognized chemical equivalent of a variety of alcohols, including methyl or wood alcohol, is well established by the proofs. The authorities uniformly hold that the word "equivalent," as applied to a chemical action may mean a fluid which is "equally good" with that specified in the patent. *Tyler v. Boston*, 74 U. S. 327, 19 L. Ed. 93. After the patentee pointed out the process and indicated the ingredients which would create a definite chemical reaction of the compounded elements, it was not difficult for others familiar with the science of chemistry to find an equally good substitute for the essential element of complainant's product. I am satisfied by the evidence that defendant's remover was rendered potent and effective by the ingredient acetone, which is a recognized substitute for alcohol and connotes the same use.

It is suggested that, as the small quantity of wax in defendant's liquid remover freely dissolved, it could not have been precipitated by the action of the alcohol, but that in fact any perceivable precipitation was due merely to atmospheric exposure. The evidence indicates that 1 per cent. of wax in combination with the other ingredients specified in the patent is sufficient to produce gelatinization or incipient precipitation; the proportion of the wax being dependent upon the desired consistency of the remover. Such being the fact, the small quantity of wax used in the liquid remover of the defendant is immaterial. A strict construction of the patent in suit probably would not include defendant's composition and process; but, as the Ellis patent in suit possesses distinct properties by a combination of known ingredients not disclosed in the prior art, this contention is not maintainable. Considering the objections to prior varnish removers, as hereinbefore pointed out, the allowance of the broad claims by the Patent Office was justified. They must be liberally construed. To limit their scope to the specific proportions set out in the specification would not be a just recognition of the inventive faculties which I conceive to have been exercised in the production of the article in controversy.

Much testimony is found in the record in relation to the alleged anticipation by Eberson's benzol or naphtha remover of 1889 or 1900. The patentee practically admits in his testimony that the formulæ of Eberson correctly describe the claims in suit, except the ninth claim, which is for specific quantities and proportions. But he contends that Eberson has never produced a remover in accordance with such formulæ; and, further, that his commercial production was inoperative, impracticable, and in fact was abandoned. I am not satisfied by the evidence that a practicable remover capable of operation

and like the invention in suit was manufactured or sold by Ebersson, as claimed by the defendant. The veracity of Ebersson's claims have been challenged by the complainant with such well-directed energy and vigor that I am reluctant to accept as true the testimony offered in relation to prior use. Certainly the presumption of validity which accompanies the patent on its issuance should not be overthrown by testimony that is so susceptible of attack as to its credibility. Even though the testimony of Ebersson is elaborately given and in some respects corroborated by credible facts and witnesses, nevertheless it is not thought sufficiently reliable or convincing to justify its consideration to anticipate the patent in suit. In short it does not belong to that high class of evidence which the law requires to invalidate a patent by antecedent use. *Lalanc & Grosjean Mfg. Co. v. Haberman Mfg. Co.* (C. C.) 53 Fed. 375; *The Barbed Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154; *Deering v. Winona Harvester Works*, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

My conclusion is that, in view of the foregoing and the evidence as a whole, claims 1 to 8, inclusive, were wrongfully appropriated by the defendant, and the paint and varnish remover of the complainant is infringed by the so-called De Ronde paint and varnish removers.

A decree for an injunction and accounting, with costs, may be entered.

ROBINSON v. S. & B. LEDERER CO. et al.

(Circuit Court, D. Rhode Island. July 23, 1906.)

No. 2,667.

PATENTS—SUIT FOR INFRINGEMENT—VIOLATION OF PRELIMINARY INJUNCTION.

That the violation by a corporation defendant of a preliminary injunction against infringement of a patent resulted from carelessness and was not intentional is no defense to contempt proceedings therefor, but may be considered on the question of punishment; and, such a proceeding being remedial, the penalty in such case may properly be measured by the damage resulting to complainant from the violation and the costs and legal expenses incurred in the proceeding.

[Ed. Note.—For cases in point, see vol. 38, Cent. Dig. Patents, § 619.]

In Equity. On petition to punish for contempt for violation of preliminary injunction.

Ellis Spear, Jr., for complainant.

Horatio E. Bellows, for defendants.

BROWN, District Judge. The complainant's evidence fails to show a violation of the injunction by any of the individual defendants. It establishes, however, the fact that the defendant corporation, since the granting of the preliminary injunction, has sold watch chains to which were attached swivels that infringe the complainant's patent. According to the weight of evidence, the violation of the injunction was not willful or intentional. The value of the swivels is so small that there appears to have been no pecuniary motive for a deliberate

violation of the injunction. Nevertheless, it was the duty of the defendant to take effective measures to prevent a confusion of goods manufactured before the injunction with those made or sold afterwards, and, as it has failed to do so, carelessness or oversight cannot serve as an excuse, though it may be considered as affecting the amount of the penalty. The case of *Westinghouse Air Brake Co. v. Christensen Engineering Co.* (C. C.) 121 Fed. 562, seems to be directly in point.

As the injury to the complainant, in whose favor the injunction was granted, gives a remedial character to the contempt proceeding, and as the punishment is to secure to the complainant the right which the court has awarded him (see *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 328, 329, 24 Sup. Ct. 665, 48 L. Ed. 997; *Robinson on Patents*, § 1219), I am of the opinion that, while the penalty should be such as will induce greater carefulness in the future, it should be measured by the amount of damage which the complainant has sustained through the defendant corporation's disobedience together with the costs and legal expenses incurred by the complainant upon this application. In case the amount cannot be agreed upon by counsel, the amount will be fixed upon further hearing.

An order may be entered accordingly.

O'CONNOR v. O'CONNOR et al.

(Circuit Court, W. D. Texas, San Antonio Division. July 18, 1906.)

No. 147.

1. COURTS—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.

A suit in equity commenced in a federal court, the purpose of which is to set aside a judgment of dismissal entered by the same court in an action at law, is ancillary to such action and within the jurisdiction of the court without regard to the citizenship of the parties, and where the defendants named in the bill were parties to the original action, or are in privity with such parties, service may be made upon them, although they reside beyond the limits of the district.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 801.

Supplementary and ancillary proceedings and relief in federal courts, see note to *Toledo, St. L. & K. C. R. Co. v. Continental Trust Co.*, 36 C. C. A. 195.]

2. SAME—TRANSFER OF CAUSES—ACT CREATING NEW DISTRICT.

Under Act March 11, 1902, c. 183, § 7, 32 Stat. 66 [U. S. Comp. St. Supp. 1905, p. 114], dividing the state of Texas into four federal judicial districts, which section transfers to the courts of the new Southern district jurisdiction of all causes of which said courts would have had jurisdiction if they had been constituted when such causes were commenced, provided, *inter alia*, that pending causes in which evidence had been taken should be retained and disposed of in the courts where pending, an action in which evidence had been taken, and in which a judgment of dismissal had been entered, remains in the court which entered such judgment for the purpose of determining jurisdiction of an ancillary bill in equity to set aside the dismissal, although if an original suit it would be within the jurisdiction of the courts of the new district.

[Ed. Note.—For cases in point, see vol. 13, Cent. Dig. Courts, § 1117.]

On Motion to Discharge Service and Vacate Process.

July 6, 1905. Thomas O'Connor, a citizen of the state of Louisiana, filed his bill in equity in the San Antonio Division of the Western District of Texas against Thomas M. O'Connor, in his own right and as executor of the estate of Thomas M. O'Connor, deceased, Joseph O'Connor, Martin O'Connor, Thomas O'Connor, Jennie O'Connor, Mary Hallihan, formerly Mary O'Connor, and her husband, J. F. Hallihan, citizens of Victoria county, Tex., in the Southern district of Texas, alleging: That October 23, 1888, plaintiff had brought suit at law in the Circuit Court of the United States for the Western District of Texas at San Antonio, of which Victoria county was then a part, against D. M. O'Connor and Thomas M. O'Connor, as beneficiaries and executors of the will of Thomas O'Connor, deceased, to collect a note for \$30,000, executed in his favor April 30, 1871, by said Thomas O'Connor, deceased, and renewed by the maker thereof by letter dated November 7, 1884. That said Thomas O'Connor died in the year 1887, leaving a will which was thereafter duly probated, whereby he appointed said D. M. O'Connor and Thomas M. O'Connor his executors, and by virtue whereof said testator devised and bequeathed to said Thomas M. O'Connor, D. M. O'Connor, and Mary O'Connor nearly his entire estate. That, pending said suit, defendants therein fraudulently and by false evidence caused plaintiff to be convicted of felony November 30, 1889, and to be imprisoned by virtue of said conviction in the penitentiary of the state of Texas until December 20, 1904. That May 16, 1890, said Circuit Court, upon motion of plaintiff's counsel without notice to plaintiff, without any warrant or authority from him, without his knowledge or consent and against his wishes and intentions, entered an order in said cause dismissing and striking the same from its docket without prejudice; said order of dismissal being in the following words: "Now comes the plaintiff in the above-entitled cause by his attorneys and says that he will no further prosecute this cause and dismisses the same without prejudice. It is therefore ordered by the court that this cause be dismissed and stricken from the docket without prejudice. And, it appearing that all costs of suit have been paid, therefore no execution will issue for same." That, during his imprisonment, plaintiff was unable to take steps to protect his rights in the premises, and that he received a pardon from the Governor of the state of Texas, restoring his civil status, December 20, 1904. That Dennis M. O'Connor had died after the beginning of said suit, leaving as his legatees and heirs at law his widow, Jennie O'Connor, and his children, Martin, Joseph, Thomas, and Mary O'Connor Hallihan, defendants in the bill. That, during the pendency of the original suit at law, the estate of Thomas O'Connor, deceased, had been divided between said Thomas M. O'Connor and D. M. O'Connor, and that said estate consisted of lands, cattle, money, and other property situated in Victoria, Refugio, and other counties in Texas, and was, for the most part, in the possession of defendants in the bill.

Plaintiff prayed for issuance of subpoena for defendants to be served in the Southern district of Texas, and that the suit at law might be revived and its prosecution permitted by and in behalf of plaintiff against defendants in the bill. Writs of subpoena were issued and served in the county of Victoria, Southern district of Texas, during the year 1905, upon the defendants, except Thomas M. O'Connor. January 19, 1906, upon application of plaintiff, the court ordered that writs of subpoena issue on plaintiff's bill to be served in the Southern district of Texas upon the defendants therein named, except defendant Thomas O'Connor. In the order upon which this application was granted it was alleged that the bill was ancillary to the original suit at law, and that all the defendants were residents and citizens of Victoria county, Tex., in the Southern district of said state. Defendant Thomas M. O'Connor was served with process of subpoena in Victoria county, February 21, 1906. September 21, 1905, defendants, except Thomas M. O'Connor, filed their motion to discharge service and vacate process of the writs of subpoena served upon them, respectively, for the reasons following: "(1) It appears from complainant's bill that these defendants are residents of the Southern district of Texas. (2) That issuance and service of the said writs of subpoena are unauthorized by law." March 3, 1906, defendant Thomas M. O'Con-

nor, in his own right and as executor of Thomas O'Connor, deceased, filed his motion to discharge service and vacate the process of the subpoena for the reasons alleged by his codefendants.

To render the statement of the case more complete, it may be added that the counties of Victoria and Refugio were detached from the Western district of Texas and attached to the Southern district by virtue of an act of Congress, approved March 11, 1902. See 32 Stat. pt. 1, c. 183, 64 et seq. [U. S. Comp. St. Supp. 1905, p. 111]. This act of Congress created the Southern district of Texas and, touching the transfer of causes pending in the old districts, the seventh section of the act provides as follows: "Sec. 7. That all causes and proceedings of every name and nature, civil and criminal, now pending in the courts of the judicial districts of the state of Texas, as heretofore constituted, whereof the courts of the southern judicial district of the State of Texas as hereby constituted would have had jurisdiction if said district and the courts thereof had been constituted when said causes or proceedings were instituted, shall be, and the same are hereby, transferred to and the same shall be proceeded with in the southern judicial district of the state of Texas as hereby constituted, and jurisdiction thereof is hereby transferred to and vested in the courts of said southern judicial district, and the records and proceedings therein and relating to said proceedings and causes shall be certified and transferred thereto; and all causes and proceedings of every name and nature, civil and criminal, now pending in the courts of the several judicial districts of Texas as heretofore constituted, whereof the courts of the several judicial districts of the state of Texas, as hereby constituted would have had jurisdiction if said districts and the courts thereof had been constituted as under the provisions of this Act when said causes or proceedings were instituted, shall be, and the same are hereby, transferred to, and the same shall be proceeded with in the said several judicial districts of the state of Texas as hereby constituted the same as if said judicial districts had been constituted and created as by the provisions of this Act, when such causes or proceedings were instituted and jurisdiction thereof is hereby transferred to and vested in the courts of said judicial district, respectively, as hereby constituted, and the records and proceedings therein and relating to said proceedings and causes shall be certified and transferred thereto: Provided, that all motions and causes submitted and all causes and proceedings, both civil and criminal, including proceedings in bankruptcy, now pending in the judicial districts of Texas, as heretofore constituted, in which the evidence has been taken in whole or in part before the present district judges of the judicial districts of Texas as heretofore constituted, or taken in whole or in part and submitted and passed upon by the said district judges, respectively, shall be proceeded with and disposed of in the said judicial districts, respectively, as heretofore constituted, where said motions and causes were submitted or where such evidence was taken in whole or in part or taken in whole or in part and submitted and passed upon as hereinbefore mentioned." 32 Stat. 66 [U. S. Comp. St. Supp. 1905, p. 114].

J. D. Guinn and W. B. Stephens, for plaintiff.

Proctors, Vandenberg & Crain, Bailey & Davidson, and William Aubrey, for defendants.

MAXEY, District Judge (after stating the facts). 1. Without intimating an opinion touching the sufficiency of the present bill, it may be stated that a bill in equity is the appropriate remedy in cases of this character. See opinion of the Circuit Court of Appeals in this case, not yet reported.

2. The defendants in the present bill were either parties to the original suit at law, or are in privity with them, and the primary purpose of the present bill is to set aside the judgment of dismissal entered in the suit at law. Hence the bill is not an original suit, but merely ancillary and supplementary to the suit at law. Thus, in Free-

man v. Howe, 24 How. 460, 16 L. Ed. 749, it was said by Mr. Justice Nelson, speaking for the court:

"The principle is that a bill filed on the equity side of the court to restrain or regulate judgments or suits at law in the same court, and thereby prevent injustice, or an inequitable advantage under mesne or final process, is not an original suit, but ancillary and dependent, supplementary merely to the original suit, out of which it had arisen, and is maintained without reference to the citizenship or residence of the parties." *Dunlap v. Stetson*, 4 Mason 349, Fed. Cas. No. 4,164, by Justice Storey; *Cortes Co. v. Thannhauser* (C. C.) 9 Fed. 226, by Judge Blatchford; 1 *Bates Fed. Eq. Proc.* § 46; *Krippendorf v. Hyde*, 110 U. S. 280, 281, 282, 4 Sup. Ct. 27, 28 L. Ed. 145; *Jones v. Andrews*, 10 Wall. 327, 19 L. Ed. 935; *Dunn v. Clarke*, 8 Pet. 1, 8 L. Ed. 845; *Clarke v. Mathewson*, 12 Pet. 172, 9 L. Ed. 1041; *Webb v. Barnwall*, 116 U. S. 193, 6 Sup. Ct. 350, 29 L. Ed. 595; *Minnesota Co. v. St. Paul Co.*, 2 Wall. 633, 17 L. Ed. 886; *Carey v. Railway Co.*, 161 U. S. 115, 16 Sup. Ct. 537, 40 L. Ed. 638.

3. In suits of the character mentioned in paragraph 2, the court having jurisdiction, service may be made upon parties, defendant, to the ancillary bill, although they reside beyond the limits of the district. *Freeman v. Howe*, supra; *Dunlap v. Stetson*, supra; *Cortes Co. v. Thannhauser*, supra, and the foregoing authorities. The case of *Pacific Railroad v. Mo. Pac. Ry. Co.* (C. C.) 3 Fed. 772, 1 *McCrary*, 647, relied upon by the defendants, is distinguishable from the present one. In that case some of the nonresident defendants were not parties to the original suit, and there seems to have been no privity between them and the original defendants. As to the non-residents, therefore, the suit was original, and they could not be brought in. Here, as it has already been shown, the suit at law was between the parties to the present bill, or those standing in privity with them. This distinction should be borne in mind in considering the following language employed by Mr. Justice Blatchford, in *Railroad Co. v. Railway Co.*, 111 U. S. 522, 4 Sup. Ct. 583, 28 L. Ed. 498, and repeated by the Chief Justice in *Carey v. Railway Co.*, 161 U. S. 131, 16 Sup. Ct. 543, 40 L. Ed. 638:

"On the question of jurisdiction the suit may be regarded as ancillary to the *Ketchum* suit, so that the relief asked may be granted by the court which made the decree in that suit, without regard to the citizenship of the present parties, though partaking so far of the nature of an original suit as to be subject to the rules in regard to the service of process which are laid down by Mr. Justice Miller in *Pacific Railroad v. Missouri Pacific Railway Co.*, (C. C.) 3 Fed. 722, 1 *McCrary*, 647."

Besides Mr. Justice Blatchford decided the case of *Thannhauser*, supra, and he scarcely intended, by the language used in *Railroad Co. v. Railway Co.*, 111 U. S. 522, 4 Sup. Ct. 583, 28 L. Ed. 498, to overrule not only what he had said in *Thannhauser's* case, but also to set at naught the rulings in *Dunlap v. Stetson*, supra, and *Freeman v. Howe*, supra.

4. The present bill, though an original bill in the chancery sense of the word, is a continuation of the former suit, on the question of the jurisdiction of the court. *Carey v. Railway Co.*, 161 U. S. 131, 16 Sup. Ct. 537, 40 L. Ed. 638; *R. R. Co. v. Railway Co.* 111 U. S. 522, 4 Sup. Ct. 583, 28 L. Ed. 498; *Minnesota Co. v. St. Paul Co.*, 2 Wall. p. 633, 17 L. Ed. 886.

That being true, did the seventh section of the act, creating the Southern district of Texas, transfer the suit, and all jurisdiction over it, to the southern district? See *Stillman v. Hart*, 126 Fed. 359, 61 C. C. A. 309. The question suggested is involved in doubt, but, in view of the fact that evidence was taken in the original suit at law, the court inclines to the view that the suit should be retained here.

An order will be entered overruling the motion to discharge the service and vacate the process.

In re CONNOR.

(District Court, W. D. Washington, N. D. January 26, 1906.)

No. 3,063.

BANKRUPTCY—EXEMPTIONS—WASHINGTON STATUTE.

Under the statute of Washington (Laws 1901, p. 222, c. 109; Ballinger's Code Supp. § 3102; Pierce's Code, § 5346), which in case of a sale in bulk of a stock of merchandise makes the purchaser responsible for the application of the purchase price on the seller's debts, the seller by making such a sale must be deemed to have assented to such application, and on his adjudication as a bankrupt cannot claim his statutory exemptions out of the money due from the purchaser. Nor do the creditors waive their rights in such fund by instituting involuntary proceedings in bankruptcy against him.

[Ed. Note.—For cases in point, see vol. 6, Cent. Dig. Bankruptcy, § 669.]

In Bankruptcy. On review of referee's order respecting disputed claim to exemptions.

Westcott & Pinckney, for creditors.

Dorr & Hadley, for bankrupt.

HANFORD, District Judge. The sales in bulk statute of this state (Laws Wash. 1901, p. 222, c. 109; Ballinger's Code Supp. § 3102; Pierce's Code, § 5346) has not been assailed in this case, and its validity will be assumed, although similar statutes in other states have been held to be unconstitutional. *Sellers v. Hayes* (Ind. Sup.) 72 N. E. 119; *Wright v. Hart* (N. Y.) 75 N. E. 404. In this connection refer to *McDaniels v. J. J. Connelly Shoe Co.*, 30 Wash. 552, 71 Pac. 37, 60 L. R. A. 947, 94 Am. St. Rep. 889; *Fitz Henry v. Munter*, 33 Wash. 629, 74 Pac. 1003; *Kohn v. Fishbach*, 36 Wash. 70, 78 Pac. 199; *Eklund v. Hopkins*, 36 Wash. 180, 181, 78 Pac. 787; *Holford v. Trewella*, 36 Wash. 655, 79 Pac. 308; *Rothchild Bros. v. Same*, 36 Wash. 680, 79 Pac. 480, 68 L. R. A. 281, 104 Am. St. Rep. 973.

The bankrupt claims as exempt part of the unpaid purchase price of a stock of merchandise which he sold in bulk previous to the initiation of bankruptcy proceedings. The effect of the statute is to charge the purchase price with a trust in favor of the vendor's creditors, by making the vendee responsible for the application of the money to the payment of their claims. It follows as a legal consequence that the right of the vendor to receive any part of the money is postponed until all of his creditors have been paid in full, and when the fund is insufficient to pay his debts in full he must be deemed to have retained no interest in the matter other than the right of a party to a

contract to enforce performance. In such a case performance means payment to the vendor's creditors pro rata. The transaction is inconsistent with any right of the vendor to claim the money under the exemption law adversely to creditors, because the statutory obligation of the vendee is necessarily incorporated into the contract, and the vendor must be deemed to have assented to the application of the purchase money, as the statute has prescribed. Such assent on his part waived any right which he might otherwise have asserted to select the purchase money in lieu of other property which would be exempt from attachment or execution for debt. The statute does not merely charge the purchase money with a trust in favor of creditors in substitution for their rights to enforce payment of debts due, by levying upon the goods in the hands of their debtor, but in unrestricted terms it imposes an absolute obligation upon the vendee to see to the application of the whole of the purchase money, if necessary to pay all the debts of the vendor. To hold otherwise, as the referee has held, would in effect change the law by judicial construction, and this court disclaims the right to amend an unambiguous statute by construction.

The contention that by instituting involuntary bankruptcy proceedings the creditors have waived rights, and that they are estopped to contest the claim to exemptions, appears to me to be insupportable. As stated, the argument is based upon a supposed requirement of the statute that they must, in order to claim its benefits, elect to accept the obligation of the vendee and surrender other legal modes of procedure against their debtor. I find no such requirement, express or implied, in the statute.

The order of the referee sustaining the demurrer will be set aside, and the exemptions claimed will be allowed with respect to household furniture, etc., valued at \$150, and disallowed as to the money.

ANDERSON COUNTY v. KENTUCKY DISTILLERIES & WAREHOUSE CO.

(Circuit Court, E. D. Kentucky. February 28, 1906.)

TAXATION—STATUTE TAXING WHISKY IN WAREHOUSE—CONSTITUTIONALITY.

Under the statutes of Kentucky, as construed by the state Court of Appeals, the proprietor of a warehouse in which bonded whisky is stored, on the removal of such whisky, is liable for the annual taxes levied thereon, with interest on each year's tax from December 1st of the year following that in which the assessment was made. *Held*, that such statute is not in violation of the Constitution of the United States, nor is it material, on such question, whether or not the proprietor of the warehouse is also the owner of the whisky.

On Demurrer to Petition.

John W. Ray, for plaintiff.

Charles H. Stoll, for defendant.

COCHRAN, District Judge. The Court of Appeals of Kentucky, in the case of Commonwealth v. Rosenfield Bros. & Co., 80 S. W. 1178, held that, under the provisions of the Kentucky statutes in relation to taxation of whisky in bonded warehouses, the proprietor of the

warehouse is bound to pay, when the whisky is withdrawn therefrom, not only the annual taxes levied thereon whilst it was in the warehouse, but interest on each year's tax at 6 per cent. from the 1st of December of the year following that as of the 15th of September in which it was assessed, and that he was not relieved from so doing by the fact that the collector of taxes had accepted from him the taxes only upon the idea that that was all that he was bound to pay. This decision seems to me to be correct in both particulars. Even if I had a doubt as to its correctness, I think I should follow it.

The question as to whether the act was constitutional under the federal Constitution was not raised or considered in that case. The question as to such constitutionality of a substantially similar statute was considered in the case of *Carstairs v. Cochran*, 193 U. S. 10, 24 Sup. Ct. 318, 48 L. Ed. 596, and it was held that it was constitutional. An attempt is made to distinguish that case from this, in that there the distiller was made bound for the tax, whereas here the owner or proprietor of the warehouse is made liable for the tax. I do not understand that the distiller and the owner or proprietor of the warehouse are separate personages. The warehouseman and the distiller I understand to be the same personage. No point was made by the Supreme Court of the fact that the Maryland statute provided that the distiller should pay the tax. It treated it as if it had provided that the warehouseman should do so. Mr. Justice Brewer said:

"That under federal legislation distilled spirits may be left in a warehouse for several years, that there is no special provision in the statutes in question giving to the proprietor who pays the taxes a right to recover interest thereon, and that for spirits so in bond negotiable warehouse receipts have been issued, do not affect the question of the power of the state. The state is under no obligation to make its legislation conformable to the contracts which the proprietors of bonded warehouses may make with those who store spirits therein; but it is their business, if they wish further protection than the lien given by the statute, to make their contracts accordingly."

The petition herein alleges that defendant was the owner or proprietor of the warehouse in question herein. On demurrer that allegation must be accepted as true. Even if the statements made in the reports as to the warehouses being occupied by Ripy should be construed to mean that Ripy, and not defendant, was the owner or proprietor of the warehouses, plaintiff has a right to show that it is not true.

The demurrer to the petition is overruled.

MATHER v. BARNES, KEIGHLEY & GREER.

(Circuit Court, W. D. Pennsylvania. August 9, 1906.)

No. 10.

1. VENDOR AND PURCHASER—FRAUDULENT MISREPRESENTATIONS—RESCISSION.

A misrepresentation with regard to material facts, by which a purchase of property is intentionally induced, amounts to a fraud, which vitiates the transaction and entitles the purchaser to be relieved.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 38-60.]

2. SAME—MEANS OF KNOWLEDGE—DUTY OF PURCHASER.

Where, however, the means of knowledge are at hand, and are equally open to both parties, if the purchaser does not avail himself of them, he will not be heard to say that he has been deceived by the misrepresentations of the vendor, being charged with a knowledge of all that could have been so readily ascertained.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 38-60; vol. 23, Cent. Dig. Fraud, §§ 19, 20.]

3. SAME—INDEPENDENT INVESTIGATION BY PURCHASER.

And the same rule obtains where, not resting on the statements of the vendor, he undertakes to make and does make an independent investigation and verification of his own.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 38-60; vol. 23, Cent. Dig. Fraud, § 18.]

4. SAME—FRAUD PRACTICED IN COURSE OF INVESTIGATION.

In order, however, to have this effect, the examination must be an untrammelled one; and this is not the case where fraud or concealment is practiced in the course of it, or misrepresentations made which would themselves afford occasion for relief. An examination perverted in this way by the act of the vendor is the same as no examination at all.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 38-60; vol. 23, Cent. Dig. Fraud, §§ 17-22.]

5. SAME—VALUE OF BARGAIN IN MATERIAL.

Neither does it matter, if misconduct be proved, that the bargain, even so, was a good one, from which the purchaser is likely to sustain no loss. He is entitled to the bargain which he supposed and was led to believe that he was getting, and is not to be put off with any other, however good.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 38-60; vol. 23, Cent. Dig. Fraud, § 24.]

6. SAME—SALE OF MINERAL LAND—QUALIFIED REPRESENTATIONS—"TRADE TALK."

Where, as a part of the negotiations for the sale of coal lands, it was represented by the defendants that the land was underlaid throughout its entire extent with a particular vein of coking coal, for which the plaintiffs were seeking and on which the land was sold, but it was also stated as a qualification that they had not themselves been over the property and were not much acquainted with it, their representations are to be taken as nothing more than the usual commendatory expressions, which, as "trade talk," are accustomed to pass at such a time, and by which, however positive, no one is expected to be bound.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 40, 50, 52, 53; vol. 23, Cent. Dig. Fraud, §§ 12-14.]

7. PRINCIPAL AND AGENT—ACTS AND STATEMENTS OF ACCREDITED AGENT.

But the acts of an accredited agent within the apparent scope of his authority are the acts of the principal. Where, therefore, prospective purchasers of coal lands were referred by those who had them for sale to a party employed by them to show the property as one who was thoroughly acquainted with it and as their representative on the ground, and such party, in the course of an examination of it by experts, made statements with regard to it which he knew to be untrue, and also concealed and deceived them with regard to certain important tests and indications which would be damaging, the territory being wild and mountainous, and requiring some one to guide such experts over it, and the coal indications being obscure to a casual observer, the vendors were responsible for such misconduct, and, a purchase having been induced thereby, the purchasers were entitled to be relieved.

[Ed. Note.—For cases in point, see vol. 40, Cent. Dig. Principal and Agent, §§ 583, 719.]

8. VENDOR AND PURCHASER—RESCISSION—STATUS QUO.

While rescission will not be ordered, where the status quo has been so changed that it cannot be restored, a substantial restoration is all that is required; and it is satisfied, as a rule, where the party against whom the rescission is asked gets back what he parted with, and the other party gives up what he got, unchanged.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 205, 208, 209.]

9. SAME—LAND OPTIONS.

Plaintiffs by fraudulent misrepresentations were induced to purchase a body of coal lands on which at the time the defendants had some 60 different options or rights to purchase at a certain price per acre, on which price a considerable advance was to be paid by the plaintiffs. In order to get title and complete the sale, with the acquiescence of all parties, the original owners were paid the portion coming to them, upon executing the proper conveyance to the plaintiffs, and the defendants were paid the rest. *Held*, that it was no objection to ordering a rescission on the ground, as contended, that the status quo could not be restored, that the defendants would be compelled to take back the lands in place of the options which they had originally held, which imposed no personal obligation, and also pay over, not only the money which they themselves got, but also that which had gone to the original owners.

[Ed. Note.—For cases in point, see vol. 48, Cent. Dig. Vendor and Purchaser, §§ 205, 208, 209.]

10. MINES AND MINERALS—RESCISSION OF SALE—COMPENSATION TO BE ORDERED ON RECONVEYANCE.

In a suit to rescind a purchase of coal land for fraud, which is sustained, the plaintiffs upon a reconveyance are entitled to have restored them the purchase money paid, with interest, the expenses incurred in having the titles searched and deeds made and recorded, and the taxes; but they are not entitled to expenditures for having the property examined and tested by experts, nor for the making of surveys, looking to the construction of a coke plant and the building of a branch railroad, nor for the organization of a corporation under which to operate, nor the issuing of bonds to finance the transaction; neither of these being of direct benefit to the property.

Hermon A. Kelley and Horace Andrews (of Hoyt, Dustin & Kelley), for plaintiffs.

A. Leo Weil and D. M. Hertzog, for defendants.

ARCHBALD, District Judge.¹ This is a bill to set aside a purchase of coal lands, on the ground of misrepresentation and fraud. In the spring of 1902 the plaintiffs, who were extensively engaged in the manufacture of iron at Cleveland and Youngstown, Ohio, were on the lookout for a body of coal lands on which they could erect a plant for the making of coke on a large scale. This was mentioned by Murray, one of their number, to R. M. Haseltine, an experienced coal man, at one time state inspector of mines in Ohio, who was commissioned to look over the different bituminous fields; and not long after, being at Uniontown, Pa., he brought up the subject in turn to Barnes and to Keighley, with whom he was acquainted, and was told by them that they had about what he wanted in the neighborhood of Masontown, Va. At that time the defendants held a large number of options, which they had taken up on lands in that vicinity, amounting, in conjunction with a

¹ Specially assigned.

tract of 1,800 acres, known as the "Falls Tract"—which they had in prospect, and which they secured in the course of the summer—to some 5,800 acres; all, as it was asserted, being underlaid with the Upper Freeport vein, a recognized coal of the highest coking qualities. Having gone to Masontown shortly afterwards with Barnes and Keighley, and examined two or three openings about there, and being satisfied from this and the representations which were made with regard to the character of the property, Haseltine, on June 23, 1902, took an option in writing, in his own name, at \$25 an acre; \$10 to be paid down, and the balance in three equal annual payments, an advance of \$13 on the amount which the defendants were themselves to pay. This action was communicated to the plaintiffs, but, owing to the absence of certain of their number in Europe, was not able to be considered by them until September; the option being twice renewed to meet that emergency. It was not, therefore, until September 9th, two weeks before the last extension would expire, that Murray, on behalf of the plaintiffs, was able to go and look at the property. He was favorably impressed with it, and so expressed himself to Barnes and Keighley, and on September 29th he visited it again, in company with Campbell and Wheeler, two other of the plaintiffs; the three being shown certain parts of the property by the defendant Barnes. The extent of the field, the coking qualities of the coal, and the required railroad facilities, were discussed on this visit, it being asserted by Barnes with respect to the former that the Upper Freeport vein underlaid the whole property, making a continuous body of coal of about 6,000 acres, and that there was also an under vein, the Kittanning, which would be thrown in. Meantime a more extended and critical examination had been insisted upon by Murray, and steps were accordingly taken to have it made. A map was necessary, and McMillan, the county surveyor, who was engaged in surveying the property for the defendants, was directed by them to prepare it; and, not being able to complete his survey until the latter part of September, the option was extended another 15 days. George W. Shaffer, a resident of the neighborhood, who represented the defendants locally, and had assisted in getting together the options which they held, was introduced as one who was thoroughly acquainted with the property, and would show it to the parties who were to be sent to look at it, and it was under his guidance that the examination by experts which followed was made. Their reports were favorable, and on the strength of them the plaintiffs closed the bargain and took the property, paying some \$139,000 for it. Upon putting on a corps of engineers, however, to trace the outcrop and plan for its development, it was discovered that the Upper Freeport vein, on the strength of which it had been taken, underlaid but about one-third of the field, and, in addition, by reason of being cut into by deep ravines and gulleys, it was left in such a detached, irregular, and strung-out condition as to make the profitable mining of it a question. Feeling that they had been imposed upon, the plaintiffs, after some further investigation, took steps to rescind the purchase, tendering a reconveyance with reasonable promptness, and demanding back their money, and finally filing the present bill. This is the case in

outline. The further particulars will be given in the course of the discussion to follow.

The general principles upon which a suit of this kind proceeds are too well settled to need the citation of authorities. A misrepresentation with regard to material facts, by which a purchase of property is intentionally induced, amounts to a fraud which vitiates the transaction, and entitles the purchaser to be relieved. As a qualification of this, however, it is at the same time universally held that, where the means of knowledge are at hand, and are equally open to both parties, if the purchaser does not avail himself of them, he will not be heard to say that he has been deceived by the misrepresentations of the vendor, being charged with the knowledge of all that could have been so readily ascertained. And the same rule obtains where, not resting on the statements of the vendor, he undertakes to make, and does make, an independent investigation and verification of his own. *Slaughter v. Gerson*, 13 Wall. 379, 20 L. Ed. 627; *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, 35 L. Ed. 931; *Smith v. Curran* (C. C.) 138 Fed. 150. It is obvious, however, that in order to have this effect the examination must be an untrammelled one, and that this is not the case where fraud or concealment is practiced in the course of it, or misrepresentations made which would themselves afford occasion for relief. An examination perverted in this way by the act of the vendor is the same as no examination at all. Neither does it matter, if misrepresentation be proved, that the bargain, even so, was a good one, from which the purchaser is likely to sustain no loss. In an action of deceit, no doubt, this would be relevant on the question of damages, in order to show that there were none (*Sigafus v. Porter*, 179 U. S. 116, 21 Sup. Ct. 34, 45 L. Ed. 113; *Pittsburg Life & Trust Co. v. Northern Central Ins. Co.* [C. C.] 140 Fed. 888), although to this the authorities are not all agreed (*Walker v. Walbridge*, 136 Fed. 19, 68 C. C. A. 569); but not so upon a bill to rescind (*Hansen v. Allen*, 117 Wis. 61, 93 N. W. 805; *Clapp v. Greenlee*, 100 Iowa, 586, 69 N. W. 1049). The purchaser is entitled to the bargain which he supposed and was led to believe that he was getting, and is not to be put off with any other, however good. It is of no consequence, in the present instance, therefore, that the plaintiffs got coal lands of intrinsic value, which are worth, perchance, all that was paid for them, if they were fraudulently induced to believe, by representations for which the defendants are responsible, that the Upper Freeport vein, for which they negotiated, underlaid the whole property, whereas in fact it extends over but a comparatively limited part.

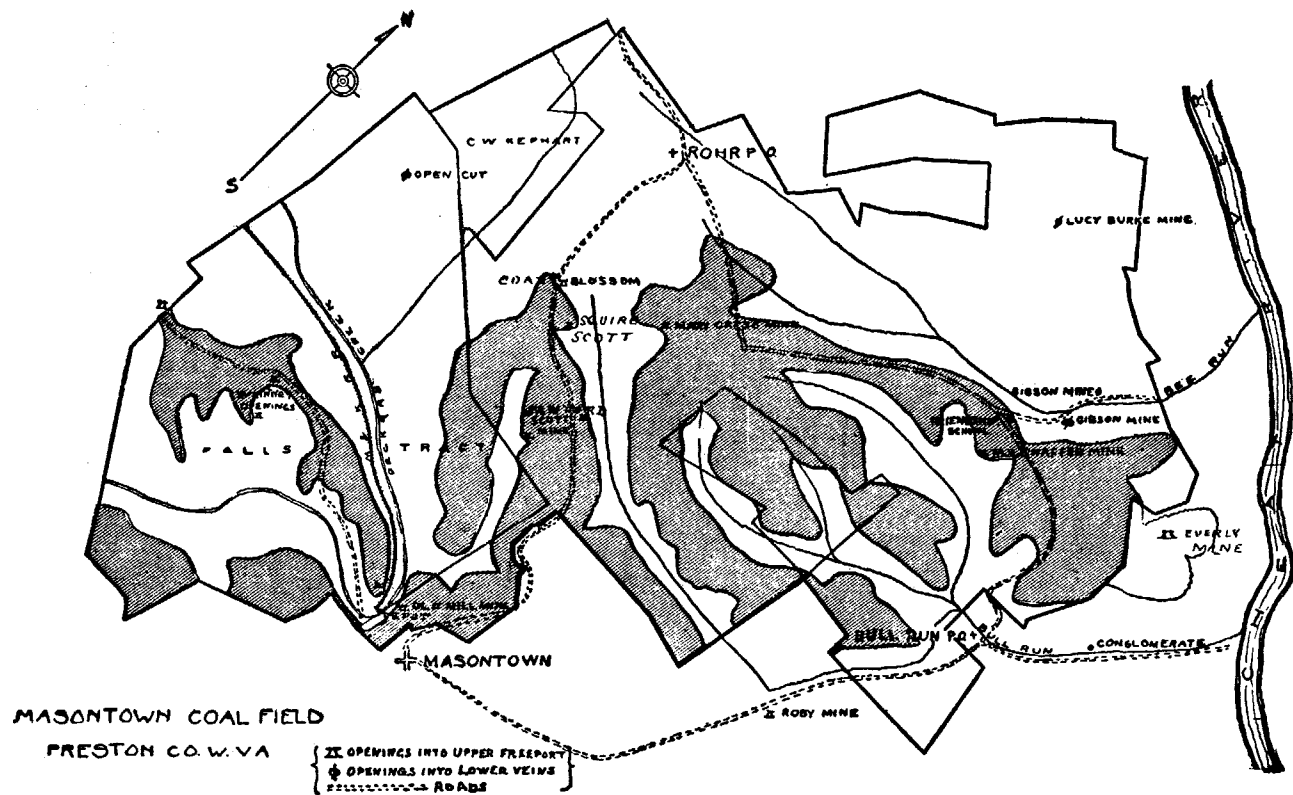
Turning, then, more immediately to the case in hand, it is not necessary to hold, as charged in the bill, that the plaintiffs are the victims of a scheme deliberately concocted by the defendants to get off onto them property which was known not to be of the character which they were led to suppose. It would, indeed, be difficult to so find. The evidence is not that way; however, there may be circumstances calculated to arouse suspicion, looking back upon the transaction and having regard to the sequel. It may be, for instance, that "Jos." Barnes (one of the original parties who took up the options, but who sold out

to Greer during the negotiations), as well as Greer himself, if not other of the defendants, had reason to believe that the Upper Freeport vein, by which the property was being sold, was of limited range over the Falls Tract, which constituted one-third of the whole acreage, and yet allowed it to be represented that it extended unbroken throughout the entire field, constituting, as it was declared, a body of coal of 5,000 acres, reaching over to the Cheat river. "Jim" Barnes' remarks, also, to McMillan: "Oh, let's call it all Freeport. We want the coal to go"—may seem to disclose a certain willingness to amplify, if not misstate, the facts; and it would no doubt inspire greater confidence in their honesty of purpose if the defendants, one and all, instead of clinging to the bargain after knowing the means by which it had been obtained, had followed the lead set them, and conceded the right of the plaintiffs to rescind. But giving due allowance to this and other circumstances which have been brought forward, and having regard not only to their individual but their collective weight, they are too inconclusive to justify the charge of intended fraud on the part of the defendants themselves. The declarations of the defendants with respect to the extent of the Upper Freeport vein may have been expressed with greater positiveness than was warranted, particularly in view of the distinct intimation to the contrary which they had. But they were at the same time accompanied with the qualification that they themselves had never been over the property, and were not much acquainted with it; and the statements could not therefore have been understood as anything more than the usual commendatory expressions which are accustomed to pass at such a time—"trade talk"—by which, however positive, no one is expected to be bound. *Sawyer v. Prickett*, 19 Wall. 146, 22 L. Ed. 105; *Kimball v. Bangs*, 144 Mass. 321, 11 N. E. 113; *Pittsburg Life & Trust Co. v. Northern Central Ins. Co.* (C. C.) 140 Fed. 888. And that the plaintiffs did not rely on these representations alone is shown by the expert examination which they undertook to make notwithstanding them. To the suggestion that "Jos." Barnes conveniently sold out his interest because he knew too much, there is to be opposed the confidence of Greer, who knew pretty much the same facts, and yet was willing to put just so much more money into the property. And the casual remark of "Jim" Barnes, to which allusion has been made, is more than offset by his straightforward expression of readiness to take back the property when its real character was disclosed, because it was not what had been represented or sold. That this course was not pursued, either by himself or the other defendants, is explained, according to counsel, not only by the advice that they were not liable, and the changed conditions which made it inequitable, but also by the fact that the money which they got out of the transaction has been tied up in the purchase of other land in that vicinity. It is to be remembered, moreover, that it was the plaintiffs who sought out the defendants in this matter, and not the defendants the plaintiffs; which naturally modifies our judgment, looking over the whole transaction.

But this is by no means all of the case, nor, indeed, the important part of it. The serious thing is the rascally conduct of George W.

Shaffer, the defendants' agent, in showing the property. 'As expressively acknowledged by Barnes to Murray: "That G— d— Shaffer is to blame for all of it." That he purposely set about to mislead and deceive those who were sent by the plaintiffs to examine the land is overwhelmingly established. For this we have not only the accomplished fact, but his own words as well, not being able to refrain from boasting of it after having been smart enough to do so. The motive is to be found in his interest. Not only was he employed by the defendants to show the property, for which he got so much a day, but he was further paid a certain price per acre (50 cents or a dollar, it seems to be differently stated) for each acre sold, which naturally made him desirous that it should go. He evidently resolved that it should not fail for lack of anything on his part, and it did not. His declarations after the fact are objected to as inadmissible to bind the defendants, being merely narrative. But not all of them stand that way. For instance, his taking McMillan to task for putting on his map the McKinney openings on the Falls Tract, which gave away the extent of the Upper Freeport vein in that section; and his declaration to E. M. Hartley, in the same connection, that he was not going to show these openings to Haseltine, and that "McMillan was too damned honest"; both of which were before Haseltine was taken over the property. Also his directions to Sanford Scott, the day that Haseltine was at Masontown, "to put his hands over his mouth so that he would not give anything away," and to caution his men not to say anything to Haseltine as to where the coal lay, and particularly not to indicate that there was any opening on the Falls Tract except the one at the depot; significantly observing that, if a mountain boy like himself could fool an Ohio expert, "let him take his medicine," and that unless they did this, and if it was found that the coal went so far up the hill (referring to the McKinney openings), they could not get the field to go, and it would stop the whole sale. But whether after the fact or not, all his declarations and statements as to what he did and why he did it are direct evidence both of knowledge and of purpose, and in any view are therefore competent. They are themselves facts, which, taken in connection with the occurrences as detailed by the parties whom he was conducting over the property, not only serve to give character to his acts, but disclose and confirm the deception practised upon them.

The first expert put forward by the plaintiffs to make a critical examination of the field was R. M. Haseltine, a coal man, as already stated, of considerable experience, through whose acquaintance with the defendants, particularly Keighley, the parties had been brought together. His examination began September 25th, before the last visit of Murray and the others, which he missed, but was continued, by direction, after it. He had arranged to have McMillan show him the property, with whom he had worked in putting together the map of it; but upon going to Morgantown, Shaffer turned up instead, meeting him with a conveyance at the station, and taking him in charge. The first point visited was the so-called "open cut" on the Falls Tract, the position of which, and other places referred to in the narrative to follow, will appear by the accompanying diagram:



It was declared by Shaffer that the vein here was the same as had been seen by Haseltine on previous visits at the Old Mill and the Scott mine, which was known to be the Upper Freeport, and that it extended clear through to Rohr, as he would show him, and also over to Bee Run to the east—a distance of about six miles. It was a new exposure, as he said, which he had had made to demonstrate that the coal was under the whole field. This was untrue, and he knew it, or, at least, was in such doubt that he had no right to make so positive an assurance with regard to it. It may be that in the beginning he believed what he stated, for we find him contending with U. G. Watson, one of the original owners up there, before the Falls Tract was bought, that the Kephart property adjoining carried the Upper Freeport, having leveled over, as he said, from where it cropped in the road. Neither is too great stress to be laid on the fact that when this tract was being bought of the owners he argued that there were but 500 acres of the Freeport vein, where they contended for 600 or 700. Sale was being made by the acre, and he would naturally talk the quantity down, and accept, what they conceded, that at most but one-third of the tract was coal. But putting all this aside, and whatever may have been his earlier views, enough remains to show that he had no doubt as to the character of this vein at the time in question. For instance, when asked by McMillan, after the defendants had taken up the tract, whether he had not found a splendid opening of coal at this cut, he said that he had made the Falls people, the original owners, very sick over it, making them believe that it was a fine vein, although in reality there was nothing but a small stratum of coal and then a stratum of slate, the coal and slate being so mixed up that it was of no value. To the same party also he said that there was no Freeport coal as far as Rohr, although he had told Haseltine just the contrary; that it did not exist in that region, giving as a reason that wells had been bored there, and did not go through it. To W. H. Warner, a prospective purchaser, when he and Keighley and Shaffer were at the cut together in the early summer, Shaffer professed not to know what the vein was; it being generally agreed, however, by them all that it was not the Upper Freeport. So to U. G. Watson, after describing how he had sheared down the sides of the vein with a pick, so as to make it look like Freeport coal, and telling him how he had fooled Haseltine with regard to it, he admitted that it was Kittanning. And after the deal with the plaintiffs was closed, and he was urging Sanford Scott, one of the original owners, to take cash and discount the notes which he held for the deferred payments due him, his chief argument was that the purchasers would find out that there was no coal in that section, and then not pay the rest; which led Scott to say: "George, you know there is no coal in that country," to which he replied: "Damn it, I know that, and that is why we are trying to get the money before they find out." There is evidence, also, that instead of this opening having been made in the ordinary manner, the sides had been carefully trimmed down, by reason of which the vein was given a much better appearance, and one which was calculated to obscure the different benches of coal and slate, and make them look pretty much alike. This is

directly testified to, not only by the parties who did the work, but by others who saw it afterwards, and it is not necessary therefore to rely for it upon Shaffer's after vaporings; and, as there was no reason for this peculiar preparation, except for purposes of deception, this is the only one that is able to be ascribed to it. There is no proof, it is true, outside of Shaffer's own statements, that in starting out with Haseltine he put a pick into the wagon, which subsequently disappeared, so as to make evidence of his declarations as to how he afterwards took it out and conveniently left it behind. But there is enough without this to convince of the duplicity which he professed to have practiced. It is also true that, notwithstanding all, Haseltine was able to get a pretty accurate section of the vein, as is shown by the comparison of his report with that of Mr. Baton, who examined it under favorable conditions after the plaintiffs had taken possession of the property. So that, if the matter stood on this alone, there would be little, if anything, to lay hold of. But it is not, after all, the deceptive appearance given to this opening, nor the obstacles thrown in the way of a correct examination of it, although on the question of intent they are not to be lost sight of. It is the positive assertion by Shaffer that the vein so shown was the Upper Freeport that is justly complained of, and that it extended easterly to Rohr and Bee Run in a continuous field, which was not the fact, to his certain knowledge. Coupled with his reiterated declarations that he knew every foot of the territory, and had traced the outcrop around it, it could not have been understood or intended to be taken as a mere expression of opinion, which was to go simply for what it was worth, except as it was verified, but as a matter upon which he was fully advised, and which, therefore, could be relied on; in the face of which it will not do to say that no one had any right to do so.

Nor does the case stop here. In fact it is merely the beginning. The next day Haseltine was taken to the Lucy Burke mine, over toward the Cheat river, the vein there being declared by Shaffer to be the same as at the Old Mill mine at Masontown, which he confirmed by pointing out what he said was the Upper Freeport or Mahoning sandstone over it; a very persistent rock, as he explained, by which it was usually identified. From there they went on down into the Cheat valley until they came to Bee Run, and then up that stream to the Gibson mine, where the vein, according to Shaffer, was the same—a statement which its fiber and the surroundings seemed to verify. The course taken to reach this place was misleading, and in all probability purposely so, but the statements made with regard to it as well as the Lucy Burke, might pass as nothing more than expressions of opinion, to be correspondingly allowed for. Neither is it necessary to stop over the evidence, which is abundant, that Shaffer knew, or was at least convinced, contrary to his assurances to Haseltine, that the vein at the Lucy Burke was not the Freeport; nor to refer to his boasting afterwards to his neighbors as to how he had fooled him with regard to it. All these merely come in, in the general summary of his conduct. As to the Gibson mine, however, there is something more serious. These openings were located on his father-in-law's farm, where he had lived

for a couple of years; and 200 feet higher up in level, and not more than 100 rods distant, on the Mary J. Shaffer (his brother's wife's) farm, was another opening, known to be into the Upper Freeport, with which he was familiar. The vein at the two places could not be the same, by reason of differences of elevation; and if this were so, and if it was the Kittanning and not the Freeport which outcropped at the Gibson, which was thus demonstrated, it was essential to a correct knowledge of the field to be shown the proofs of it. Nothing was said, however, with regard to the Mary Shaffer mine, although Haseltine and Shaffer went by there the next day in coming down to the Everly. Shaffer's excuse is that the mine had fallen in, of which there is some evidence. But even so, and although this may have prevented seeing the vein, it was still most important as showing the outcrop, and should not have been passed by. That it was designedly done there can be little question, and there was thus at this point in the examination not only willful misrepresentation but practiced concealment, sufficient, of itself, to justify a rescission if the defendants are responsible for it.

Passing by the excursion through the Bull Run valley, which followed—where a large cascade of conglomerate in the bottom of the creek was represented to be Upper Freeport sandstone, and that vein was declared to underlie the entire valley, which was said to constitute a synclinal or trough—and also the visit to the Roby, several miles farther up, which was stated to be the other side of the synclinal, with all of which Haseltine, as a coal expert, ought not perhaps to have been deceived, the next day, after an intermediate visit to the Mary Cress and the Everly, they went to the Old Mill mine, near Masontown, which they examined, together with an opening some 500 feet across the creek, on a corner of the Falls Tract, on all of which the Upper Freeport was unquestionably found. According to McMillan's map, a further opening was also shown in this section of the field, and Haseltine accordingly inquired about it; but was met by the statement that there was none, and that its entry on the map was a mistake. The country about there was declared by Shaffer to be an unbroken forest, with no way to get through it, owned by people in the East, who paid no attention to it. As a matter of fact, the map was correct, and there was a well-known mine (the McKinney) in the direction indicated, which had long been opened, and to which a county road directly led, from a point across the railroad near the station, up over the hills, somewhat obscured from observation, however, where it started. Of all of this Shaffer, of course, knew; but the openings told too plainly against the property to have Haseltine visit them. As will be seen by the diagram, they were in the Freeport vein, on the southerly exposure or outcrop, establishing beyond a peradventure the very narrow and limited range of the field in that vicinity. Knowledge of this was thus of the utmost importance, and its concealment a most flagrant breach of faith, which nothing will excuse. This practically closed the examination of the property by Haseltine; his subsequent visit, October 7th, after Murray and his party had been there, being without particular significance, merely for the purpose of obtaining samples for coking, which he got from the Old Mill mine.

The next person to go upon the field on behalf of the plaintiffs was Theo. O. Deaumer, sent out by Mr. Selwyn M. Taylor, whose opinion had also been asked, to make a preliminary examination preparatory to that of his own. In the main Deaumer's experience with Shaffer was similar to Haseltine's, but was somewhat peculiar at the outstart. As will be recalled, the option expired October 8th, and had been renewed for another 15 days; a further renewal beyond that being refused. The time was therefore short, and on the day named Deaumer went to Morgantown with written instructions from Mr. Taylor to trace approximately the outcrop of the Freeport, which was recognized as the controlling vein, and to get samples. Driving to Rohr, he inquired for Shaffer, and found he was at Masontown. Calling him up by telephone, Shaffer came to Rohr at his request, but upon Deaumer telling his errand, and presenting his letter of instructions, Shaffer positively refused to show him the property, telling him that he might as well go right back to Pittsburg. Apparently reconsidering the matter later on, he said that he would go and see his people (the defendants), and find out what was the matter, whether anything had gone wrong; and he went off in the direction of Morgantown to do so. The next day, having heard nothing from him, Deaumer concluded to start out and find what he could unaided. Shaffer had told him that the coal was down at the bottom of a ravine, which he pointed out, and so had one or two others, but going down into it Deaumer found nothing, and after wandering around for a couple of hours and getting lost he gave up the task, managing in some way, he hardly knew how, to get back at last to Rohr. Getting a message from Shaffer, he then went to Morgantown; but on reaching there he found that Shaffer had gone on to Uniontown, Pa.—as he left word—to see his people. Puzzled by these maneuvers, Deaumer telegraphed Taylor, and got instructions to go ahead and do the best he could. In the meantime, however, Shaffer reappeared, and stated that his people knew nothing about this, and that he had no orders to go with him; but the next day he came, and said he had decided to do so. Three days had been wasted in this way, and the rest of that one was consumed in getting back to Rohr. Starting out from there the next day (Sunday) they had not gone far before the team balked, throwing them out, and breaking the harness, and they were compelled to return to Morgantown for another outfit. Considering that it was the evident desire of Shaffer to use up time, and that this team had been procured at his urgency at a livery kept by a friend, whom he particularly recommended, after Deaumer had already secured a conveyance at another, it requires no stretch of the imagination to conclude that Shaffer had a good deal to do with its being balky. Be that as it may, another day was gone, making five in all, and leaving but ten in which to make an examination and report and take up the option.

Getting back, however, to Rohr, they made a final start from there the next morning, and driving along toward Masontown they came to the outcrop or coal blossom in the road, which is shown on the diagram. Deaumer wanted to stop and examine it, asking whether

it was not Freeport coal. "Oh, no," said Shaffer, "that is one of the upper veins in this territory. Come on about half a mile or so. I can show you the Freeport at a much lower depth, and you can get a sample." That this coal blossom was the Upper Freeport, and that Shaffer knew it, there can be no question. Arguing with Dr. Cobun on the subject, on one occasion, before any negotiations with the plaintiffs, Shaffer contended at first that it was the four foot or Masontown vein. But upon Dr. Cobun declaring that it was not, and that it was the Freeport, Shaffer acknowledged that he knew it, but that it was all right to make others believe so. Discussing with U. C. Watson, before the option on his property had been taken, whether certain farms to the north carried the Freeport vein, Shaffer declared that he had leveled across from where it came out at this point; thus conceding the identity of the outcrop there. On the other hand, in several different talks with Squire Scott with regard to taking up these same farms, Shaffer maintained that it was not material whether they were secured or not, as the Freeport ran out there. Not far away, also, Shaffer had helped to survey and lay out on the Scott farm a two-acre reservation around a coal opening, which was recognized to be in the Freeport vein. There is other evidence, more or less conclusive, to a similar effect, which might be referred to. But without going into it, there is enough, as it stands, to show a willful misrepresentation by Shaffer of the facts with regard to this coal blossom, the importance of which to a correct estimate of the field was conspicuously apparent and fully known to him. Located high up in the hills, as it was, if this coal blossom was the Upper Freeport, it showed that the vein, rising rapidly from the Old Mill mine on the south, ran out at this point, discrediting the entire territory beyond it. This the expert whom he was conducting over the property was entitled to know, and Shaffer was bound to disclose it, or, at least, not to misstate, as he did, the facts which he knew with regard to it.

Having got Deaumer by the coal blossom, and saying nothing to him about the opening in the Freeport on the Squire Scott farm, just spoken of, Shaffer took him, as he had promised, to what was in reality an Upper Freeport opening farther on, known as the Sanford Scott Mine (not the Squire's) also sometimes called the Jacob Grove. This is a southerly exposure, and is down in a ravine, over the hill, so as to convey the idea of a low level, and is quite deceptive on that account, except as it be corrected by other data. It was correctly stated, however, to be Freeport coal, and the other matters, of course, were for the expert. From there the two went back to Rohr, and then out another road to the Mary Cress mine, which is also a southerly outcrop of the Freeport, and was so stated. It is similarly approached, however, in a way to suggest a low level, and is not calculated, therefore, to give an altogether correct impression; but for that, by itself, no one is to be held responsible. The Lucy Burke was next, and was also reached from Rohr, and pretty much the same occurred there as at the visit of Haseltine. Deaumer was pleased with the coal exposure, and asked if it was the Upper Freeport, to

which Shaffer said, "Yes, this is the same coal we saw over at the Mary Cress bank." It was at the foot of a pretty good-sized hill, and some boulders on top, which attracted Deaumer's attention, were said to be the Mahoning sandstone.

Following the same course pursued with Haseltine, Deaumer was next taken down into the Cheat valley, and then up it to Bee Run, and then up Bee Run to the E. C. Gibson property. Noticing 10 or 12 inches of slate in the vein at that point, Deaumer asked what was the matter, and whether Shaffer was sure it was Upper Freeport, to which Shaffer replied, "Yes"; that he knew it was the same as the Mary Cress. As to the slate, he said it thinned down farther in, and was merely local, and, going into the mine to satisfy himself, Deaumer found that this was so. Here, again, the same as with Haseltine, Shaffer omitted to point out any of the other openings in that vicinity, the importance of which to a fair knowledge of the field has already been alluded to. He did, however, show the Taylor mine farther down, going from there up the Bull Run valley to the Roby mine, which was correctly given as Upper Freeport coal, and thence to Masontown, where they examined the Old Mill mine and the Scott mine opposite it. "Now," said Shaffer to his companion, "you have been around the outskirts of this field pretty well, and we have been to one or two places in the middle, and you can see that the whole of it is underlaid with Upper Freeport coal." This he also undertook to demonstrate by the map by referring to the different places where they had been. After supper Deaumer got looking at the map again, and was led to ask whether there were not some openings on that part of the Falls Tract near where they were which he could see. "No," said Shaffer, "there is no use of going over there. The coal dips right under the creek. You can't see it. There's no exposure, and furthermore it's too rough. You can't travel back in there." Returning to Rohr, and again consulting his map, Deaumer noticed the indication of an opening (the McKinney) on this tract, the same as Haseltine had, and again brought the matter up, asking how it happened to be there. But Shaffer declared that the map was not right, and that the opening ought not to be on it; that McMillan put it on, but that it did not belong there. All of which, of course, was untrue.

The final point visited was the so-called "open cut," on the northwest margin of the field, which Shaffer was possibly moved to show by reason of Deaumer's inquiry for developments on the Falls Tract. To this, therefore, the next morning, they started out, but found it in such a condition that, according to Deaumer, he could only get a glimpse of it. There is nothing to account for the transformation which had taken place in this opening in the three short weeks since Haseltine saw it, and there is at least ground for suspicion that it had not fallen in unaided. But that, after all, is not so material. The telling thing is, that here, as well as elsewhere, at essential points all over the territory examined, in the face of what he knew to the contrary, Shaffer declared that the vein was the Upper Freeport, the same as at the Mary Cress, establishing, as he said, the extent of

the field. While still at this cut, with Shaffer's assistance, Deaumer proceeded to sketch in on his map the line of the Upper Freeport outcrop, as indicated by his supposed observation of it at different points; this line, as so laid out, being thus not only inherently in error in its general contour, by reason of Shaffer's misrepresentations, but also, at several places along the creeks and valleys in the middle, being made, by Shaffer's misleading promptings, to vary widely from where it was ultimately found.

With this misinformation instilled in to the assistant whom he had sent out, Mr. Selwyn M. Taylor, on October 14th, came himself upon the field. Shaffer said that another party wanted to see it, and left Mr. Taylor to the guidance of Deaumer, by whom he was shown the coal blossom in the road, the Sanford Scott or Jacob Grove pit, the Old Mill mine, and the Masontown bore hole to the south of that. For lack of time they did not visit the openings to the northeast, towards the Cheat river, but Deaumer told Mr. Taylor that according to Shaffer they were Upper Freeport, which Shaffer had further assured him underlaid the whole. He also showed the notes which he had taken, and the line of the outcrop as he had sketched it in with Shaffer's aid. Being asked by Taylor why he skipped certain openings with it which were marked upon the map, he explained that Shaffer said they were not the Freeport but the Upper Four foot or Masontown vein. He also repeated the declaration of Shaffer that the McKinney openings, shown on McMillan's map, were a mistake. The misconception of the property induced by Shaffer was thus carried forward, and colored the views of Taylor, and the deception of the three experts who had examined the property was complete. Based on the data which he supposed he had obtained, on October 20th, Mr. Taylor made a favorable report, which, with a similar report from Haseltine, was gone over carefully by the plaintiffs, and, after a further extended conversation on the subject with Taylor by telephone, it was decided on October 23d, two days before the option expired, that they would accept. The defendants having been notified, a new and somewhat modified contract was subsequently drawn up, by which, among other things, the price per acre was reduced to \$23.50, following which steps were taken to have the titles examined and the proper papers passed. By the middle of January, 1903, deeds were executed and delivered and payments made as to all but three of the different tracts, and by April 4th everything as to these also had been closed up. Meanwhile a corps of engineers were put upon the property, to run the outcrop line, and another to locate a site for the proposed coke plant, and lay out the branch from the Baltimore & Ohio Railroad. It was at this juncture, and as a result of the survey, that the plaintiffs for the first time discovered the deficiencies in the property and the mistake which had been made in the estimate of it; and being convinced, as already stated, after having fully investigated the subject, that they had been badly imposed upon, and the defendants, after having their attention called to the matter, having refused to recognize their responsibility, the present bill was brought.

By the facts which have been so recited, and others to be found in this record, it is established to a demonstration that the most glaring misstatements were made with regard to the character of the property, on which the plaintiffs were led to rely, as the result of a confidence directly inspired, the responsibility for which the defendants cannot avoid. It is of no consequence that they are not themselves convicted of misrepresentations, and that they suffer for the delinquencies of another. This is unfortunate, but it is not material. The acts of Shaffer, their accredited agent, within the apparent scope of his authority, were their acts, and his misconduct theirs, and they must take the bargain so secured with all its infirmities—the burden equally with the benefit.

It is idle to argue against his agency, the defendants having expressly recognized and held him out as their local representative to show prospective purchasers over the property, on whose knowledge they could rely. The country was wild and mountainous, which made it important that some one intimately acquainted with its peculiarities should act as a guide; for which we need no more than the experience of Deaumer in trying to make an independent examination of his own. But more than this, the coal indications to a casual observer were obscure and elusive, and needed an interpreter, and this the defendants undertook to supply. Declaring themselves unfamiliar with the property, in repeated conversations with Murray and Haseltine, they referred them to Shaffer, as one who had taken up the coal field for them, and was thoroughly acquainted with it, and would show it to any one who was sent to examine it. He was actually under contract with them to do so, and was to get \$2 a day for his services, in addition to the price per acre he was to receive in case of a sale; on which basis the defendants settled with and paid him for what he did in taking Haseltine and Deaumer over the property, thus virtually adopting and confirming his acts. The contention is that he was merely to take the plaintiffs' experts to such points as they desired to see, and that, as to anything outside of this, he was a volunteer. But he did not so understand his duties, nor did they; nor was that the extent of his contract or commission. He was to do this, but he was to do more. He was to show the field as an aid in selling it, and was expressly commended to the confidence of the plaintiffs to that end. So accredited, he was bound to show it as he knew it, without evasion, concealment, or misrepresentation. No doubt the defendants might have contented themselves with much less. They were not required to make any disclosures with regard to the property, allowing the plaintiffs to get such information as they could. But this would not have sold the land, and they did not stop with it. Nor could it have been understood that, in introducing and commending Shaffer as one who was intimately acquainted with the property, and would show parties over it, it was intended to limit him to acting as a mere uninformed and uninforming guide. He was not called, of course, to furnish expert knowledge, and, as already observed, his expressions of opinion are carefully to be distinguished from his statements of fact. It was for those who were

sent to examine the property to draw their own conclusions from the information which they received and the observations which they made, and it was on this that the plaintiffs were expected to rely. But this required the information furnished to be as complete and accurate as possible, and in undertaking to give it, through Shaffer, as they did, the defendants were bound to see that it was as he and they knew it, and not misrepresented or distorted, or concealment and deception practised, as was the case.

It is said that the experts who were employed by the plaintiffs failed in their duty, and relied on what was told them to an extent that they had no right to do; that they were bound to take the statements made them only so far as they were proved; and that this is nothing more nor less than an attempt to put off on the defendants the result of their inefficiency and mistakes. Also, that the defendants did their full duty when they placed in the hands of Haseltine and Deaumer carefully prepared maps of the territory, showing the different openings, to which they were severally taken, and allowing them to make such observations and deductions as they chose; and that the plaintiffs relied on the examination so made, and the reports which they got through these sources, with the character of which the defendants had nothing to do, and for which they are not now to be held. But this is more specious than sound, and has already practically been answered. It seeks to measure the defendants' responsibility by the delinquency of others, if any, rather than by their own, and it puts out of sight the direct agency which they had in the final result. It may be that Haseltine and Deaumer allowed themselves to be drawn into a confidence which they should not have entertained, as the sequel no doubt proves. But it cannot be said that the professions of Shaffer as to his intimate knowledge of the country, as well as the credit directly given him by the defendants, did not invite, as well as justify, it at the time. And it ever comes with an ill grace for any one to suggest that too implicit a reliance has been put in what he has said and done. Pom. Eq. Jur. § 896, n. Nor was it to be expected that those who were inspecting the property under Shaffer's guidance would not only steel themselves against his statements, but be able to detect the deception in which he indulged. They were at least entitled to rely on being treated with common honesty, and not to assume that they were dealing with a rascal. And to expert reports, based upon misinformation and concealment, as these were, a purchaser cannot in all conscience be held. Undoubtedly, the plaintiffs were led to close with the option and take the property on the favorable reports of it which they got. But this only serves to emphasize the responsibility of the defendants for the fraudulent means by which these reports were induced.

It is said, however, that the character of an undeveloped coal field, such as this, can never be determined with accuracy, and, the means of knowledge with regard to it being open to the same extent to both parties, the purchaser is bound to investigate it for himself, and is not entitled to rely upon the representations of the vendor, which are to be taken as mere expressions of opinion, by which,

as it is conceded, no one is expected to be bound. The general principle which is so appealed to has been already recognized in this opinion, but has no application to the case as made. It has also been practically disposed of in what is said above. An examination of the field by the plaintiffs may have been a duty, and, had it been made without any attempt on the part of any one to influence it, there would have been no just ground for complaint. But unfortunately that was not the case. There was a direct intervention in it by the defendants, through the agency of Shaffer, which upsets it all. It may be that his statements with regard to the character and identity of the vein might pass, under ordinary circumstances, as mere expressions of opinion, under the rule invoked. The trouble is, however, that they were made in the face of direct knowledge to the contrary, which he had no right to misstate, as he did. They were in fact, for the most part, nothing short of positive falsifications, accompanied also by concealment and deceptive showing, the responsibility for which the defendants must assume.

It is further said that the denial by Shaffer that there were any developments on the Falls Tract, such as the McKinney openings, is the only serious thing in the case, and is met and offset by the fact that they were plainly shown on McMillan's map; and that, the defendants having unmistakably in this way affirmed to their existence, neither Haseltine nor Deaumer was authorized, on the mere say-so of Shaffer, to assume that they were not there. It amounted at the most, as it is urged, to an assertion by the defendants by one representative that there were such openings, and a denial of it by another; and, the one being as much to be relied on as the other, concealment cannot therefore be charged. It is conceded that a different aspect would be put upon the matter, so far as Haseltine is concerned, if Shaffer called McMillan to task for it in his presence. But this is denied; the interview in which that occurred, as it is claimed, being when Haseltine was not there. The evidence is not clear upon the latter point, and the defendants' version may therefore be accepted. But, even so, it does not justify the argument made. Notwithstanding the map, it could not be expected that Haseltine would persist in the face of Shaffer's denial. What good, indeed, would it have done him if he had? And what inquiry of others, after Shaffer's careful instruction to the people about there, would have been likely to succeed? No road to these disputed openings was indicated on the map, and none was visible; in confirmation of which he was assured by Shaffer that the country in that direction was an impassable wilderness, owned by people who paid no attention to it. This was plausible, and was bound to prevail, coming, as it did, from one of whose intimate acquaintance with the region Haseltine was assured, not only by his own reiterated declarations, but by the assurances of the defendants themselves. Against the particularity and positiveness of statement indulged in by Shaffer, the map counted for little, and could not be expected to. At the best, it was indefinite and inconclusive, the unsupported declaration of an absent party, and to cling to it under the circumstances would have been a reflection by Haseltine on his companion, which might have deprived him of

his further guidance. He had a right, therefore, as had Deaumer after him, to rely on the statement of Shaffer that the map was a mistake, and to disregard it as he did. It is, of course, not to be accepted that this is the only serious feature in the case. There are others equally so, even if this were out of it; but the truth is that, notwithstanding what is said of it, it is to be reckoned with along with the rest, in the general account which the defendants have to face.

It is finally urged with confidence, as a ground for denying relief notwithstanding the misrepresentations proved, that the relation of the parties to the subject has been changed, and that, the plaintiffs being unable to restore the status quo, the right to rescind, if it ever existed, is now irreclaimably gone. The defendants, as it is pointed out, at the time they were approached by the plaintiffs, had some 60 different options, by which the collective field was held. This imposed upon them no personal obligation, merely giving them the privilege, according to their ability and pleasure, to take or refuse any one or all. These options, by their contract with Haseltine assigned to Murray, they agreed, as it is said, to hand over, without more, at a certain additional figure, an option on an option, which also involved them in no responsibility, and enabled them simply to make the difference in price. This optional contract, as it is further said, was subsequently superseded by the one of November 17th, with new and modified provisions, which put quite a different aspect upon the matter. The price, for one thing, was reduced from \$25 to \$23.50 an acre, and there was to be no less than 5,000 acres in all, while by the original agreement nothing was said about this; and according to the options which the defendants were to turn over, payment was to be made simply by the coal acre, the quantity of which was to be determined by a survey. Abstracts and searches were also now required, showing marketable titles free and clear of incumbrances, which had not been previously exacted. And whereas, by the prior agreement, payment was to be made to the defendants themselves (\$10 an acre down, upon presentation of a good and sufficient title, and the balance with interest in three annual payments), leaving it to them to take care of the purchase money going to the original owners, by the subsequent agreement, payment to the latter was to be made direct, and only the amount over and above this was to be turned over to the defendants. As the result of all of this, it is pointed out that, if rescission is now ordered, the defendants will get back, not the options which they held and the freedom of action which they enjoyed under them, but will be saddled with the land itself, which they might never have concluded to take, together with the additional tract about the Everly mine, which the plaintiffs directed to be purchased, not included in the original bargain; and they will also be required to repay the whole purchase price—some \$139,000—to say nothing of the other moneys claimed, over \$70,000 of which has gone into the pockets of the landowners, and of which they never got a penny. Moreover, had they taken up the land themselves, on the options which they held, but which are now inoperative, the deferred payments, as it is claimed, would have been met by the earnings from the property, which they had proposed to develop, but

which is now a dead load on their hands, having yielded nothing also all these years, while interest has been mounting up against them.

It is no doubt true that rescission will not be ordered, where the status quo has been so changed that it cannot be restored. 29 Am. & Eng. Ency. Law (2d Ed.) 647; 6 Cyc. 306. But this is merely out of the desire to do full justice, and is not to be carried too far. A substantial restoration is all that in any event is required. 29 Am. & Eng. Ency. Law (2d Ed.) 649; 6 Cyc. 307, 310. It is satisfied, as a rule, where the party against whom rescission is asked gets back what he parted with, and the other party gives up what he got, unchanged. The mistake in the present instance arises from a misconception as to what this was. The misrepresentations upon which a rescission is asked entered into the whole transaction, and there is no distinction between the contracts such as is sought to be made. The false impression created in favor of the property continued to be operative to the end, and affected, not only the contracts themselves, but all the steps by which the sale was finally consummated. The purpose of the negotiations from the beginning was, on the one hand, to get the property, and on the other to dispose of it at the price agreed upon, and they cannot be divided up in the way suggested in order to let the defendants out. Their relation to the property, of course, has changed, but that is not material. It had to, in order to carry out the bargain which they made, as was, in deed, well understood. The plaintiffs did not buy the options, as argued, but the land, which the options merely held for the defendants, and enabled them to dispose of at the large profit which they made. The payments to the original landowners were necessary in order to get title, and were with the concurrence and for the convenience of all parties. They were the same, in effect, as if made to the defendants themselves, and, not being able to be required back from the landowners, with whom the plaintiffs have no contract connection, and who are not chargeable with anything, the burden of repayment must be assumed by the defendants, whatever personal hardship it may entail. They get back the property in the same condition that it was, even though their relation to it may not be so favorable, which is all that they can ask, being themselves alone responsible for the change. Otherwise, notwithstanding the fraud practiced upon them, if the argument should prevail, the plaintiffs would be compelled to keep the property which has been put off upon them, which was not what they bargained for or wanted, or was represented to be; while the defendants, by whom this situation was brought about, would be permitted to have the full benefit of the transaction, and retain the large amount of money which they made out of it. This is not equity, and is not the rule to be here enforced.

It remains to consider the exact measure of relief to be given by the decree. A reconveyance has been tendered, and the deed which has been executed in that connection will be made effective when the defendants are in shape to comply. And in return for it the plaintiffs will be entitled to be reimbursed the money which they paid out on the strength of the purchase and as contemplated by it. This has been gone into, in detail, in the proofs, for the purpose of saving the expense

and delay of a reference to a master, so as to come at once to a final decree. A statement by items of what is claimed on this account by the plaintiffs is set forth in the margin¹; but only a part of it can be allowed. The expense, for instance, of sending experts into the field to examine it and test the coking qualities of the coal was preliminary to a purchase, and independent of it, and for it the defendants cannot be held. The plaintiffs would not have taken the property without an examination, and the expenses would thus have been incurred whether they did or not. It stands here the same, in fact, as though there had been no sale at all. If the misrepresentations which are relied upon had preceded the examination, so that it could be said to have been induced by them, it might be different, but as it is this item must go out. The same is true of the traveling expenses incurred in that connection, and the small item of expense for smelting. Neither can claim be made for outlays incident to the incorporation of the Coal & Coke Company which was organized. A corporation to develop the property and a bond issue to finance the enterprise may have been

¹ Services of experts in examining and reporting upon the coal field, and in examining and testing the coke from the Freeport vein of coal:

R. M. Haseltine.....	\$1,931 96	
Selwyn M. Taylor.....	474 21	\$2,406 17
	<hr/>	
Expense in smelting coke.....		13 00
Expense for traveling to examine the field of coal, including telegrams and telephone messages.....		487 86
Expense for legal services in drafting contracts, examining and passing upon deeds, abstracts, and titles to all the property entering into the field of coal; organization of the Masontown Coal & Coke Company; preparation of mortgage and issue of bonds; other like services connected therewith, with expenses of traveling.....		4,486 97
Expenses for taxes on property, recording of deeds, payments to assessors, etc.....	\$579 28	
Credit: Tax assessor's fee returned.....	2 50	
	<hr/>	
Balance		576 78
Expenses incidental to the organization of the coal and coke company, including issue and printing of bonds, payment to public officers, with interest on bonds prior to discovery of fraud, certification of bonds, etc.....	\$1,141 67	
Credit: Interest received on bank deposit.....	722 22	
	<hr/>	
Balance		419 45
Expense of superintendence of property, including initial steps toward construction of coking plants and railroad prior to discovery of fraud.....	\$2,209 92	
Credit: Office supplies sold.....	25 92	
	<hr/>	
Balance		2,184 00
Expense of engineering in connection with construction of coking plant and railroad.....		3,917 90
Amount paid for coal lands.....		138,923 01
	<hr/>	
Total.....		\$153,415 14

convenient commercially, but they were not essential to the use and enjoyment of the property, so as to make the defendants responsible. This includes also the claim for legal services, except so far as they were incurred in the examination of titles, making of deeds, etc. The expense of superintendence, including the steps looking to the construction of a coke plant and the building of a branch railroad, and the engineering work involved therein, present a closer question. These expenditures were made on the strength of the purchase, and the development of the property in this way was the subject of discussion between the parties, so as to be known to the defendants to have been in contemplation. It is at the same time true that, if they had gone on and resulted in actual improvements, no claim, according to the authorities, could be made for them, except to the extent that they directly benefited the property (16 Am. & Eng. Ency. Law [2d Ed.] 75; 29 Am. & Eng. Ency. Law [2d Ed.] 651; 6 Cyc. 642); a consideration which seems to effectually exclude them.

This leaves merely the purchase money paid, with interest, the legal services for examining titles and making deeds, and the recording fees, taxes, etc. 29 Am. & Eng. Ency. Law (2d Ed.) 651. The aggregate amount of this will be settled by the decree, and a reasonable time will be given for its repayment. As the deed reconveying the property will not be delivered until this is completed, there is no occasion at present for ordering a lien in favor of the plaintiffs, or providing for a sale of the property in case of default, with a decree against the defendants for the deficiency. The decree to be entered will impose a personal obligation, and it will be sufficient to meet the other matters when they arise. The defendants will also pay the costs.

Let a decree be drawn by counsel to the effect indicated.

THE MARGARET. THE IMPERATOR. THE S. O. NO. 53.

(District Court, E. D. Pennsylvania. July 23, 1906.)

No. 49.

COLLISION—TUG WITH TOWS AND ANCHORED SLOOP—FAILURE TO KEEP PROPER DISTANCE.

A tug passing down the Delaware river on the east side of Chester Island with two barges on a hawser, and with an ebb tide, *held* in fault for a collision between one of such tows and a sloop anchored on the west side of the channel, for a failure to keep sufficiently to the other side of the channel.

[Ed. Note.—For cases in point, see vol. 10, Cent. Dig. Collision, §§ 200-202.]

In Admiralty. Suit for collision.

G. Albert Smyth and Henry C. Huey, for libellant.

Henry R. Edmunds, for respondent.

HOLLAND, District Judge. On the 10th day of October, 1905, the Margaret anchored about 11 o'clock on the east side of Chester Island, in the Delaware river, but on the west side of the channel.

Her jib and top sail were down and the main sail was flying with the wind, which was from a direction a little south of east. There had been an ebb tide for about one-half an hour. The combined effect of the tide and wind upon the yacht caused her bow to point east toward the Jersey shore as she lay at anchor. About 12 o'clock the *Imperator*, a tug towing two barges abreast, at the end of a hawser about 200 feet long, was seen by Clifford P. Futch, captain of the yacht, coming around the bend at a point on the Jersey shore about three quarters of a mile distant and headed down the river with the tide. The tug, with its tow, seemed to be coming toward the yacht, and the captain of the latter called to it to keep off. The *Imperator* passed the yacht at a distance of from 50 to 150 feet east of it, but the barges, being towed behind the tug at a distance of about 200 feet, struck the bowsprit of the yacht causing damage thereto. The libelant contends that the tug came too close with her tow, and that the barges swerved from their course to the east and struck the *Margaret* while she lay at anchor. The respondent claims that just as the tug passed the yacht the latter broke her anchor and moved through the water south-eastwardly into the barges, although no one was at the wheel of the yacht at the time, and that she moved in a direction against the wind, which was blowing hard.

The evidence convinces me that the yacht was at anchor, and that it could not after the tug had passed start up against the wind and make the distance claimed that it did make southeastwardly to reach Barge No. 62, but that the *Imperator*, coming down the river with the tide, with the wind from the southeast, was towed too close to the yacht and swerved over toward the yacht. The captain made an effort to correct the error when too late, by heading the tug to the Jersey shore, but his efforts failed to prevent Barge No. 62 from colliding with the yacht. The *Margaret* was anchored far enough west of the center of the channel between the island and the Jersey shore to enable the tug, with its tow, to pass safely had it kept off from the west side of the channel, which it failed to do. It is therefore responsible for the damage caused by the collision.

A decree will be entered in favor of the libelant.

MEMORANDUM DECISIONS.

BRUNSWICK-BALKE-COLLENDER CO. v. BEYER. (Circuit Court of Appeals, Second Circuit. May 24, 1906.) No. 277. Appeal from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 145 Fed. 353. S. L. Moody, for appellant. J. Q. Rice, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree affirmed, with costs.

HIGHLAND BOY GOLD MINING CO. et al. v. McCLEERY et al. McCLEERY et al. v. HIGHLAND BOY GOLD MINING CO. et al. (Circuit Court of Appeals, Eighth Circuit. May 12, 1906.) Nos. 2,356, 2,386. Appeals from the Circuit Court of the United States for the District of Utah. Sutherland, Van Cott, Allison, Riter & Harkness, for appellants. Henderson, Pierce, Critchlow & Barrette, for appellees. Appeal dismissed as to David McCleery and John Evans, per stipulation, without costs to either party in this court. See 140 Fed. 951.

M. A. DONOHUE & CO. et al. v. HARPER BROS. (Circuit Court of Appeals, Seventh Circuit. May 15, 1906.) No. 1,250. Appeal from the Circuit Court of the United States for the Northern District of Illinois, Eastern Division. Jacob Newman, S. O. Levinson, Benj. V. Becker, C. E. Cleveland, Harry Goodman, and Arthur Schaffner, for appellants. Douglas Dyrenforth and W. W. Gurley, for appellee.

PER CURIAM. Decree of the Circuit Court (144 Fed. 491) affirmed.

NEW YORK HERALD CO. v. STAR CO. (Circuit Court of Appeals, Second Circuit. May 24, 1906.) No. 276. Appeal from the Circuit Court of the United States for the Southern District of New York. For opinion below, see 146 Fed. 204. H. S. Knight, for appellant. W. A. Megrath, for appellee. Before WALLACE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Order affirmed, with costs.

ST. LOUIS DRESSED BEEF & PROVISION CO. v. MARYLAND CASUALTY CO. (Circuit Court of Appeals, Eighth Circuit. May 12, 1906.) No. 2,089. In Error to the Circuit Court of the United States for the Eastern District of Missouri. W. B. & Ford W. Thompson, for plaintiff in error. George F. McNulty and Seddon & Holland, for defendant in error.

PER CURIAM. Reversed with costs, and remanded for further proceedings etc., on authority of opinion and mandate of the Supreme Court (26 Sup. Ct. 400, 50 L. Ed. 712).

THE TUG NO. 32. (Circuit Court of Appeals, Second District. May 22, 1906.) No. 250. Appeal from the District Court of the United States for the Southern District of New York. Wilhelmus Mynderse, for appellants. H. G. Ward, for appellee. Before LACOMBE, TOWNSEND, and COXE, Circuit Judges.

PER CURIAM. Decree of District Court (140 Fed. 87) affirmed, with interest and costs.